

The vendor's claim for specific performance - is it worth the bother?

by

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For the last three or so years, he has been instructed by the Berkeley Homes Group of companies in relation to a large number of Purchaser defaults arising from the liquidity and financial crises (see e.g. *St James (Grosvenor Dock) Limited v Aribisala* [2009] 1 WLR 1089). Hence his particular interest in today's topic.

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1. INTRODUCTION

- 1.1. It is in the nature of Property Law that the economic cycle influences the regularity with which a lawyer is faced with any particular problem: one such consequence of the “credit crunch” has been the large number of defaulting Purchasers failing to complete on purchases of real estate whether “off-plan” or as-seen. This issue has arisen in the context of the dramatic falls in property values that were in turn principally the product of the squeeze on liquidity. The principles discussed here will clearly have an impact going forward, particularly in light of the continued economic uncertainties and wildly varying assessments of the property sector’s state of health.
- 1.2. In the circumstances under discussion, the Vendor/ Developer is faced with forcing Purchasers to make good on contractual bargains, agreed in very different economic times. The means of doing so is via the remedy of specific performance (“SP”), the alternative to which is rescinding the contract and claiming damages.
- 1.3. In contracts for the sale of land, an order for SP has come to be regarded as automatic (save in exceptional circumstances). The purpose of this paper is to question whether or not, in the context of a Vendor’s claim, it can any longer be said with any particular degree of conviction that a Vendor will always be awarded SP of a contract for the sale of land, rather than damages. If it cannot, then is it worth pursuing at all?
- 1.4. This paper first considers the development of the remedy and secondly, in the light of recent English and Commonwealth authority, sets out the case for and against pursuing the remedy.

2. NATURE OF THE REMEDY

- 2.1. The remedy of SP, like all equitable remedies, is still said to be discretionary. However, the exercise of that judicial discretion is not wholly at large and is exercised by applying well-established principles.
- 2.2. So for example, the remedy cannot be available where there is no concluded or valid¹ contract. Similarly, it will not be ordered where the contract is conditional and the condition has not yet been satisfied.²
- 2.3. However, subject to a few exceptions, in the context of the sale of land, the remedy of SP has come to be regarded as one granted almost “automatically” or “invariably”³, the onus being on the Purchaser to show that there was a good ground for refusal⁴ (or a defence such as that of delay existed).
- 2.4. Procedurally, that is reflected in the provisions of PD 24 paragraph 7 that permits a party to apply for summary specific performance at any time after the claim form is served. Questions that may arise on the investigation of title may be raised by way of a Vendor and Purchaser Summons under *s.49(1) Law of Property Act 1925*.
- 2.5. As is well known, the common law courts were limited in the remedies that they could award, such a remedy was almost always an award in damages. The Courts of Chancery developed the remedy of SP to fill the remedial inadequacy of the common law courts, awarding SP where damages were thought to be an inadequate remedy. An order for SP came to be regarded as the almost invariable right of any vendor or Purchaser.

¹ By reason of s.2 Law of Property (Miscellaneous Provisions) Act 1989

² *Beech Properties Ltd v GE Wallis & Sons Ltd* (1976) 241 EG 685

³ *Hall v Warren* (1804) 9 Ves 605 at 608 per Grant MR; *Hexter v Pearce* [1900] 1 Ch 341 at 346 per Farwell J; *Rudd v Lascelles* [1900] 1 Ch 815 at 817

⁴ *AMEC Properties v Planning Research & Systems* [1992] 1 EGLR 70 per Mann LJ

2.6. To that end, it has been said that it is possible for a Vendor to “thrust the property down the Purchaser’s throat”⁵ - in so doing, the Vendor is able to get rid of the property and avoid the need to make a claim in damages

2.7. From time to time, the Courts of Equity sought to justify this development. The rationale was said to be that land was of unique or special value to the Purchaser, so the remedy of SP would always be granted to a Purchaser⁶. The Vendor was granted SP by reason of the principle of mutuality- that is that SP should not be awarded to one party, if it would not be awarded to the other.⁷

2.8. However, the so-called principle of mutuality, relied upon to justify the position with regards to the vendor, seems highly questionable. The idea derives from *Fry on Specific Performance*⁸ and has been much criticised⁹. Clearly, there is no mutuality where a Vendor is unable to show good title at the outset of the contract but does so later: a vendor has no right to SP. However, a Purchaser is entitled to the remedy of SP in such circumstances¹⁰. So far as performance is concerned, a Vendor may not enforce where he is unable to convey substantially¹¹ all the land that was the subject-matter of the contract, but the Purchaser may do so subject to then receipt of an abatement¹² or award of damages.¹³ The principle of mutuality was examined in *Price v Strange* in 1977¹⁴ and rejected. The Court held that there was an independent discretion to award SP, notwithstanding the want of mutuality.

2.9. The consequences of *Price v Strange* are still yet to be worked out fully. However, the rejection of the rationale of mutuality leaves the justifications for the automatic award of SP to the Vendor looking somewhat flimsy. After all, the Vendor is only interested in receiving its money. Consequently, the obvious

⁵ *Hope v Walter* [1900] 1 Ch 257 at 258

⁶ *AMEC Properties Ltd v Planning Research Systems PLC* [1992] 1 EGLR 70 at 72

⁷ *Clifford v Turrell* (1841) 1 Y & C Ch Cas 138

⁸ 6th Ed at pp 222-223

⁹ *Langdell* (1887-88) 1 Harv LR 104; *Ames: Lectures on legal History* 370; *Jones & Goodhart on Specific Performance* p 38 et seq

¹⁰ *Wu Koon Tai v Wu Yau Loi* [1997] AC 179, PC (Hong Kong)

¹¹ *The remedy is open to the vendor if able to convey substantially all the land* (Condition 7.1.3 of the Standard Conditions of Sale (4th ed)); *Rutherford v Action-Adams* [1915] AC 866, PC (NZ)

¹² *Rutherford supra*;

¹³ SCA 1981, s.50

¹⁴ [1978] Ch 337

remedy for non-completion is for the Vendor to re-sell the property and make a claim in damages.

2.10. Indeed, can it any longer be right that real property should be regarded as unique, when property is traded and dealt with and held as an investment in a manner not dissimilar to other investment instruments and is treated as a money-making commodity? Even the property itself is becoming more generic in form and function. That is important because SP is not ordinarily the remedy for non-completion of a contract concerning personalty. There, unless the subject-matter of the contract is unique or at least an acceptable substitute is *not* readily available in the market, SP will not be granted.

2.11. The settled position¹⁵ in Canada is that there is no presumption in favour of granting SP of a contract for the sale of land and it will be granted only where there is evidence that the property is unique or a substitute would not be readily available in the market.

3. THE PRINCIPLE REMAINS BUT HOW AUTOMATIC IS IT?

3.1. We have not yet reached that point in this jurisdiction, although the Canadian position has attracted academic interest¹⁶, not least because it reflects the modern reality of the nature of realty. The *Semelhago* case and the principles upon which it is based is yet to be considered by the Courts of England. In this and other common law jurisdictions (save for Canada), the focus has been upon the basis upon which the discretion may be exercised in refusing an order for SP, based upon the principles of impossibility, futility and hardship.

3.2. As an initial comment, it is tolerably clear from the authorities that hardship (caused to a Purchaser by the requirement to complete) will not, save in exceptional circumstances, provide a reason for refusing the Vendor's claim for

¹⁵ Applying the obiter dicta of Sopinka J in the Supreme Court of Canada in *Semelhago v Paramadevan* [1996] 136 DLR (4th) 1

¹⁶ See e.g. "The importance of Specific Performance" in Degeling v Edelman (eds): "Equity in Commercial Law" (2005)

SP, a principle endorsed by HHJ Davies in the relatively recent case of ***Matila Ltd v Lisheen Properties Ltd***.¹⁷

3.3. In ***Patel v Ali***,¹⁸ the Court (Goulding J) did allow an appeal against the granting of an order for SP on the ground of hardship. That was not economic hardship, but hardship that would have been caused to the Defendant by reason of her personal circumstances. He found that the Purchaser had suffered an extraordinary and special change in her circumstances that would have meant that enforcing the contract for sale would have amounted to an injustice.

3.4. In so- doing, the Court ruled against the proposition that only such circumstances as existed at the date of the contract (or difficulties caused by the Vendor) could support the defence of hardship. However, it is clear that hardship of whatever sort that the Purchaser brings upon himself, will not be considered: ***Francis v Cowcliffe Ltd***¹⁹

3.5. As it appears then, it will only be in very rare circumstances that the Purchaser will be able to rely upon hardship²⁰. However, the much more commonly heard ground for opposing an order for SP is that the Purchaser is simply unable to raise the money to complete, so that performance is “impossible”. The common scenario in recent years has been that a Purchaser has contracted to buy a new build property (usually a Flat) off-plan. The global financial crisis intervened between exchange of contracts and completion. At completion, the Purchaser has been unable to obtain funding for the full purchase price (because of the collapse in values) and claims to have no other source of funding available sufficient to pay the completion monies.

3.6. To what extent does this constitute a good reason for refusing SP?

¹⁷ [2010] EWHC 1832 (Ch)

¹⁸ [1984] Ch 283

¹⁹ [1976] 33 P & CR 368

²⁰ It should be noted that Clarke J in the ***Aranbel*** case noted below opined obiter that forcing sale of the family home to finance a sale might, in some circumstances, amount to requisite “hardship”

3.7. In *North East Lincolnshire BC v Millennium Park (Grimsby) Ltd*,²¹ the Court of Appeal determined that impossibility brought about by the Purchaser's inability to raise finance could form the basis of an argument in opposition to the grant of SP. However, the appeal was one against summary judgment, obviously requiring only the lower summary judgment threshold to be satisfied²², and the case was settled before Trial.

3.8. These are the only English authorities of which I am aware that deal with these issues. However, mindful of Mr Justice Morgan's exhortation²³ to embrace the usefulness of other common law jurisdictions' treatment of property issues²⁴, a survey of some of the other common law jurisdictions²⁵ is instructive. Whilst such decisions are not of course binding upon the Courts of this jurisdiction, in searching for ruling principles, the usefulness of foreign judgments has been described²⁶ in pragmatic terms as "*our judges tak[ing] their good where they find it.*"

4. SUMMARY JUDGMENT

4.1. Clearly, one of the attractive aspects of a claim for SP is the relative speed with which a Vendor is able to obtain an order, as it is able to apply for SJ at any time after the service of the Claim Form. However, perhaps needless to say (i) the onus is on the Vendor to prove that the Purchaser has no real prospect of establishing a good reason for the Court not to make the order and (ii) there is no facility for questioning the Purchaser if he seeks to resist the order on the grounds of his financial circumstances.

²¹ [2002] EWCA Civ 719

²² *The appeal was successful because the Judge had decided the case on the balance of probabilities not the real prospect of success test*

²³ *Issued extra-judicially at the Property Bar Association Conference 2010*

²⁴ *Although clearly, such decisions may only at most be persuasive, depending upon their provenance*

²⁵ *See Dowling in [2011] Conv 3 208*

²⁶ *By Sir Carleton Kemp Allen in "Law in the Making" (1964)*

4.2. In setting out²⁷ the position in relation to an application for Summary Judgment, Osborne AJ indicated that (with reference to r.12.2 of (1) the High Court Rules, similar in effect to the Part 24 of the CPR):

Where there is raised an impossibility defence to a summary judgment application for specific performance, the plaintiff must prove that the defendant has no arguable defence that there is a very substantial probability that the defendant will be unable to comply with an order for specific performance

4.3. In circumstances where the Purchaser's evidence in reply cannot be tested, it may be difficult to do this. This is particularly true where, as frequently happens, Purchasers act in person and file witness statements (often at the last minute), the wholly truthful nature of which has to be accepted at face-value (even when the formal document is not supported by a statement of truth). Therefore, it cannot be the subject-matter of any meaningful scrutiny or investigation. Moreover, the Court may find the lack of detail in the evidence provided by a litigant in person less significant: it is not mediated by a lawyer who might be taken to "know what to say" in the evidence. In my experience, both those factors have been important in Masters refusing orders for SP at SJ.

4.4. Consequently, there is a real case for saying that the availability of summary SP is not necessarily a good reason for inserting such a claim, when there is no longer a guarantee of a successful outcome at SJ.

4.5. The other point to be made about summary judgment is that, if the Court refuses the summary remedy, usually automatically it is likely to give judgment for the alternative remedy for damages (assuming that it is pleaded and only SP is resisted).

4.6. However, in the New Zealand case of *Prime Resources Co Ltd v Kumar*,²⁸ the Court confirmed the principle taken from *Gillespie Projects v Prestidge*²⁹ that a refusal of summary SP should not be seen as concluding the matter in the Purchaser's favour and that, in an appropriate case, SP could be ordered after

²⁷ *In Ngai Tahu Property Ltd v Dykstra* [2009] NZHC 1474
²⁸ [2007] NZHC 439
²⁹ Auckland Registry 2/10/01

trial. The case of *Cable Bay Sections Ltd v Wu*³⁰ is the example of just such an outcome where, the application for SJ having been refused, the Judge found at Trial that the Purchaser had financial backers and that it was not beyond the realms of possibility that these backers would provide the completion monies.

- 4.7. Moreover, even if a summary order is granted, another possible pitfall is identifiable from the dicta of Deeny J in the Northern Irish Case of *Titanic Quarter Ltd v Rowe*³¹. It has been uncontroversial since *Johnson v Agnew*³² that a vendor in possession of an award of SP may return to Court and seek its dissolution in the event that the Purchaser does not comply, termination of the contract and an order for an assessment of damages. Deeny J expressed the view that in such circumstances the Purchaser would be entitled to its costs of defending the summary application as the Vendor had had “a second bite at the cherry”.
- 4.8. However, there is no indication in *Johnson* itself that the Court thought that it would be appropriate to credit the Purchaser with its costs of the summary judgment application. Furthermore, to hold the vendor liable in circumstances where the purchase has refused to obey an order of the Court appears, to have little merit as a position.
- 4.9. The same judge considered the issue further in *Fernhill Properties (Northern Ireland) Ltd v Mulgrew*³³ in which he appeared to resile to some extent from that position. Nevertheless, he indicated that if a Vendor persisted in a claim for SP where it had indications from the Purchaser that it was impossible to complete, then it might be visited with the consequences of electing subsequently to abandon the remedy of SP and seek a judgment in damages. The same reasoning might equally apply where judgment for damages is awarded at a summary judgment hearing where SP is refused.

³⁰ [2009] NZHC 656

³¹ [2010] NICh 14

³² [1980] AC 367

³³ [2010] NICh 20

5. INABILITY TO PAY: THE PRINCIPLE

5.1. That inability to pay may form the basis for refusing SP has been accepted at Trial in Ireland (*Aranbel Ltd v Darcey & Crampton*³⁴); Australia (*Bovino Pty Ltd v The Casey Group Holdings Pty Ltd*³⁵) and New Zealand (*BOS International (Australia) Ltd v Griffiths*³⁶).

5.2. Together with the North East Lincolnshire case, the body of common law case law certainly strongly favours the proposition that if a Purchaser were able to establish an inability to pay (amounting to impossibility), then impossibility (or the futility of making such an order) would represent a reason for the court to refuse an order for SP.

6. AVAILABILITY OF OTHER ASSETS

6.1. In a positive vein, a survey of the cases show that the Courts have taken a relatively liberal view of what might constitute available assets for the purposes of making the satisfaction of an SP order possible; so

6.1.1. In *Boyarsky v Taylor*,³⁷ the New South Wales Supreme Court held that the Purchaser's interest in the former matrimonial home meant that compliance was possible, despite there being a strong possibility that there would be a delay in the realization of the proceeds of sale (so no date for completion was stipulated in the original order).

6.1.2. In *Rural View Developments Pty Limited v Fastfort Ltd*,³⁸ the Queensland Supreme Court inferred that by reason of the Purchaser being part of a group of companies and there being cross company guarantees, completion would be possible.

³⁴ [2010] IEHC 272 per Clarke J

³⁵ [2009] QSC 250 per Judd J

³⁶ High Court, Auckland Registry, 21 December 2009

³⁷ [2008] NSWSC 1415

³⁸ [2009] QSC 244

6.1.3. In *Matarangi Beach Estates Ltd v Dawson*,³⁹ the Purchaser's home was vested in a Trustee. There was available equity in the home of NZ\$ 250,000, NZ\$ 387,000 being required for completion. Despite the home being the subject-matter of the trust, the Court ruled on an SJ application that it was possible that the home could be sold and the trustees could lend the net proceeds to the Purchaser, which, the Judge thought (for reasons not entirely clear from the report), the trustee would agree to. Further, because the subject matter of the contract was two parcels of land, one parcel could be used as security for the mortgage to fund the balance. Afterwards, the mortgage would be dischargeable by selling one of the parcels.

6.2. Nevertheless, it is pertinent to observe that in the current economic climate, it takes little to persuade the Court that the Purchaser had found it impossible either (i) to raise sufficient security against the subject property or (ii) obtain further funding against other properties that they owned, given the reluctance of lenders to take second charges.

7. IMPOSSIBILITY, FUTILITY AND HARDSHIP

7.1. One of the notable features of some of the cases is that these concepts become conflated in the reasoning, so for instance

7.1.1. In *Aranbel*, Clarke J's conclusion, that the making of an order would be "in vain" and nothing would be achieved by it, seemed to be directed to the question of futility. However, he then went on to consider the issue with reference to the availability of finance.

7.1.2. In *Bovino*, it appears that the Defendant's defence was based upon futility, although Judd J dealt with the issue on the basis of impossibility and hardship

7.2. However, they clearly are distinct concepts:

³⁹ [2008] NZHC 1445

- 7.2.1. Hardship deals with the question of the consequences of the making of an order: only in exceptional circumstances will hardship justify the refusal of an order for SP
- 7.2.2. Impossibility is premised upon the ability of the Purchaser to comply with the order
- 7.2.3. Futility is clearly a concept closer to impossibility than hardship and often the cases make the point that it would be futile to make the order because the Purchaser's financial circumstances make it impossible for him to complete. However, even though compliance with an order may be impossible, it may not be futile to make such an order. After all, the Vendor is concerned with issues in addition to that of obtaining the purchase monies⁴⁰ (although clearly this the primary consideration) so that:
- 7.2.3.1. The making or refusal of an SP order may affect whether or not risk passes under the terms of an open contract (as the creation or continuation of the purchase trust relies upon the availability of SP)
- 7.2.3.2. If SP were refused, the Vendor continues to be responsible for the outgoings of the property (insurance, service charge, ground rent), the extent of such outgoings that are not always easily calculated from the Vendor's point of view.
- 7.3. Accordingly, if as posited above, a Purchaser is unable to complete (either judged at the date that completion is required under the contract or the date of the consideration of the application) the Court might still consider that making an order is not futile because:
- 7.3.1. The Purchaser goes into occupation, his equity being subject to an unpaid vendor's lien.
- 7.3.2. The vendor is divested of the responsibility of occupation and ownership.

⁴⁰ *This may also be a basis for arguing that s.4 Debtors Act 1869 should not apply given that completion of the contract is concerned with matters other than simply that of the payment of completion monies*

7.3.3. The vendor is entitled to say that the property has been disposed of for the purposes of its sales figures.

7.4. Consequently, as it seems to me, it is open to the Vendor to argue that if the making of an order for SP would not be futile (even though the Purchaser at the time of the making of the order would find compliance impossible), then the order should still be made.

8. SANCTION FOR NON-COMPLIANCE

8.1. What happens if the Purchaser simply does not comply with the order? The obvious remedy for non-compliance with an order of the court is committal for contempt. In *Aranbel*, Clarke J accepted that it would in theory be open to the court to imprison a Purchaser that failed to comply. However, he went on to say that necessarily, the Vendor would need to demonstrate that the Purchaser was culpable (in the sense that he could complete but was simply refusing to do so) before committal would be contemplated.

8.2. However, in this jurisdiction there is a difficulty in that the power to commit pursuant to RSC Order 45 is made expressly subject⁴¹ to the provisions of the Debtors Act 1869 and 1878. Imprisonment for debt was abolished by section 4 of the Debtors Act 1869⁴² and while the section allowed for exceptions where imprisonment remained possible (under the 1878 Act the Court being given the discretion to decide the appropriate remedy), the case of the Purchaser who fails to perform his obligation to pay money owing to his vendor does not fall easily into any of them (an argument based upon the third exception⁴³ is untested insofar as I am aware).

8.3. If the court cannot commit a Purchaser for failing to comply with an order for SP (i) it renders the remedy much less powerful and (ii) such a consideration acts as a makeweight when the court is considering whether or not the making of an order is futile.

⁴¹ By r.5(1)(iii)

⁴² *Thereby emptying The Queen's Bench Prison of many of its inmates*

⁴³ "[d]efault by a trustee or person acting in a fiduciary capacity and ordered to pay by a court of equity any sum in his possession or under his control"

- 8.4. As I have already indicated, the Vendor is still entitled to obtain a declaration, as part of the order for SP, that he is entitled to an unpaid vendor's lien pursuant to which a transfer could be executed in the Purchaser's name, the property thereafter being sold pursuant to the unpaid vendor's lien. However, in one case of which I am aware,⁴⁴ Master Moncaster trenchantly described this as "a pointless way to raise the money for the Claimant."
- 8.5. Such a view leaves out of account the possibility that the Vendor could wait until property values improved before exercising its lien and forcing a sale, whilst being credited with interest in the meantime (or waiting until such time as the Purchaser is able to borrow against the security of the property to discharge the lien). However, where there is a particularly sustained downturn, (the length of which is impossible to predict at the time the decision is made), the vendor may be waiting some time for his money. This delay runs against the initially perceived value of making the claim in the first place, namely the speed with which an order and payment of the purchase monies could be obtained.
- 8.6. So where there is non-compliance and the Vendor is not prepared to wait for the completion monies, the primary remedy is to seek dissolution of the order from the Court and judgment for damages to be assessed. Until such an order is made; the vendor is unable to terminate the Contract and re-sell⁴⁵ (which of course it is entitled to do if it were simply seeking damages), so the existence of the order causes delay (and in the worst case scenario loss of a third party buyer)⁴⁶. The making of an order for dissolution is likely to be the norm, but cannot be guaranteed. In ***GKN Distributors Ltd v Tyne Tees Fabrication Limited***⁴⁷, Nourse J stated that an order of dissolution was "no mere formality" and could be refused where dissolution would cause injustice to the Purchaser.

⁴⁴ *St James Group Limited v Holt* ChD 25/2/2009

⁴⁵ *Johnson v Agnew* [1980] AC 367; *Pegasus Town Ltd v Wong HC*; *Christchurch Civ 2008-409-2087*; this remains the law in Australia despite strong academic criticism (see Meagher, Gunmow and Lehane, (4th ed) at 20-265)

⁴⁶ In New Zealand, it has been suggested (Bell AJ) that the way forward would be for the order to provide for vendor's termination in the event of the Purchaser's non-compliance: *Arranmore Developments v Zeeland Developments Auckland Registry* 15 October 2010; *Vincent Street Trustee v De Jongh HC Auckland* [2010] NZHC 1082

⁴⁷ [1985] 2 EGLR 181

8.7. If the Vendor seeks to hold on to his order for SP, there is no opportunity for the Purchaser to argue that the vendor re-sold at an undervalue (which he may do if the vendor simply seeks damages), an easy allegation to make if a large number of units remain unsold at a development and the subject unit is disposed of by way of a discounted bulk sale. However, the advantages of this may be out-weighed by the considerable delay it causes.

8.8. In such circumstances, the Vendor is probably better off mitigating some of his loss by a sale to a third party and recovering the balance of the price in damages. Of course, the fact that a Purchaser said that it was impossible to complete does not mean that he will be unable to satisfy a judgment that, necessarily, will be in a smaller sum than the sum required to complete under an order for SP.

8.9. However, that is, of course, the outcome that would have been achieved if the Vendor had simply sought damages in the first place: frustrating and possibly expensive.

9. CONCLUSIONS

9.1. In the economic climate of the sort that the UK has been experiencing for the last three years, Purchasers are likely to have had difficulty in obtaining financing, particularly where the economic landscape changed during the completion period.

9.2. Inability to pay, if established, either at SJ or Trial constitutes a good reason for refusing SP.

9.3. That makes obtaining the summary remedy, the most attractive procedural aspect of SP, more of a lottery (particularly where litigants in person are concerned) because the impossibility of obtaining mortgage finance strengthens the Purchaser's hand in seeking to resist SP.

- 9.4. When SP is refused at SJ, although possible, continuing to pursue SP to trial is unattractive.
- 9.5. Even where an order for SP is made, the only real remedy for a Purchaser's failure to comply with an SP order is to seek a dissolution of the order; committal is unlikely to be an option: so the remedy lacks "teeth."
- 9.6. There is a question whether or not the presumption in favour of SP ought to be displaced in any event
- 9.7. There is evidence from the Commonwealth jurisdictions that some judges are of the view that the vendor is at risk on costs in pursuing the remedy of SP where ultimately it proves fruitless, although the Vendor is of course the innocent party.
- 9.8. Recent case law, particularly from the Commonwealth, seems to show that the vendor probably can have some confidence in SP as the remedy of first resort. However, the financial viability of the Purchaser remains the key question.
- 9.9. In answer to the question posed by the title of this paper, "is SP worth the bother", the answer must be "up to a point" but a Vendor must be astute to the exact circumstances of the Purchaser; a fixation on obtaining an order for SP may well be counter-productive.

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