ARE EQUITABLE REMEDIES DISCRETIONARY?

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Abstract: *Equitable remedies are often said to be "discretionary" by nature. This feature is said to distinguish them from common law remedies, such as orders to pay damages and orders to pay agreed sums, available 'as of right'. This paper explores what exactly is meant by "discretion" in this context. It argues that simply describing equitable remedies as "discretionary" may be misleading, for it conceals importantly distinct senses in which equitable remedies can engage discretion-like considerations. The sense in which equitable remedies are 'discretionary' should not be overstated, and we should be slow to generalise about the distinctiveness of equitable remedies simply on the basis that they are 'discretionary'.*

1. INTRODUCTION

Generations of lawyers have thought the doctrines of equity to belong to so drastically different a regime that 'the common law ignores… equitable interest[s]'.[1] In contrast to their common law counterparts, equitable remedies are typically described as 'discretionary'. In contract law, students are taught that while damages for breach of contract are available 'as of right', that is not so with specific performance because, being equitable in origin, specific performance orders are 'discretionary'. Little wonder that this has become the accepted wisdom.

This paper's aim is to question that orthodoxy. To evaluate that position we need to assess more precisely the sense(s) in which equitable remedies could be said to be 'discretionary'. For reasons of scope and manageability, our paper is limited mainly to cases on specific performance and injunctions, two core examples of remedies supposedly 'discretionary' because equitable. It is also necessary to acknowledge that our primary focus in this paper concerns the law of equity as applied in the courts of England and Wales. What we say is likely to be significant in other common law contexts as well, given the common origins of the equitable jurisdiction; however, there may well be important points of divergence between different systems.[2]

We make four claims:

1. First, equitable remedies are sometimes 'discretionary' in the sense that there may be a range of permissible determinations of whether a remedy should be given on particular facts, i.e., in relation to a remedy's *availability*. In contrast to the orthodox view, however, this is not true of *all* decisions about equitable remedies. Only some questions

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1 *Skandinaviska Enskilda Banken AB (Publ) v Conway* [2019] UKPC 36 at [89].

2 See further Andrew Phang, 'The importance of comparative common law—a view from Singapore' [2023] *Journal of Business Law* 538.

about equitable remedies are discretionary in this sense (e.g., whether specific performance should be refused on the basis of the duty-bearer's hardship). Others are not (e.g., whether specific performance should be refused because damages are adequate).

2. Second, equitable remedies are also sometimes 'discretionary' in a sense relating to the *content* of the remedy rather than its availability. A court may have the power to tailor the content of specific relief according to the justice of the case, hence giving an impression of greater flexibility. Like rescission, specific performance may also be granted 'on terms'. A clearer distinction needs to be made between the remedy's (i) availability and (ii) its content. There is no entailment between these two aspects—just because a court may have 'discretion' in respect of the latter, it does not follow that it has 'discretion' in respect of the former, and vice versa.

3. However, third, equitable remedies are *not* discretionary in the sense that previous decisions do not bind future judges. Not only do past decisions establish legal rules which apply to future disputes, they can also render determinate the correct outcome in future disputes which would otherwise be indeterminate. *Stare decisis* applies across the equity/common law divide.

4. Fourth, and finally, the sense(s) in which equitable remedies are 'discretionary' are not distinctive to equity: similar discretions can be found elsewhere in the common law. We should therefore be slow to generalise about the distinctiveness/uniqueness of equitable remedies on the basis that they are 'discretionary'.

These conclusions have important theoretical and practical ramifications. First, they call into question recent attempts to distinguish the relationship between citizens and courts in law and in equity.[3] Second, they also invite questions about the appropriate standard of review to be applied when decisions about equitable remedies are appealed.[4] And, finally, they suggest that those arguing for (or against) the grant of equitable remedies may find more assistance in appeal to past decisions than is sometimes assumed.[5]

2. EQUITABLE DISCRETION: THE 'ORTHODOX' PICTURE

What we take to be the orthodox picture of how discretion features in equitable remedies has been eloquently articulated by Ian Spry:[6]

> All equitable remedies are, in an appropriate sense, discretionary… [E]quitable discretions are exercised by taking into account all relevant matters that tend towards the justice or injustice of granting the remedy that is sought… and by weighing them against each other in order to

[3] See text to fn. 15. For broader comparisons between the common law and equity, see Section 5.

[4] See fn. 65 and text thereto, as well as text to fn. 95.

[5] See Section 4.2.

[6] Ian Spry, *The Principles of Equitable Remedies: Specific Performance, Injunctions, Rectification, and Equitable Damages* (9th edn, Sweet & Maxwell 2014) at 1.

> decide whether the particular relief that is in question should be granted in an absolute, partial or conditional form or else refused.

Thus Spry argues that one must always 'bear[] in mind the special nature of equitable discretions' and resist analogy with 'common law attitudes, which tend towards the formulation of struct and inflexible rules'. [7]

In similar vein, Justice Mark Leeming of the Supreme Court of New South Wales relied on 'equity's distinctive approach to evaluation of all the facts, the existence of discretion and relief on terms, and the wealth of remedies as opposed to common law's damages' to explain why 'it [is] sensible in the 21st century still to divide judge-made law between common law and equity'.[8] Leeming stated further that '[t]he discretionary exercise of equitable relief, justified by reasons and informed by maxims, was vastly different from the binary issues to which common law pleading was directed, and which would be resolved by the opaque verdicts of juries at law'.[9]

There are likewise many judicial statements to similar effect. Lord Chelmsford said in *Lamare v Dixon* that 'the exercise of the jurisdiction of equity as to enforcing the specific performance of agreements, is not a matter of right in the party seeking relief, but of discretion in the Court'.[10] And, in *Stickney v Keeble*, Lord Parker said that 'the dominant principle has always been that equity will only grant specific performance if, under all the circumstances, it is just and equitable so to do'.[11] Lindley L.J. put it even more strongly in *Scott v Alvarez*, holding that 'when we come to the remedy by specific performance, we get into an entirely different region of law. The extraordinary remedy by specific performance is always more or less open to discretion'.[12]

The supposedly discretionary nature of equitable remedies formed the basis for the UK Supreme Court's recent controversial introduction of a novel form of injunction, the 'newcomer injunction'.[13] Key to their reasoning was that 'equity has not been constrained by hard rules or procedure in fashioning a remedy to suit new circumstances'.[14]

This feature has also influenced broader theories about the relationship between citizens and courts at common law and in equity. John Goldberg and Benjamin Zipursky influentially argued that 'individuals who bring claims in equity do not, strictly speaking, possess rights of

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7 Spry (n 6) at 25–26.

8 Mark Leeming, *Common Law, Equity, and Statute* (Federation Press 2023) at 181. Justice Leeming also co-edits one of the leading 'orthodox' Equity textbooks: Peter G Turner, John Dyson Heydon, and Mark Leeming, *Meagher, Gummow, and Lehane's Equity Doctrines and Remedies* (5th edn, LexisNexis Butterworths 2015)

9 Leeming (n 8) at 202–23. Cf. Robert Stevens, 'Sorting sources' (2023) 45 *Sydney Law Review* 539.

10 *Lamare v Dixon* (1873) L.R. 6 H.L. 414 at 423.

11 *Stickney v Keeble* [1915] A.C. 386 at 419.

12 *Scott v Alvarez* [1895] 2 Ch. 603 at 612–613.

13 *Wolverhampton City Council v London Gypsies and Travellers* [2023] UKSC 47. Spry's *Equitable Remedies* was cited with approval at [17], [33], and [147]–[148] (Lord Reed, Lord Briggs, and Lord Kitchin).

14 *Wolverhampton CC* (n 13) at [238] (Lord Reed, Lord Briggs, and Lord Kitchin).

action' because 'equity courts enjoy leeway that courts of law do not … In deciding whether to grant equitable relief, courts assert a power and indeed a responsibility to exercise substantial discretion'.[15] By contrast, '[c]ourts of law make neither of these assertions. This is because any claim to discretion of this sort is fundamentally inconsistent with the idea of a plaintiff being entitled to have a court heed its institutional duty to enforce her demand for recourse once the basis for the demand is proven'.[16] On this basis they concluded that '[a]ctions that sound in equity are fundamentally different to tort actions'; whereas in the latter 'the plaintiff asserts an entitlement to relief', the former 'is more akin to a… request for assistance that a court has some discretion to accept or reject'.[17]

There is therefore a risk that if the precise sense(s) in which equitable remedies are discretionary is not clarified, the orthodox picture will be over-simplified to the point of being misleading. Perhaps the most startling example is the conclusion which Millett L.J., arguably the leading Chancery judge of his time, drew from equity's supposedly discretionary nature:[18]

> Reported cases are merely illustrations of circumstances in which particular judges have exercised their discretion… Since they are all cases on the exercise of a discretion, none of them is a binding authority on how the discretion should be exercised…

This is an overstatement. Or so we shall argue.

3. UNPACKING 'DISCRETION'

Davies and Sales have recently noted that '"Discretion" is not an uncontroversial term and a clear definition will often prove problematic'.[19] We agree. Part of the problem, we think, stems from the fact that the term 'discretion' is used by judges in different senses. Proper assessment of the claim that equitable remedies involves a special kind of 'discretion' therefore requires that we disambiguate the kinds of discretion potentially at play.

As public officials within a legal system, judges operate within 'a surrounding belt of restriction'.[20] Within this context Dworkin distinguished between 'strong' and 'weak' discretion. We broadly follow this approach, supplementing it where appropriate.

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15 John Goldberg and Ben Zipursky, 'From *Riggs v Palmer* to *Shelley v Kraemer*: judicial power and the law—equity distinction' in Denis Klimchuk, Irit Samet, and Henry Smith (eds), *Philosophical Foundations of the Law of Equity* (Oxford University Press 2020) at 296.

16 Goldberg and Zipursky (n 15) at 296.

17 John Goldberg and Ben Zipursky, *Recognizing Wrongs* (Harvard University Press 2020) at 58–90.

18 *Jaggard v Sawyer* [1995] 1 W.L.R. 269 at 288.

19 Paul Davies and Lord (Phillip) Sales, 'Controlling contract discretions: *Wednesbury* reasonableness, good faith, and proper purposes' (2024) 140 *Law Quarterly Review* 106.

20 Ronald Dworkin, *Taking Rights Seriously* (Bloomsbury Publishing 2013) at 31. Dworkin argued that the concept of discretion is at home in only one sort of context; when someone is in general charged with making decisions subject to standards set by a particular authority. Compare Herbert Lionel Adolphus Hart, 'Discretion' (2013) 127 *Harvard Law Review* 652 at 671.

We argue that the supposedly unique 'equitable discretion' to decree specific performance or an injunction is not discretion in Dworkin's 'strong' sense. Moreover, it involves discretion in more than just his 'weak' sense. Thus it involves a distinct sense of discretion lying somewhere in between. For that reason, and for ease of reference and exposition, we propose to call it a 'moderate' discretion**.**

3.1. Weak discretion

At one end of the spectrum there is a 'weak' discretion, involving the need to exercise non-mechanical judgement. As Leggatt J. said in *Brogden v Investec Bank plc*:[21]

> In legal argument the term 'discretion' is used in several different senses. The term is sometimes used in a weak sense, simply to mean that the standards that a decision-maker must apply cannot be applied mechanically and demand the use of judgement. In Professor Dworkin's example, a sergeant has a discretion in this sense if he is told to select his five most experienced men to take on patrol.

In situations involving the exercise of 'weak' discretion, the judge is not free from legal rules. They are bound by precedent or statute to apply a legal rule or standard; it is just that application of the relevant rule may involve a degree of judgement.

Many legal rules involve discretion in this sense. To take just one example, when determining whether a term is to be implied (in fact) into a contract, a judge must ask themselves whether implication of the term satisfies the 'business efficacy' and 'officious bystander' tests. [22] The question whether a term is 'necessary' for business efficacy, or 'obvious' to the parties at time of formation, cannot be answered mechanically.[23] Applying these tests involves an element of judgement, but the test to be applied is clear, and there are 'right' and 'wrong' answers to the question that a judge could give.[24] Indeed, in cases of this nature, judges have on occasion denied that the exercise of judgement involves a 'discretion'. For example, as Thomas L.J. said in *Aldi Stores Ltd v WSP Group plc*, the determination of whether the bringing of a second action involves an abuse of process does not involve discretion because although it involves 'the assessment of a large number of factors… there can, in such a case, only be one correct answer'.[25]

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21 *Brogden v Investec Bank plc* [2014] EWHC 2785 at [95]–[96].

22 See e.g. *Marks and Spencer plc v BNP Paribas Securities Services Trust Company (Jersey) Ltd* [2015] UKSC 72 at [21] (Lord Neuberger).

23 For instance, it cannot be simply answered by empirical observation of the natural world. To draw a parallel with Dworkin's example: if the necessity or obviousness of a term were indeed empirically observable, there would not even be 'discretion' in this weak sense. The situation would be analogous to where a sergeant is told to select their five tallest soldiers, rather than their five most experienced.

24 See e.g. *Benedetti v Sawiris* [2013] UKSC 50 at [143] (Lord Reed).

25 *Aldi Stores Ltd v WSP Group plc* [2007] EWCA Civ 1260 at [17]. Cf. *Stuart v Goldberg Linde (a firm)* [2008] EWCA Civ 2 at [82] (Sir Anthony Clarke M.R.).

This sense of discretion is so weak as to be trivial. Almost *all* judicial decision-making involving the application of legal rules requires it. That is why, when Dyson L.J. in *Carty v Croydon* adopted this sense of discretion, his Lordship concluded that: '"discretion" is a somewhat protean word. It connotes the exercise of judgment [sic] in making choices. In a sense, most decisions involve the exercise of discretion'.[26] And as Hart observed, discretion in this sense of being discerning about one's judgement is the name of an intellectual virtue, a near synonym for 'practical wisdom, or sagacity, or prudence',[27] to be expected of all judicial decision-making,

'Discretion' in this sense is therefore is not particularly illuminating for our purposes; it does not tell us very much about the sense in which equitable remedies involve a supposedly special or distinctive kind of discretion on the 'orthodox picture'. We bring it up merely to distinguish it, and to show that something *more* must be involved.

Dworkin also thought of 'finality'[28]—in the sense of being immune from review or reversal by another official within a hierarchy of officials—as constituting a different sense of discretion, which he also classified as 'weak' discretion. His example was how in baseball, certain decisions, like the decision whether the ball or the runner reached second base first, are left to the 'discretion' of the second base umpire. All this means is that, on this issue, the head umpire has no power to substitute their own judgement even if they disagree: the second base umpire has the 'last word' on the matter. We harbour doubts about the appropriateness of Dworkin's classification of 'last word discretion' as only a 'weak' one, but in any case this too is not the supposedly unique sense of equitable 'discretion' in which we are interested—as we discuss later below in section 4.3, decisions about specific performance and injunctions *are* subject to appeal and reversal on grounds that the lower court judge misapplied binding legal rules, such that they do not have the 'last word' on the matter.

3.2. Strong discretion(s)

In a Dworkinian sense, a judge has 'strong' discretion when they are 'simply not bound' by pre-existing law when deciding the issue. In other words, the decided cases neither 'govern', nor do they purport to 'control', his decision.[29] So, following Dworkin, Leggatt J. in *Brogden* said that:[30]

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26 *Carty v Croydon London Borough Council* [2005] EWCA Civ 19 at [25].

27 Hart (n 20) at 656–657. Because in law we are considering its use by official holding a public office and we think they should choose responsibly, discretion in this sense means a certain kind of 'wisdom or deliberation guiding choice'.

28 Dworkin (n 20) at 32. Note, of course, that finality is not the same as infallibility (see Herbert Lionel Adolphus Hart, *The Concept of Law* (3rd edn, Oxford University Press 2012) at 141). It is possible for a decision to be mistaken yet still binding. That, for Raz, is what it means to have practical authority: to be able to bind in virtue of source not merit: Joseph Raz, *Practical Reason and Norms* (Oxford University Press 1999) at 134–136.

29 Dworkin (n 20) at 32

30 *Brogden (HC)* (n 21) at [97]; cf. *Brogden v Investec Bank plc* [2016] EWCA Civ 1031 at [16] and [23] (on appeal).

> In a contractual context references to a 'discretion' are often to a discretion in the strong sense, meaning that the contract confers a duty or a power on one party to take a particular decision but does not expressly specify any standard which *controls or constrains* the decision.

The decision-maker is, in other words, free from any rules (or principles)[31] that would otherwise determine the answer or result they must reach. In such a case the decision-maker has 'run out of rules'.[32] These are what might be called 'legally unregulated' cases, where no decision either way is dictated and the law is accordingly incomplete.[33]

Closest to this view of equitable discretion is Millett L.J'.s description in *Jaggard v Sawyer* of how judges should approach previous decisions:[34]

> Reported cases are merely illustrations of circumstances in which particular judges have exercised their discretion, in some cases by granting an injunction, and in others by awarding damages instead. Since they are all cases on the exercise of a discretion, *none of them is a binding authority on how the discretion should be exercised*. The most that any of them can demonstrate is that in similar circumstances it would not be wrong to exercise the discretion in the same way. *But it does not follow that it would be wrong to exercise it differently.*

If indeed equitable remedies are 'strongly discretionary' in this sense, a decision regarding the award of specific performance or an injunction would not be appealable by reference to past authority. For if the decided cases do not create any 'binding authority' on a future court, a judge's decision to refuse or to order specific relief could not be legally incorrect or legally wrong. It would then be impossible to appeal or review it on grounds that the judge made an error of law. Yet, as we explain further in section 4.3, that is observably not the legal position—judges can and do get it 'wrong', with the result that their orders get overturned on appeal. It may be useful at this juncture to note the potential overlap between 'strong' discretion and 'weak' discretion in the 'finality' sense, identified above in section 3.1.

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31 'Principles' are in parentheses as, by Dworkin's own definition, 'principles' are under-determinative and do not 'necessitate' a result. They only have 'weight' and do not dictate a result on an issue either way (see Dworkin (n 20) at 22–28; see also Hart (n 28), *The Concept of Law* at 260–263). On this view, 'principles' better resemble 'factors', which only have to be taken into account and balanced with others in an overall consideration of all relevant factors.

32 Dworkin (n 20) at 34.

33 See Joseph Raz, 'Law and value in adjudication' in Joseph Raz (ed), *The Authority of Law: Essays on Law and Morality* (Clarendon Press 1979) at 193–194 and Hart (n 28), *The Concept of Law* at 272.

34 *Jaggard v Sawyer* (n 18) at 288 (emphasis added).

This does not mean that judges *never* have 'strong' discretion. Briefly, two possible examples are (i) determinations of costs orders,[35] and (ii) judicial findings of fact.[36] In both of these situations the decided cases do not control or constrain a judge in the instant case.

As to cost orders, the clearest example concerns orders for the payment of costs by a non-party.[37] Here judges have repeatedly emphasised that previous decision have no binding effect, and have bemoaned the 'abundance of authority on the absence of any need for abundant authority on the principles which should guide a judge as to whether to make a third party order for costs'.[38]

As to fact-finding, a judge is required to take the facts of the instant case before them as a standalone when finding facts on the basis of the evidence presented to them at trial.[39] They need not look at or be guided by other cases. The first instance judge's determination is thereafter only appealable in tightly constrained circumstances. As Lord Shaw said in relation to reviewing a lower court's findings of fact, the relevant question is whether the appellate judge—who does not have 'those advantages, sometimes broad and sometimes subtle, which are the privilege of the judge who heard and tried the case'—is able to 'come to a clear conclusion that the judge who had them was plainly wrong'.[40] As the Supreme Court explained in *Henderson v Foxworth Investments Ltd*, a decision is 'plainly wrong' only if it 'is one that no reasonable judge could have reached'.[41]

Before moving on a caveat is due. That a judge has 'strong discretion' in deciding some aspect of the instant case—so they cannot be legally incorrect however they decide—does not mean their decision cannot be criticised on other grounds, say, that it was arbitrary, irrational, careless, or in bad faith.[42] Moreover, regardless of the substantive merit of the outcome, any decision could be criticised (and potentially reviewable) for the *manner* or *procedure* through which the decision was arrived.

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35 See e.g. *Tanfern Ltd v Cameron-MacDonald* [2000] 1 W.L.R. 1311 at [32] (Brooke L.J.) and *Atack v Lee* [2004] EWCA Civ 1722 at [34] (Brooke L.J.).

36 See e.g. *Thomas v Thomas* [1947] A.C. 484 at 487–488 (Lord Thankerton).

37 Under Senior Courts Act 1981, s. 51.

38 See e.g. *Alan Phillips Associates Ltd v Terence Edwards Dowling* [2007] EWCA Civ 64 at [31] (Chadwick L.J.).

39 See *Assicurazioni Generali SpA v Arab Insurance Group (BSC)* [2002] EWCA Civ 1642 at [10] (Clarke L.J.): 'As Brooke L.J. makes clear, Lord Fraser of Tullybelton was considering the correct approach where the appeal is against the exercise of a discretion by the lower court. An appeal of the kind with which we are concerned challenges the judge's conclusions of fact, not the exercise of a discretion'.

40 *Clarke v Edinburgh & District Tramways Co Ltd* 1919 S.C. (H.L.) 35 at 37; cited with approval in *Powell v Streatham Manor Nursing Home* [1935] A.C. 243 at 250 (Viscount Sankey L.C.) and *Thomas v Thomas* (n 36) at 488 (Lord Thankerton).

41 *Henderson v Foxworth Investments Ltd* [2014] UKSC 41 at [62] (Lord Reed). For further analysis see generally Adam Perry, 'Plainly wrong' (2023) 86 *Modern Law Review* 122.

42 See Dworkin (n 20) at 33 and Hart (n 28), *The Concept of Law* at 273.

3.3. Moderate discretion

There is at least one further sense of 'discretion' overlooked by the weak/strong dichotomy in Dworkin's scheme. We call this 'moderate' discretion.

The basic idea is that, in some circumstances, the rules and principles which govern a particular decision will leave the correct decision under-determined. There may be a range of decisions all of which conform to the applicable rules and principles. To take a simple example, consider the rule that, when a contract is frustrated, a contracting party who has paid money to their counterparty may prima facie recover such sums; however, the payee may retain a 'just' proportion of such amount as they have expended in performance of the contract.[43] The rule here clearly sets boundaries on what orders a judge may permissibly make: they cannot allow the payor to recover more than they paid, nor can they allow the payee to retain more than they expended. More nebulously, the rule indicates that the judge may only allow the payee to retain a 'just' proportion. But, within the confines of these boundaries, there may be more than one permissible order: it is doubtful that there is one uniquely correct answer to the question what is the 'just' proportion to be retained.[44] The existence of only 'one correct answer' is inimical to the nature of discretion.[45]

The boundaries between this sense of discretion and Dworkin's weak discretion can be hard to draw. Indeed, all cases involving moderate discretion will also involve weak discretion: a decision-maker must exercise judgement in selecting sensibly between the range of permissible answers. However, the converse is not true. Some decisions may admit of only one correct answer, but identifying that answer requires the exercise of judgement. There may well be room for reasonable disagreement about which decisions involve only weak discretion, and which involve both moderate and weak discretion.[46]

3.4. Summary

To summarise briefly the preceding discussion, we have identified at least four different—although sometimes overlapping—senses in which one might say that a decision-maker has 'discretion' in respect of a given decision. These are:

1. Where the decision-maker must exercise judgement, rather than reaching their decision mechanistically.

2. Where the decision-maker's decision is not susceptible to challenge.

43 Law Reform (Frustrated Contracts) Act 1943, s. 1(2).

44 See e.g. the discussion in *Gamerco SA v ICM/Fair Warning (Agency) Ltd* [1995] 1 W.L.R. 1226.

45 See *Aldi Stores* (n 25) at [17] (Thomas L.J.).

46 The distinction we draw in section 4.1 may well illuminate some factors which factors which influence where the boundaries lie.

3. Where the decision-maker is not constrained by rules or principles which would, if such rules or principles were applicable, at least narrow down (if not determine) the decisions which the decision-maker may permissibly render.

4. Where the decision-maker is constrained, but still has open to them a range of permissible, equally correct, decisions from which they may select.

The first two, as we have seen, were described by Dworkin as 'weak' discretions (though the second is in our view more closely related to 'strong' discretion). The third aligns with what Dworkin called 'strong' discretion. The fourth, a sense of discretion not canvassed in Dworkin's work, we called 'moderate' discretion.[47]

The relationships between these different senses of discretion should be fairly obvious. For example, where a decision-maker has a discretion in sense (3), it must follow also that they have a discretion in sense (2). If any decision is permissible, it must follow that the decision cannot be challenged (at least in terms of its substance; it of course may be the case that the decision might be challenged because of the procedure by which it was reached). So too are the decisions of a decision-maker with sense (4) discretion immune from challenge (sense (2)), at least when rendered within the range of permissible answers. In contrast, discretion in senses (3) and (4) are in opposition: whereas (3) posits that there are no standards of correctness against which the decision can be measured, (4) holds that such standards do exist, but are partially indeterminate of the correct answer. Finally, and trivially, in all of these cases it may be possible to say that a decision-maker has discretion in sense (1), viz., that they need to exercise judgement in rendering their decision.

4. EQUITABLE DISCRETION REVISITED

This section explores three aspects of the ways in which the above senses of discretion may or may not apply to decisions concerning equitable remedies. It begins by examining the extent to which equitable remedies exhibit 'moderate' discretion; i.e., discretion involving the selection from a range of equally permissible conclusions due to indeterminacy. It then asks whether decisions about equitable remedies involve a 'strong' discretion, in the sense of being unconstrained by rules—in particular focusing on whether past decisions constrain future determinations about equitable remedies. Third, it asks whether such decisions involve the discretion of being un-challengeable or immune from appeal, i.e., 'last word discretion' (about which we differed from Dworkin). For completeness the section ends by elaborating on a further distinction between a judge having 'discretion' as to a remedy's *availability* versus a discretion as to its *content*—it is in respect of the latter, not the former, that a judge may possess greater flexibility in equity than at common law.

[47] A yet further sense of discretion, which we do not discuss specifically here, concerns situations where the decision maker must assess 'facts that cannot be considered in isolation, but must instead be weighed together, in a global or "bundle-of-factors" fashion' (Stephen Smith, *Rights, Wrongs, and Injustices* (Oxford University Press 2019) at 320). In our view, this sense of discretion is subsumed within other senses of discretion which we discuss below. It is a subset of cases in which decisions must be made using judgement as opposed to mechanistic-decision making ('weak discretion'), and it is liable to produce situations where the decision-maker has a range of equally permissible decisions from which to select ('moderate discretion').

4.1. Discretion as range-of-correct-answers

Leaving aside the trivial 'judgement'-sense of discretion, the 'moderate' or 'range-of-permissible-answers' sense most plausibly tracks the way in which decisions concerning the availability of equitable remedies might be discretionary . It is to examining this possibility to which we now turn. In the context of this discussion, we bracket the question whether analogous past decisions constrain judges in deciding these questions—we will address that question later. Instead, we assume for this part that the judge approaching the question does so from a largely blank slate. Of course, there is a degree of artificiality in this approach: in the common law tradition, it is only against the backdrop of precedent that we know on what bases (if any) judges might refuse equitable relief at all.[48] The present assumption, however, is more modest: we assume simply that there is no case which could be relied upon not merely to illustrate general rules and principles, but instead to be dispositive of the result on the facts. Put another way, the question with which we are concerned here is whether there are good reasons for decisions about equitable remedies to be discretionary by their very nature.

We argue here that equitable 'discretion' in this sense is multi-faceted. There are some aspects of the power to grant or refuse equitable relief which are indeed discretionary in this sense; there are others which are not. The two categories here broadly map onto what Steve Smith called 'internal' and 'external' partial defences respectively.[49] However, unlike Smith, who thought that both situations involved discretion, we consider that it is only in cases involving 'external' partial defences that courts enjoy 'moderate' discretion.[50]

4.1.1. Cases with 'discretion'

A clear example of cases involving 'moderate discretion' are situations where equitable relief is denied on the basis that granting relief would cause undue hardship to the defendant.[51] On a given set of facts, it may be (although clearly will not always be) that it would neither be 'wrong' to grant relief or to refuse it. There is, in other words, scope for reasonable disagreement about what ought to be done. The correct answer is in that sense indeterminate, and therefore we can say that the judge has a 'discretion' in selecting amongst these equally-correct answers. Other similar situations include where relief is denied on the basis that the claimant comes with 'unclean hands'[52] or where the grant of relief would be contrary to the public interest,[53] or where specific performance is sought of a contractual obligation which is

48 By contrast, the power to award equitable relief now find itself on a statutory footing (see Senior Courts Act 1981, s. 37))—although it obviously did not have statutory origins. See *Wolverhampton CC* (n 13) at [145]–[146] (Lord Reed, Lord Briggs, and Lord Kitchin).

49 See Smith (n 47) ch9

50 Cf. Smith (n 47) at 319–322.

51 See e.g. *Wroth v Tyler* [1900] 1 Ch. 257; *Patel v Ali* [1984] Ch. 283; and *Redland Bricks Ltd v Morris* [1970] A.C. 652.

52 See e.g. *Lamare v Dixon* (n 10); *Mason v Clarke* [1954] 1 Q.B. 460; and *Hubbard v Vosper* [1972] 2 Q.B. 84.

53 See e.g. *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 1 W.L.R. 798; *Dennis v Ministry of Defence* [2003] EWHC 793 (QB); *Coventry (t/a RDC Promotions) v Lawrence* [2014] UKSC 13; and *Fearn v Board of Trustees of the Tate Gallery* [2023] UKSC 24.

insufficiently precise.[54] All of these situations are, at least sometimes, indeterminate ex ante as to whether equitable relief should be granted or refused.

Two features unite situations where equitable remedies involve a discretion in this sense. The first is that the supposed reason why it may be appropriate to refuse equitable relief must be weighed against the claimant's interest in seeing the duty owed to them performed. The second is that the reason in favour of refusing relief is not binary: it is a reason which is measured in degrees, rather than simply being either present or absent. Both of these features are displayed clearly in Lord Hoffmann's speech in *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd*:[55]

> Precision is of course a question of degree and the courts have shown themselves willing to cope with a certain degree of imprecision in cases of orders requiring the achievement of a result in which the plaintiffs' merits appeared strong

To like effect, Lord Upjohn stated in *Redland Bricks Ltd v Morris*, in relation to hardship as a reason to refuse relief, that 'the amount to be expended under a mandatory order by the defendant must be balanced . . . against the anticipated possible damage to the plaintiff'.[56] And, in *Duchess of Argyll v Duke of Argyll*, Ungoed-Thomas J. acknowledged that '[a] person coming to Equity for relief . . . must come with clean hands: but the cleanliness required is to be judged in relation to the relief that is sought'.[57]

We can briefly posit two explanations for why these two features generate a range of correct answers. Both might be said to have something to do with incommensurability or incomparability between competing values.[58] The first reason concerns the lack of a common metric along which two objects can be compared.[59] It is at least plausible that this is true of some questions about equitable remedies. It is, for example, difficult to see against what common metric we might measure and compare the extent of hardship the grant of specific relief would cause the defendant with the claimant's interest in performance *in specie* of the obligations owed to them. This is most obvious if one endorses some form of value pluralism,

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54 See e.g. *The South Wales Railway Company v Wythes* (1854) 5 De G.M. & G. 880; 43 E.R. 1112; *Joseph v National Magazine Co* [1959] Ch. 14; and *Redland Bricks Ltd v Morris* (n 51).

55 *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1998] A.C. 1 at 14.

56 *Redland Bricks Ltd v Morris* (n 51) at 666. See similarly *Kelk v Pearson* (1870–71) L.R. 6 Ch. App. 809 at 812 (Sir W.M. James L.J.); *National Provincial Plate Glass Insurance Co v Prudential Assurance Co* (1877) 6 Ch. D. 757 at 671 (Jessel M.R.); and *Gravesham Borough Council v British Railways Board* [1978] Ch. 379 at 405 (Slade J.).

57 *Duchess of Argyll v Duke of Argyll* [1967] Ch. 302 at 332.

58 The philosophical literature on incommensurability is vast, and it is fair to note that there is considerable disagreement about what is meant by the idea of incommensurable values.

59 See similarly Henry Richardson, *Practical Reasoning about Final Ends* (Cambridge University Press 1994) at 104–105 and David Wiggins, 'Incommensurability: four proposals' in Ruth Chang (ed), *Incommensurability, Incomparability, and PracticalReason* (Harvard University Press 1997).

which some philosophers of private law accept.[60] However, it is plausible that even value monists can admit of incommensurability problems.[61] So, for example, the most plausible attempt to compare (say) hardship against the claimant's interest in performance might be to measure them against a single third value such as 'utility' or 'justice'.[62] Even so we might maintain that there is a qualitative difference between the kind of utility or justice considerations at play in respect of each factor.

The second reason, also familiar in the literature concerning incommensurability,[63] is the problem of vagueness. Even if we were to assume that there is some common metric—such as justice or utility—applicable in cases of the sort with which we are concerned, there are considerable limitations in making a comparison along that metric in any given dispute. On one hand evaluations of that sort can depend on very particular nuances of fact which—as with all disputed facts—can be obscured or misevaluated in the heat of litigation. However, a more important concern is how one translates fact-finding into measurements along our (supposed) common metric. How, in other words, does one *specifically* measure 'hardship' or 'moral turpitude'? It is only possible to give open-textured, qualitative, descriptions of such things.[64] In other words, it is only possible to say that—for example—the 'hardship value' of a given set of facts exists somewhere within a vague range.

There are a number of reasons for this, and the related phenomenon of why there can be reasonable disagreement about the extent of hardship which exists on a given set of facts. One reason is underlying vagueness in the metric: 'hardship', unlike 'grams', is not susceptible to precise quantitative measurement. Another concerns the limits of human moral judgement. To say of a given set of facts that it has a particular 'hardship-value' of *X* requires an infallibility in one's judgement which is not humanly accessible. For these reasons, the values which are to be compared in cases involving (for example) hardship or unclean hands can *at best* be measured in terms of a vague qualitative range. It is therefore possible that, in a given dispute, the ranges to be compared may overlap so as to make it impossible to say definitively whether, on balance, relief should be granted or refused.

The preceding analysis has interesting ramifications for the position of trial judges in making determinations about equitable relief. It is often assumed that trial judges enjoy a privileged position because of they have the advantage of hearing evidence presented at trial first-hand. However, in truth, this comparative advantage in relation to questions of fact is only of marginal relevance to the majority of the reasons why equitable remedies might be 'discretionary' in the present sense. It clearly does not bear on the question whether there exists any common metric in cases concerning equitable remedies. Nor does it bear on questions of

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60 See e.g. Prince Saprai, *Contract Law Without Foundations: Toward a Republican Theory of Contract Law* (Oxford University Press 2019) ch1; Smith (n 47) at 320–321; and Lord (Phillip) Sales and Frederick Wilmot-Smith, 'Justices for foxes' (2022) 138 *Law Quarterly Review* 583.

61 See Ruth Chang, 'Introduction' in Ruth Chang (ed), *Incommensurability, Incomparability, and Practical Reason* (Harvard University Press 1997) at 16–17.

62 This is not to say that one needs to be a value monist about either utility or justice: one might simply hold that whatever value one chooses is the only relevant value *in the particular context at hand*.

63 See e.g. Joseph Raz, *The Morality of Freedom* (Clarendon Press 1986) ch13. Raz distinguishes 'vagueness' in this sense from true incomparability or incommensurability.

64 Similarly, Raz (n 63), *The Morality of Freedom* at 386, describing the problem as one concerned with the 'general indeterminacy of language'.

the vagueness inherent in translating a given set of facts into measurement along such a common metric (if one does indeed exist). The only comparative advantage truly enjoyed by trial judges is a privileged access to the nuances of impressions created by first-hand access to evidence which therefore increases the fidelity of the determinations of fact on which judges rely. [65] While important, the accuracy of fact-finding is far from the most significant reason to think that cases of this sort involved moderate discretion. Therefore, if the current position—that trial judges' decisions about the grant or refusal of specific relief should only be reversed in narrow circumstances[66]—is to be supported, it must be on the basis of other reasons.

4.1.2. Cases without 'discretion'

By contrast, there are other situations where judges do not appear to have a 'moderate' discretion in relation to the grant or refusal of equitable remedies. One such example is in deciding whether damages are an adequate remedy. In *Neurim Pharmaceuticals*, the Court of Appeal treated the question whether injunctive relief should be refused on the basis that damages were an adequate remedy as one which had a straightforward right-or-wrong answer.[67] Similarly, courts have invariably treated it as an absolute bar to the grant of specific performance that the obligation sought to be performed is one for personal services: the 'critical issue' was whether 'the judge was correct… to hold that damages were an adequate remedy' or whether 'he was wrong'.[68] The same is true where specific performance is sought in respect of an obligation undertaken without consideration (e.g. by deed),[69] or where equitable relief is sought against someone who lacks the capacity to be the subject of a coercive court order.[70]

We suggest that there are two distinct reasons why these cases do not involve a range-of-correct answers. The first, applicable to the 'adequacy of damages' bar, is that no question of incommensurability arises because there is in fact only one value at play. To say that damages are adequate just is to say that the claimant does not have a sufficient interest in specific relief. There can be, therefore, no question of comparing the (in)adequacy of damages *against* the claimant's interest in specific relief.

By contrast, in cases involving (for example) personal services or lack of capacity, the reason there is no 'moderate' discretion is quite different. There are indeed two different values at issue in these cases. However, one of these values straightforwardly 'trumps' the other: in other words, '*any* amount of [one], no matter how small, is more valuable than *any* amount of

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65 Although in *Aldi Stores* (n 25), the (non-discretionary) determination of whether the bringing of a second action constituted an abuse of process was held to the same standard of review as decisions involving discretion because of the necessary sensitivity to factual nuance (see at [17] (Thomas L.J.)).

66 See *Hadmor Productions Ltd v Hamilton* [1983] 1 A.C. 191.

67 *Neurim Pharmaceuticals (1991) Ltd v Generics UK Ltd (t/a Mylan)* [2020] EWCA Civ 793 at [34] (Floyd L.J.).

68 See e.g. *Clarke v Price* (1819) 2 Wils Ch 157; 37 E.R. 270 and *De Francesco v Barnum* (1890) 45 Ch. D. 430. In the employment context, the rule is now found in the Trade Union and Labour Relations (Consolidation) Act 1992, s. 236. See further *Tesco Stores Ltd v Union of Shop, Distributive and Allied Workers* [2024] UKSC 28 at [65] (Lord Burrows and Lady Simler).

69 See *Lister v Hodgson* (1867) L.R. 4 Eq. 30 and *Cannon v Hartley* [1949] Ch. 213.

70 *Wookey v Wookey* [1991] Fam. 121.

[the other]'.[71] So, for example, the personal services bar exists to prevent turning 'contracts of service into contracts of slavery'.[72] Nor should courts make orders which are 'ineffective and a waste of time'[73] against individuals who lack the resources to be fined and who are too young to be committed to prison—which explains why equitable relief is not awarded in these circumstances irrespective of the claimant's interest in performance.

Where these kinds of considerations apply, the reason for refusing relief is—unlike the examples considered in section 4.1.1 above—essentially binary. The reason either obtains, or it does not: the contract is for personal services, or it is not; the defendant either can be the subject of a coercive order, or they cannot.

4.2. Precedent and *stare decisis*

To the unwary, the 'orthodox picture' might suggest that a judge is 'simply not bound' by pre-existing law. That would be misleading. Past decisions on how the 'discretion' has been exercised form a 'body of authority' with precedential effect. Thus the equitable discretion to award or refuse specific performance or an injunction is not a 'strong' one.

Cases decided in the past can, because they constitute precedents, reach into the future, rendering certain decisions impermissible by the judge in the present case. Cases where judges have awarded or refused specific performance or injunctions are sources of law—they 'bind' future courts. Courts cannot and do not ignore them simply on the basis that their equitable jurisdiction is 'discretionary'. As early on as in 1802, Lord Eldon L.C. recognised that 'giving a specific performance is matter of discretion: but that is not an arbitrary, capricious, discretion. It must be regulated upon grounds, that will make it judicial'.[74]

As Lord Chelmsford said in *Lamare v Dixon*, while 'the exercise of the jurisdiction of equity as to enforcing the specific performance of agreements, is not a matter of right in the party seeking relief, but of discretion in the Court… [it is] one to be governed as far as possible by fixed rules and principles'.[75] Similarly, it was said in *Ryan v Mutual Tontine Westminster Chambers Association* that '[t]he jurisdiction to compel specific performance has always been treated as discretionary, and confined within well-known rules'.[76] And as Lord Blackburn similarly warned in *Doherty v Allman*, 'the discretion is not one to be exercised according to the fancy of whoever is to exercise the jurisdiction of equity'.[77] Instead, 'the discretion of the Court must be exercised according to fixed and settled rules; you cannot exercise a discretion by merely considering what, as between the parties, would be fair to be done; what one person may consider fair, another person may consider very unfair; you must have some settled rule

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71 James Griffin, *Well-Being: Its Meaning, Measurement and Importance* (Clarendon Press 1986) at 83.

72 *De Francesco v Barnum* (n 68) at 438 (Fry L.J.).

73 *Wookey v Wookey* (n 70) at 135 (Butler-Sloss L.J.).

74 *White v Damon* (1802) 7 Ves. Jr. 30 at 35; 32 E.R. 13 at 15.

75 *Lamare v Dixon* (n 10) at 423.

76 *Ryan v Mutual Tontine Westminster Chambers Association* [1893] 1 Ch. 116 at 126 (Kay L.J.); see also at 123 (Lord Esher M.R.).

77 *Doherty v Allman* (1878) 3 App. Cas. 709 at 728–729.

and principle upon which to determine how that discretion is to be exercised'.[78] Therefore, even in 'a very hard case' in which, 'in the forum of his own conscience', the claimant ought not to insist upon specific performance, specific performance might be granted.[79]

It could therefore be 'wrong' in similar circumstances to exercise an equitable discretion differently. In *Jaggard v Sawyer*, Millett L.J. overstated the position—it is untrue that 'the reported cases are merely illustrations…' so that 'none of them is a binding authority on how the discretion could be exercised'.[80]

Courts do not approach each case *de novo,* considering it afresh upon its merits. It is a well-known feature of legal systems in the common law tradition that, like statutes, past cases are a source of law. We have a doctrine of precedent (*stare decisis*). Later courts are 'bound' by the decisions of past courts; they must follow the decision unless they can distinguish or overrule it. It is an acquired lawyerly skill to differentiate *ratio* and *obiter dicta*, and to extract rules from cases. On what might be termed the conventional theory of precedent, cases establish legal rules.[81] We see no reason to think the decisions of the Chancery courts were any different in this respect. Faced with a decision to be made, the instinctive reaction of any judge is always first to seek guidance from existing case-law, even on 'novel' issues.[82] As Lord Leggatt has said extra-judicially,[83]

> The common law has as its primary source reports of past cases… Without precedents to follow, a judge would just be sitting (metaphorically) under a palm tree, doing whatever he or she thinks right. Justice would be arbitrary, as it would depend simply on the conscience of the individual judge, with nothing to promote any sort of consistency between decisions made by different judges and between what is decided in one case and the next. I would not call that law at all. What gives content to the common law is the obligation or expectation that judges will, generally at least, follow precedents.

The decided Chancery cases are also an authoritative source of 'rules and principles'. That is why, on the availability of specific performance, the judges themselves have said that 'the

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78 *Haywood v Cope* (1858) 25 Beav. 140 at 151 (Sir John Romilly M.R.). See also *Holliday v Lockwood* [1917] 2 Ch 47 at 57 (Astbury J.).

79 *Haywood v Cope* (n 78) at 153 (Sir John Romilly M.R.). See similarly *Cowper v Cowper* (1734) 2 P. Wms. 720 at 753; 24 E.R. 930 at 942 (Sir Joseph Jekyll M.R.). Statements such as these illustrate the caution with which one needs to approach the vague notion of 'conscience' in equity (see Alexander Georgiou, 'Knowing receipt: continuing trusts and conscionability' (2022) 86 *Modern Law Review* 276 at 286).

80 *Jaggard v Sawyer* (n 18) at 288 (Millett L.J.). In *Aldi Stores* (n 25) at [38], in relation to abuse of process, Longmore L.J. considered it 'troubling if two different judges could come to two different conclusions [about] the same facts… and yet both be right'; his Lordship's concerns are equally apposite in the present context.

81 Cases are an independent *source* of law, though legal philosophers differ on the exact *mode* by which cases create law (e.g. whether they constitute rules, or (protected) reasons, which bind future courts). See e.g. Frederick Schauer, *Playing by the Rules* (Oxford University Press 1993); Rupert Cross and J. W. Harris, *Precedent in English Law* (4th edn. edn, Clarendon 2004); Grant Lamond, 'Do precedents create rules?' (2005) 11 *Legal Theory* 1; and Frederick Schauer, *Thinking Like a Lawyer* (Harvard University Press 2012).

82 Similarly, see *Robinson v Chief Constable of West Yorkshire* [2018] UKSC 4 at [26]–[27] (Lord Reed).

83 Lord (George) Leggatt, 'Precedent in English law' (Harris Lecture, Oxford, 26 April 2024).

question to what extent a Court of Equity will go is very largely one of authority as to what has been done before'.[84] Were it not so, it would be radically unpredictable whether specific performance or an injunction were available on any given set of facts. More importantly, reading decided cases on the issue would be of no aid whatsoever. That is (thankfully) clearly not the case. As far back as the early 1900s, Frederick Maitland observed in his *Lectures on Equity* that:[85]

> Suppose now the contract to be one of a kind which specific performance is usually granted, for instance a contract for the sale of land, can we go on to say that in the particular case before us specific performance will be decreed? I believe as a general rule we may. It used to be said, and from time to time this sort of thing is still repeated, that specific performance is a discretionary remedy, but I think that of late years this talk has lost its meaning…

There is an alternative way of framing how past decisions might bind future courts on questions of equitable relief. Past decisions can render determinate the correct outcome in future disputes which would otherwise be indeterminate. As discussed above, there could be situations where it is indeterminate *ex ante* whether equitable relief should be granted or refused. Assume for the sake of argument that *Patel v Ali*[86] was such a case. Suppose that, on its facts, it could not be said definitively that the claimant's interest in specific performance outweighed the hardship such an order would have inflicted on the defendant. Following Goulding J.'s decision it would no longer be such a case. Law's subjects have a legitimate expectation that like cases be treated alike. So if the facts of *Patel v Ali* were to re-occur—call this *Patel v Ali (No. 2)*—the defendant could legitimately expect that specific performance would again be refused. To do otherwise would unfairly treat the defendant *Patel v Ali (No.2)* less favourably than the defendant in the original case, *Patel v Ali*. The same can be said of cases which are *a fortiori* the original case. In this way, decisions in cases about equitable relief can render determinate previously indeterminate issues.

4.3. Appealability

Because the exercise of an equitable discretion to grant or refuse specific performance or an injunction is subject to legal rules, decisions on its exercise can be appealed on grounds that the judge misapplied the law they were bound to apply. That such awards can be appealed and reversed by a higher court on grounds that the lower court was 'wrong'[87] further proves that first instance judges do not have the 'last word' on the availability of specific relief—despite its supposedly 'discretionary' nature.

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84 *Scott v Alvarez* (n 12) at 615 (Rigby L.J.).

85 Frederick Maitland, *Equity: A Course of Lectures* (2nd edn. edn, 1936) at 308.

86 *Patel v Ali* (n 51).

87 Civil Procedure Rules 1998, r. 52.21(3)(a): 'The appeal court will allow an appeal where the decision of the lower court was (a) wrong'. See also *Hadmor Productions Ltd v Hamilton* (n 66) at 220 (Lord Diplock): 'The function of the appellate court is initially one of review only. It may set aside the judge's exercise of his discretion on the ground that it is based upon a misunderstanding of the law or of the evidence before him'; *Moyna v Secretary of State for Work and Pensions* [2003] UKHL 44 at [20] (Lord Hoffmann).

The familiar decision in *Co-op Insurance Society v Argyll Stores* is illustrative. The case is well-known for Lord Hoffmann's famous statement that '[t]he principles upon which English judges exercise the discretion to grant specific performance are reasonably well settled and … of very general application' and his analysis of the constant supervision bar.[88] Perhaps less well-known is how, in that litigation, a lower court's exercise of its 'discretion' to order specific performance was overturned on appeal, twice. At trial, Judge Maddocks refused to order the defendant, a supermarket which was the claimant's anchor tenant, to keep open its stores and continue trading on the premises. He instead awarded summary judgment for damages to be assessed. The Court of Appeal overturned the High Court judge's decision and ordered specific performance. In the House of Lords, the Court of Appeal's decision was in turn overturned, and the order of damages by the trial judge restored.

It is notable that the judges at all levels treated the past cases as guiding their discretion. It was undisputed that the decided cases established a 'settled practice', that a court would not compel a defendant to run a business, especially a losing concern.[89] In refusing specific performance the trial judge was simply following that 'settled practice' created by that line of authority.

What was in dispute was whether this well-established 'rule or practice' had a convincing rationale, and whether the facts of this case were sufficiently exceptional, such that the established 'settled practice' might justifiably be departed from. The majority of the Court of Appeal thought that because the defendants 'behaved very badly'[90] an exception should be made and the trial judge had been 'unwarrantably reluctant to do so'.[91] Millett L.J. did not think so. In his dissent his Lordship emphasised how '[o]ver the centuries rules of practice have evolved so that the parties can know in advance which contractual obligations will be specifically enforced and which sound in damages only'.[92] His Lordship continued, 'consistent practice, no less than common error, makes the law'.[93] On this point the House of Lords agreed. The trial judge had not misapplied the law he was bound to apply. The rule was well-settled, and indeed justifiable on various different grounds. While it might have been possible to conceive of a case in which the 'needs of justice will override all the considerations which support the settled practice', *Argyll* was not such a case.[94]

In *Hadmor Productions Ltd v Hamilton*, Lord Diplock said that:

> The function of the appellate court is initially one of review only. It may set aside the judge's exercise of his discretion on the ground that it is based upon a misunderstanding of the law or of the evidence before him or upon an inference that particular facts existed or did not exist, which… can be

88 *Argyll Stores (HL)* (n 55) at 11–12 (Lord Hoffmann).

89 *Argyll Stores (HL)* (n 55) at 11–12 (Lord Hoffmann); *Cooperative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1996] Ch. 286 at 294 (Leggatt L.J.), 297–298 (Roch L.J.), and 302 (Millett L.J.).

90 *Argyll Stores (CA)* (n 89) at 295 and 299 (Roch L.J.).

91 *Argyll Stores (CA)* (n 89) at 294 (Leggatt L.J.), 298 (Roch L.J.), and 302 (Millett L.J.)..

92 *Argyll Stores (CA)* (n 89) at 304.

93 *Argyll Stores (CA)* (n 89) at 305.

94 *Argyll Stores (HL)* (n 55) at 18 (Lord Hoffmann).

> demonstrated to be wrong by further evidence that has become available by the time of the appeal… [or] upon the ground that no reasonable judge regardful of his duty to act judicially could have reached it.' [95]

One might think that this standard of review is problematic for the preceding analysis. It is ostensibly the same approach as that taken when e.g. a decision as to costs, or a finding of primary fact, is appealed,[96] and we argued above that those decisions involved true discretions. But our argument is not that decisions about equitable relief *never* involve discretion; like the orthodox picture this would be over-simplified and wrong. There are indeed aspects of such decisions which involve moderate discretion, and which can only be challenged on the basis that they are 'plainly wrong'.[97] Equally, however, there are aspects of such decisions which do not, and in these cases the decision can and should be challenged on the basis that it involves a 'misunderstanding of the law'. So, far from supporting the orthodox picture, the standard of review as expressed in *Hadmor* is in fact far more consistent with our analysis.

4.4. Discretion as to content of the remedy

One final distinction remains. In a recent judgment which seems largely to reflect the 'orthodox picture', the UK Supreme Court stated 'that equity takes an essentially flexible approach to the formulation of a remedy'.[98] This was an important premiss from which their Lordships fashioned a novel 'newcomer injunction'. With respect, their Lordships elided an important distinction relating to equitable discretion.

It is essential to distinguish between a remedy's *availability*, and its *content.* Just because a court may have a certain kind of 'discretion' in respect of the latter (i.e., its 'formulation' or form), it does not follow that it has an equivalent 'discretion' in respect the former—there is no entailment between these two aspects.

In this paper we have mainly examined the discretion a judge has in relation to the availability of specific relief. But it is also possible for equitable remedies to be 'discretionary' in a sense relating to the *content* of the remedy. Outside the context of specific relief, this has been expressed in terms of the claimant having an 'equity', which may then be 'satisfied' by the court in a variety of ways, through different orders, having regard to all the circumstances.[99] This feature in particular gives the impression of the judge having greater remedial freedom and flexibility in equity than at common law.

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95 *Hadmor Productions Ltd v Hamilton* (n 66) at 220.

96 See text to fns. 35–42.

97 Although we did doubt, at text to fn. 66, whether the reasons a discretion exists in these cases truly do justify privileging the trial judge's perspective.

98 *Wolverhampton CC* (n 13) at [238] (Lord Reed, Lord Briggs, and Lord Kitchin). Spry's *Equitable Remedies*, which neatly encapsulates the orthodox view, was cited with approval by their Lordships at [17] and [147]–[148].

99 Such as in cases involving proprietary estoppel: see e.g. *Crabb v Arun District Council* [1976] Ch. 179 and *Guest v Guest [2022] UKSC 27*.

One example in the context of specific relief is how the court has the power to tailor the remedy's content by setting conditions on its grant according to the justice of the case. Like rescission (in equity),[100] specific performance[101] can also be granted 'on terms'. In 'rescission on terms', the court orders that the contract be rescinded only on condition that the claimant comply with certain terms. When specific performance is granted 'on terms', a defendant might be ordered to perform, but only on condition that the claimant pays that defendant a sum of money. The same is true of injunctions: 'any such order may be made either unconditionally or on such terms and conditions as the court thinks just'.[102] By comparison, there is no such equivalent jurisdiction to grant damages 'on terms'.[103]

In *Wolverhampton City Council* the Supreme Court blurred this important distinction. In a controversial judgment, their Lordships held that that the court had the power to award a new kind of injunction: 'newcomer injunctions' or injunctions against 'persons unknown', i.e. persons who were neither defendants nor identifiable at the time of the grant. These were granted against gypsies and travellers to restrain them from potential trespasses or breaches of planning laws. The Supreme Court reasoned that:[104]

> [A] general equitable principle is equity's essential flexibility... Not only is an injunction always discretionary, but its precise form, and the terms and conditions which may be attached to an injunction (recognised by section 37(2) of the 1981 Act), are highly flexible… this flexibility enables not merely incremental development of a new type of injunction over time in the light of experience, but also the detailed moulding of any standard form to suit the justice and convenience of any particular case.

In this passage, which formed a crucial plank in their reasoning, their Lordships incorrectly reasoned from the (perceived) broad discretion as to the *availability* of injunctions towards a considerable broadening of the discretion as to the *content* of injunctions, and vice versa. This enabled the Court to conclude that the granting of an injunction against persons unknown was a mere extension of its power to grant an injunction (against an identified defendant) on terms. As we have seen, however, the discretion(s) involved in the availability of specific relief do not inform the discretion(s) involved in determining its content (or vice versa).

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100 *Hanson v Keating* (1844) 4 Hare 1; 67 E.R. 637 at [5; 638]; *TSB Bank Plc v Camfield* [1995] 1 W.L.R. 430; *Solle v Butcher* [1950] 1 K.B. 671.

101 *Re Fawcett and Holmes' Contract* (1889) 42 Ch. D. 150; *Shepherd v Croft* [1911] 1 Ch. 521; *Price v Strange* [1978] Ch. 337; *Harvela Investments Ltd v Royal Trust Co of Canada Ltd* [1986] A.C. 207.

102 Senior Courts Act 1981, s. 37(2).

103 Although possibly closely analogous, albeit not analytically identical (and deriving from statute rather than the common law), are the court's powers to award damages (i) on a provisional basis under the Senior Courts Act 1981, s. 32A; and (ii) on a periodic basis under the Damages Act 1996, s. 2.

104 *Wolverhampton CC* (n 13) at [152] (Lord Reed, Lord Briggs, and Lord Kitchin). The court also emphasised equity's 'flexibility' and ability to 'innovate' by raising as examples freezing injunctions, search orders, third-party disclosure orders, internet blocking orders, and anti-suit injunctions; see at [20]–[22].

5. 'DISCRETION' BEYOND EQUITY

As we have seen, there are two senses in which we can think of equitable remedies as 'discretionary'. There is first the largely trivial sense in which decisions about equitable remedies are 'weakly' discretionary, i.e., they require the exercise of judgement rather than mechanistic decision-making. And, second, there is the less trivial sense in which decisions about equitable remedies sometimes admit of a range of *ex ante* permissible answers from which a judge might, equally correctly, select (i.e., 'moderate discretion'). In this section, we argue—building on some examples given briefly above—that neither of these senses of discretion are unique to the law of equitable remedies.[105]

5.1. Breach of duties of care

A clear analogy can be drawn between equitable discretion and the determination involved in deciding whether one individual breached a duty of care to another. As with equitable discretions, a judge deciding this question may often be required to weigh competing and potentially incommensurable factors. These include the likelihood of the risk in question eventuating, the costs of minimising or avoiding it, and the social utility of the conduct or activity said to breach the duty.[106] This will include both considerations which tend towards the conclusion that the defendant behaved unreasonably as well as those which tend against it. The 'correct' answer to this balancing exercise may well be indeterminate: it may not be possible clearly to say that a defendant's conduct was or was not unreasonable in every case (although of course in some cases it will be). The exercise is therefore similar to that involved in determining equitable moderate discretion. Indeed, in defence of the view that equitable relief is discretionary, Smith considered that the hallmark of discretion was the existence of 'facts that cannot be considered in isolation but must instead be weighed together, in a global or "bundle-of-factors" fashion'.[107] This is precisely the exercise in which judges are engaged when deciding whether a duty of care has been breached.

5.2. The determination of other 'reasonable' standards

Many other instances in which judges are called upon to determine a 'reasonable' or 'objective' standard also involve equity-like discretions, although there is scope for debate about whether they involve weak or moderate discretions. Two examples include situations where a judge must determine the 'reasonable sum' to be paid following the award of quantum meruit or the 'just sum' to be retained by the payee of money pursuant to a frustrated contract. Both questions are clearly evaluative ones in which a degree of judgement must be exercised. However, it is at least plausible that questions of reasonableness sometimes go further and involve the weighing of incommensurable values. For example, when deciding what is a 'just sum' for a

105 As we noted previously, another comparison which one might draw is between the kinds of discretion present in equity with 'true' examples of strong discretion; see text to fns. 36–39.

106 *Tomlinson v Congleton Borough Council* [2003] UKHL 47 at [34] (Lord Hoffmann). Although the case was concerned with liability under the Occupier's Liability Act 1984, Lord Hoffmann's comments therein are of general application for present purposes.

107 Smith (n 47) at 320.

payee to retain, the court is required to 'hav[e] regard to all the circumstances of the case'.[108] As Garland J. recognised in *Gamerco SA v ICM/Fair Warning (Agency) Ltd*,[109] this involves a 'broad discretion'. This sweeping approach is likely to require comparison of factors which are on their face incommensurable, such as the hardship to the payor/payee with the respective conduct of the parties.[110]

5.3. Extensions of limitation periods

Another example of a situation in which courts are engaged in a similar balancing exercise is where a party has made an application to disapply the limitation period applicable to an action for personal injury or death, pursuant to the Limitation Act 1980, s. 33. As Johnson J. recognised in *TVZ v Manchester City Football Club Ltd*, '[t]he opposing factors are incommensurable. Neither has primacy'.[111]

5.4. Remedial discretion at common law

However, perhaps the closest analogue, although equally the most controversial, is the existence of remedial discretion at common law. It is often thought that common law remedies are available 'as of right'. To this effect, Lord Sales stated in *R (Imam) v Croydon London Borough Council* that:[112]

> Private law claims are different [to public law claims], since usually a remedy in that sphere in the form of damages is granted as of right. It is partly for this reason that, in the private law sphere, mandatory orders granted in equity in the form of injunctions or specific performance are also discretionary.

This may be an over-simplification. It overlooks restrictions on another significant common law remedy, viz., the order to pay a sum due. The availability of this remedy is conditioned on the claimant having an adequate 'legitimate interest' in the remedy sought.[113]As one of us has argued elsewhere, this may raise similar considerations to those engaged in determining whether equitable specific relief should be refused on the basis that damages are an adequate remedy.[114] This is not, therefore, an example of a common law moderate discretion; however,

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108 Law Reform (Frustrated Contracts) Act 1943, s. 1(2).

109 *Gamerco SA v ICM/Fair Warning (Agency) Ltd* (n 44).

110 The question of reasonable price is perhaps more likely to involve only a weak discretion. Indeed, in some cases (such as where there is a liquid market), it may be that a reasonable price can be determined almost mechanically.

111 *TVZ v Manchester City Football Club Ltd* [2022] EWHC 7 at [214].

112 *R (Imam) v Croydon London Borough Council* [2023] UKSC 45 at [42].

113 Alexander Georgiou, 'Making contract-breakers pay' (2025) 141 *Law Quarterly Review* 104.

114 See e.g. Georgiou (n 113), 'Making contract-breakers pay' at 112.

it is an example of a common law (weak) discretion which is closely analogous to at least one aspect of what is often thought to be 'discretionary' about equitable relief.

6. CONCLUSION

Jeffrey Hackney remarked that decisions attributed to the demands of equity as if it were some creature with a will of its own (such as insistences that 'equity will not allow…' and 'equity will not assist a volunteer') 'can give Chancery law an unnecessary but highly characteristic air of mysticism'.[115] And in the opening paragraphs of his monograph on the topic, Aharon Barak commented that '[j]udicial discretion is, for the most part, a mystery—to the general public, to the community of lawyers, to teachers of law, and to judges themselves'.[116]

It is all too often claimed that because 'all equitable remedies are discretionary', they are fundamentally different from common law remedies—and therefore certain implications and conclusions about their nature follow.[117] But we are not the first to have noted that 'discretion' is not an easy notion.[118] Incautious use of the term can lead us astray. The term stands in need of clarification and demystification. We hope to have shown in this paper that too much should not be made of equity's supposedly discretionary nature; justifying the distinctiveness of equitable remedies on this basis does not appear a promising path.

115 Jeffrey Hackney, *Understanding Equity and Trusts* (Fontana Press 1987) at 19.

116 Aharon Barak, *Judicial Discretion* (Yale University Press 1989) at 3.

117 See eg *Wolverhampton CC* (n 13) and text to (n 104).

118 See eg Charlie Webb, 'Discretionary Justice' in Dennis Klimchuk, Irit Samet, Henry Smith (eds), *Philosophical Foundations of the Law of Equity* (OUP 2020).