

Specific performance and how to avoid it.

by John McGhee QC

Specific performance is an equitable remedy and, like other equitable remedies is said to be discretionary. The discretion is not a wide or unfocussed one however. Just like in other areas of law, it is subject to well established principles which are then applied to the facts of any case.¹

In contracts for the sale of land specific performance is regarded as the automatic right of any vendor or purchaser. The so-called equitable discretion has, it appears, crystallised into a hard rule that specific performance will always be awarded save in exceptional circumstances. The purpose of this paper is to question that assumption.

As is well known, the common law courts were limited in the remedies which they could award. In particular a monetary remedy was usually the only remedy available and they did not have power to force defendants to keep to their bargains. The Courts of Chancery fashioned new remedies to fill the remedial inadequacies of the common law courts. One of these was the remedy of specific performance. It became regarded as the almost invariable right of any vendor or purchaser of land.²

The Courts of Chancery felt the need from time to time to justify why land contracts were treated as deserving preferential treatment in this way. The justification differed depending on whether it was the purchaser or the vendor which was seeking specific performance. Where the purchaser was seeking specific performance, the justification was based on the idea that the land in question would have some special value to the purchaser so that damages would be an inadequate remedy.³ The vendor was granted specific performance too because of the principle of mutuality, that is that specific performance should not be awarded to one party to a contract if it would not be awarded to the other.⁴

This paper questions each of these justifications and finds them inadequate. It then goes on to consider briefly the implications if there was no rule that the vendor and purchaser automatically obtained specific performance of land contracts.

At the outset however it is useful to consider another possible suggestion that might be advanced for granting specific performance of contracts for the sale of the land. It might be said that the effect of a contract for the sale of land is to vest a beneficial interest in the

¹ A point made eg. by Burrows, *Remedies for Torts and Breach of Contract* 3rd ed. 2004 p457

² see eg. *Eastern Counties Ry Co v. Hawkes* (1855) 5 HLC 331 (vendor); *Hall v. Warren* (1804) 9 Ves 603 (purchaser)

³ *Adderley v Dixon* (1824) 1 Sim & St 607

⁴ *Clifford v. Turrell* (1841) 1 Y & C Ch Cas 138

land in the purchaser immediately because of the doctrine that 'equity regards as done that which ought to be done'. This is indeed a well established doctrine and appears from the leading cases of *Lysaght v. Edwards*⁵ and *Walsh v. Lonsdale*.⁶ However two points need to be noted. Firstly the doctrine means that for some purposes the land is regarded as being held on constructive trust for the purchaser but it does not result in the purchaser obtaining the full beneficial interest in the property until the time for completion has arisen.⁷ Secondly the basis of the doctrine is that, in principle, specific performance is available. If specific performance is not available then the maxim that 'equity regards as done that which ought to be done' has no application and the doctrine cannot apply either. To argue that specific performance should be available because the purchaser has an equitable interest in the property under a constructive trust is to try to pull oneself up by one's own boot straps.⁸

The idea that a purchaser should be able to obtain specific performance of a contract for the sale of land because damages are an inadequate remedy seems at first glance to be a relatively safe proposition. It is a general principle that specific relief by way of injunction or specific performance is only awarded if a remedy by way of damages would be inadequate⁹ or, as it sometimes put, it would be unjust to confine a claimant to a remedy in damages.¹⁰ The application of that principle to land contracts may seem obvious. But that will not always be so. A purchaser might be purchasing a flat in a large block where there are numerous identical flats available. Or it might have organised a subsale and would be selling the property on immediately. Even if not selling on the property immediately it might be intending to retain it as an investment or to develop the land and sell it on once the development was completed. In those circumstances it is not obvious that it is necessary to do more than award the purchaser a sum by way of damages. The justification of awarding the remedy to the purchaser on the basis that the property is unique no longer applies if it is not in fact unique or if its quality of uniqueness does not matter to the purchaser. In that event there seems on the face of it to be no reason to adopt a different rule for land than for personal property. A contract for the sale of personal property is not ordinarily specifically enforced unless the property in question is unique or at least an acceptable substitute is not readily available in the market.

In 1996 the Supreme Court of Canada accepted this argument in *Semelhago v Paramadevan*.¹¹ Sopinka J, giving the majority judgment said:

While at one time the common law regarded every piece of real property to be unique, with the progress of modern real estate development this is no longer the case. Both residential, business and industrial properties are now produced in much the same way as other consumer products. If a deal falls through for one property, another is frequently, though not always, readily available...

⁵ (1876) 2 Ch D 499

⁶ (1881) 21 Ch D 9

⁷ See Fox, 'The *Lysaght v. Edwards* doctrine and bars to specific performance' (2006) Chancery Bar Association seminar

⁸ Although the point escaped Lord St. Leonards in *Eastern Counties Ry Co v. Hawkes* supra at 377

⁹ *Hutton v. Watling* [1948] Ch 26

¹⁰ *Evans Marshall & co v. Bertola SA* [1973] 1 WLR 349

¹¹ (1996) 136 DLR (4th) 1

It is no longer appropriate, therefore, to maintain a distinction in the approach to specific performance as between realty and personalty. It cannot be assumed that damages for breach of contract for the purchase and sale of real estate will be an inadequate remedy in all cases...

Specific performance should, therefore not be granted as a matter of course absent evidence that the property is unique to the extent that its substitute would not be readily available."

Although these dicta were strictly obiter, they have been followed widely in Canada although not yet in other jurisdictions and have attracted much academic interest.¹² The position in Canada now is that in order to obtain specific performance of a contract a purchaser must show that it was objectively unique or had some special value to it. The *Semalhão* case and the principles upon which it is based have not yet been considered in England. Since the English principle purports to be based on the uniqueness of the property in question there does not appear to be anything which would prevent an English court following it although it would take a brave judge at first instance to overturn what appears to have been a settled practice for 200 years.

Turning to the reasons why the vendor should be afforded specific performance, the notion that it should be awarded specific performance because the remedy is available to the purchaser no longer applies of course if such a remedy is not automatically available to the purchaser. However even if the purchaser remains entitled virtually as of right to specific performance the so-called principle of mutuality which is relied on to confer a similar right on the vendor seems highly questionable. The idea derives from Fry on Specific Performance¹³ but has been much criticised.¹⁴ So far as it purports to state that this is a requirement at the outset of the contract it cannot apply for example in a situation where the vendor is unable to show good title at that stage but does so later. So far as the position at the date of performance is concerned it also cannot apply for example in a situation where the vendor does not have substantially all the land that it has contracted to convey but where the purchaser can enforce the contract if it wishes. The principle of mutuality was examined in depth by the Court of Appeal in *Price v. Strange*¹⁵ in 1977 and was rejected. The true position the court held was that there was a discretion to award specific performance notwithstanding the absence of mutuality.

The implications of *Price v. Strange* generally to the position of a vendor seeking specific performance have not yet been worked out. If the vendor cannot rely on the principle of mutuality either because there is no such principle or because the purchaser would not itself get specific performance then it is difficult to see what other justification there can be to grant to the vendor any award other than one of damages. The vendor was always interested only in the financial aspects of the transaction. Since it was selling the

¹² See eg. Clark 'Will that be Performance or Cash?' (1999) 37 Alta L Rev 589; Berryman 'Equitable Developments in the Law of Equitable Remedies' [2002] VUWLRev 3; Chambers 'The Importance of Specific Performance' in Degeling & Edelman eds. *Equity in Commercial Law* (2005)

¹³ 6th ed. pp222-223

¹⁴ Langdell (1887-88) 1 Harv L R 104; Ames, *Lectures on Legal History* 370; Jones & Goodhart *Specific Performance* p38 et seq.

¹⁵ [1978] Ch 337

property it had no special value to it and, at least normally, it will be able to remarket the property and sell it to a third party.

A number of commentators¹⁶ have considered the implications of the change. It is said that it will give rise to uncertainty and to greater expense of litigation. These comments are somewhat overdone. If the question of specific performance is at large the courts will in time develop principles which will enable parties to predict whether in any given case specific performance is likely to be awarded. If damages are awarded instead valuation evidence will be available to help determine the amount of such damages. In the meantime parties will be persuaded to take sensible steps to mitigate their loss where specific performance is unlikely to be awarded.

There is however a more significant objection. The availability of specific performance and thus the doctrines of *Lysaght v. Edwards* and *Walsh v. Lonsdale* underpin the creation of many equitable interests in property. An option is only an interest in land because specific performance is available. So also a contract to grant an interest in land only qualifies as an interest in land for that reason. The implications of all this for registered conveyancing would need to be worked out if specific performance were no longer automatically available. There would be implications too for priority on insolvency although this may be of less concern.

The implications do not stop there. A party's right to set aside a contract or for rectification of a contract or to claim a remedy by way of proprietary estoppel are said to create a species of property interest known as a 'mere equity', which has the same character as other equitable interests in property save that it can be defeated not only by a bona fide purchaser of a legal estate but also by a bona fide purchaser of an equitable interest.¹⁷ The reason that these interests appear to qualify as equitable interests is that the court will grant specific relief to set aside or rectify the contract or enforce the estoppel. If the court is not prepared to grant specific enforcement of a contract it is not clear why it should grant specific relief to re-vest property under a contract which has been rescinded since the right to re-vesting is in effect a form of 'specific unperformance'.¹⁸

It has been said that all this undermines the institution of property and the distinction between property rights and personal rights. But there is no longer a clear divide in any event between property and personal obligation¹⁹ and the idea of personal property seems to have thrived notwithstanding that parties are normally confined in case of dispute about it to remedies by way of damages.

At its root the debate is about whether it is still right to regard real property as warranting special protection in the way in which it has been protected for the last 200 years or so. One reason which puts pressure on such a change is that property is now traded, dealt with and held as an investment in ways which treat it simply as a money making commodity. The identity of the property itself is not important. The other reason is that the courts have recognised that the loss of property rights results not just in simple financial loss but in the

¹⁶ See fn 12 supra

¹⁷ Ruoff & Roper, *Registered Conveyancing* paragraph 15.031

¹⁸ Millett, 'Restitution and Constructive Trusts' (1998) 114 LQR 399 at 416

¹⁹ Worthington, 'The Disappearing Divide Between Property and Obligations' in Degeling & Edelman eds., *Equity in Commercial Law* (2005)

loss of bargaining position which should be properly compensated for.²⁰ Where damages can be awarded to provide full compensation for the loss of a property interest, it is tempting to say that a person who holds a property interest only as an investment should be confined to such an award and should not be granted relief designed specifically to enforce its right.²¹

²⁰ See *Wrotham Park Estate v. Parkside Homes* [1974] 1 WLR 798

²¹ cf. *Midtown v. City of London Real Property Co* [2005] 1 EGLR 65 where an injunction was refused to protect a right to light partly on the basis that the claimants were only interested in profiting financially from that right.