THE REMEDY OF SPECIFIC PERFORMANCE AND CONTRACTS FOR THE SALE OF LAND: A BRIEF SURVEY

A PAPER PROVIDED IN CONJUNCTION WITH A PRESENTATION ON 6 MARCH 2015 TO THE JOINT SAL/ChBA CONFERENCE ON

"EQUITABLE REMEDIES IN COMMERCIAL LITGATION"

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1. INTRODUCTION

1.1. The remedy of specific performance ("SP") is available for the breach of contracts agreed in such diverse spheres as the sale and detention of goods, building and construction and for the purchase of items said to be essential and otherwise unavailable.[1]

1.2. A real estate lawyer finds him or herself drawn to a discussion of the nature and efficacy of SP in the context of contracts for the sale of land. It is hoped that this audience will forgive such parochialism. If excuse be required, then some justification might be found in such contracts being the most common case in which the remedy is sought.

1.3. This paper first considers the development of the remedy and secondly, in the light of recent English and Commonwealth authority, attempts to examine its present status.

1.4. In England, traditionally the remedy of specific performance was (i) regarded as the principal remedy for a contracting party's breach of a contract for the sale of land and (ii) granted automatically because of the unique status afforded to real estate as the subject-matter of a contract. That is because English Law has treated no two pieces of land as the same.

1.5. As the reader will well-know, the most recent upward ascent in the economic cycle came to an end with collapse of Lehman Brothers. In the UK, and particularly London, a speculative residential construction boom, concomitant with which was a speculative

[1] *This last requirement leading to orders in relation to the purchase e.g. of coal wagons (**North v Great Northern Ry Co** 1860 2 Giff. 64; sawlogs (**Farwell v Warbridge** (1851 2 Gr 332, Ontario)*

investment boom, took place. That experience was no different to other parts of the developed world. Dramatic falls in property values were principally the product of a squeeze on liquidity. Many who had purchased speculatively-off plan were faced with completing on purchases at prices that reflected pre-crisis levels but with access to funding reflecting post crisis valuations. Defaults increased and produced a raft of cases in which vendor developers sought to enforce contracts.

1.6. One preliminary observation should be made: in relation to the law of England and Wales: this paper considers the remedy as one granted by the Court. S.48(5)(b) of the Arbitration Act 1996[2] provides that an arbitral tribunal has the same power as the Court to order specific performance of a contract, other than a contract relating to land i.e. one that creates or transfers and interest in land.[3] Consequently, where the procedural law of the arbitration or *lex arbitri* is that of England and Wales, there is no jurisdiction to order SP of a contract for the sale of land.

2. BASIS OF THE REMEDY

2.1. The primary remedy that the common law affords for a breach of contract is an award of damages. The remedy of SP, like all equitable remedies, is still said to be discretionary. It would be available, it is said, where it was demonstrated that damages were inadequate as a remedy. Unlike the award of damages, the making of an order of SP is discretionary, albeit that the exercise of that judicial discretion is not wholly at large and is exercised by applying well-established principles.

2.2. The remedy cannot be available where there is no concluded or valid[4] contract. Similarly, it will not be ordered where the contract is conditional and the condition has not yet been satisfied.[5]

2.3. 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"[6], the onus

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2 *Formerly under s.15 Arbitration Act 1950*

3 *The case of* ***Telia Sonera HB v Hilcourt (Docklands) Ltd*** *[2003] EWHC 3540 (Ch) clarified that an obligation contained in a contract for the transfer of land, not itself the obligation to transfer, may be the subject-matter of an order for specific performance in arbitration proceedings (in that case, works of refurbishment and re-fitting of the premises by a tenant)*

4 *For instance by reason of the formality requirements of s.2 Law of Property (Miscellaneous Provisions) Act 1989*

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

being on the Defendant to show that there was a good ground for refusal[7] (or an equitable defence, such as that of delay existed).

2.4. Procedurally, that is reflected in the provisions of Practice Direction 24 of the Civil Procedure Rules 1998, paragraph 7 that permits a party to apply for summary specific performance at any time after the claim form is served.

2.5. Questions that may arise in that case on the investigation of title (i.e. between contract and completion) may be raised by way of a vendor and purchaser summons under s.49(1) Law of Property Act 1925. Although, now little used in England and Wales, in a relatively recent article[8], Malcolm Merry has made the point that this form of application remains common in Hong Kong (under s.12 of Conveyancing and Property Ordinance 1984). This is principally to be explained by the absence of the guarantee of title by registration, the differences in contractual practice (often meaning binding contracts are entered into prior to lawyers becoming involved) and the prevalence of illegal structures blighting the title.

2.6. It has been said that it is possible for a vendor of land to "thrust the property down the purchaser's throat"[9]- 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[10] or special value to the purchaser, so the remedy of SP would always be granted to a purchaser[11]. 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.[12]

3. A RETREAT FROM ORTHODOXY AND UNINTENDED CONSEQUENCES?

3.1. 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*[13]

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6 ***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*

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

8 *The Conveyancer [2010] 4 308*

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

10 ***Sudbrook Trading Estate v Eggleton*** *[1983] 1 AC 444*

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

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

13 *6th Ed at pp 222-223*

and has been much criticised[14]. Such a "principle" cannot apply where a vendor is unable to show good title at the outset of the contract but does so later. A purchaser *is* entitled to the remedy of SP in such circumstances[15]. So far as performance is concerned, a vendor may not enforce where he is unable to convey substantially[16] all the land that was the subject-matter of the contract, but the purchaser may do so subject to the receipt of an abatement[17] or award of damages.[18] The principle of the requirement of mutuality was examined in ***Price v Strange*** in 1977[19] and rejected. The Court held that there was an independent discretion to award SP, notwithstanding the want of mutuality.

3.2. The consequences of *Price v Strange* are still yet to be worked out fully. The rejection of the rationale of mutuality leaves the justifications for the automatic award of SP to the vendor looking somewhat flimsy. The vendor is only interested in receiving its money. Consequently, the obvious remedy for non-completion is for the vendor to re-sell the property and make a claim in damages.

3.3. Can it any longer be correct that real property should be regarded as unique, when property is traded and dealt with and held an investment in a manner not dissimilar to other investment instruments is treated as a money-making commodity[20]? Even the property itself is becoming more generic in form and function. Indeed, an injunction was refused in ***Midtown Ltd v City of London Real Property Co Ltd***[21] exactly because the dominant owner of an easement was interested in the property "from a money making point of view."

3.4. SP is not ordinarily the remedy for non-completion of a contract concerning personalty. That is: unless the subject- matter is unique or at least an acceptable substitute is *not* readily available in the market, so that damages would be an adequate remedy.

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

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

16 *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)*

17 ***Rutherford*** *supra;*

18 *SCA 1981, s.50*

19 *[1978] Ch 337*

20 *As Lord Hoffmann observed in the Hong Kong case of* ***Jumbo King Limited*** *(1999) 4 HKC 707*

21 *[2005] EGLR 65*

3.5. The settled position[22] in Canada (now established in almost every province) 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. With the advent of modern real estate development, on the Canadian view, the "mass production" of property, particularly in the investment context, the presumption was said no longer to be justifiable in making a distinction, in the approach to specific performance, as between realty and personalty. Accordingly:

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

3.6. The Canadian authorities[23] since *Semalhalgo* have shown, in the main, the Courts' continued willingness to grant SP to residential purchasers (although less so for those purchasing for the purpose of sub-sale or investment) but not to vendors. That principally is because:

> *[Residential] Purchasers typically examine many properties and make a selection on the basis of a combination of price, location, design and many other subjective factors which will usually make it very difficult to find another house which exhibits all of those same features.*

The notion that investment property on the whole, cannot be treated as unique has its difficulties. A purchaser may have his own views as to the value of the property as an investment. Why, it could be argued, should an innocent purchaser be forced to accept the court's objective assessment of value?

3.7. As to vendors[24], other than the principle of mutuality mentioned above, two other justifications usually are made for the right to SP[25]. Firstly, although the vendor is simply seeking money by way of performance, the result of an order for SP is that he receives

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

23 *E.g.* ***Tropiano v Stenvalley Eastes Inc*** *(1997) 36 O.R.3d 92 (subdivision lot unique due to proximity to ravine);* ***Beier v Proper Cat Constructions Ltd*** *(2013) 564 A.R. 357 (purchaser able to enjoy property without proximity of neighbours)*

24 *Legislation regulates the vendor's remedy in Saskatchewan (Land Contracts (Actions) Act and Limitation of Civil Rights Act, s.2(1) and in Alberta (Law of Property Act, s.41)*

25 *Although there is less discussion in the Canadian cases of vendor claims, neither of these justifications seem likely to survive the Semalhalgo approach*

the entire price, not simply damages based on the difference between contract and market price. Secondly, there may not be an alternative purchaser or obvious comparable in the market: refusing SP again simply substitutes the court's assessment of loss for the bargain struck by the parties.

3.8. Similar developments had taken place in New Zealand, although it does not appear that there has been further momentum given to this development in recent years[26]. In the 2005 case of ***Landco Albany Ltd v Fu Hao***[27], the purchaser sought SP of a contract for the sale of 53 lots for the purposes of development. In refusing the order for SP, the Court of Appeal concluded that Fu Hao "*must have entered into the transaction in order to make a profit and in those circumstances damages would be an adequate remedy*."

3.9. That line of argument relatively recently has been taken up by the Singaporean Court of Appeal in ***EC Investment Holdings Pte Ltd v Ridout Residence Pte Ltd & Ors*** [28] (citing Fu Hao)**.** While the Court examined the arguments in some detail, the Judges found it unnecessary to decide whether or not the more restrictive approach should as a matter of principle be adopted in this jurisdiction. In refusing the purchaser's application for SP, the court preferred expressly to base its decision upon the circumstances of the case "specific performance being an equitable and discretionary remedy."

3.10. Without referring to that earlier decision, the Judge in ***New Dennis Arthur & Or v Greesh Ghai Monty***[29] stated obiter (paragraph 12) that in most cases where the vendor sought the remedy, damages were likely to be an adequate remedy because his interest was likely to be "purely financial in nature." He picked up the reservations that the editors' of Snell's Equity (now in its 33rd Ed) expressed about the principal of mutuality and the awkward exception to the rule on adequacy of damages, to which a vendor's application for SP gives rise.

3.11. The re-evaluation of SP in this sphere gives rise to a number of unintended and potentially difficult problems, in relation to (i) the equitable consequences of the availability of SP "as a matter of course" as a remedy and (ii) the principle of mitigation of damage. If this development is to take root, then these problems will need to be addressed.

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26 *It appears to have "sunk without trace" according to Don McMorland of the Auckland Law School*

27 *[2006] 2 NZLR 174*

28 *[2011] SGCA 50*

29 *[2012] SGHC 122*

Creation of equitable interests

3.12. Although the principle has been criticised (not least by the editors of Snell), it remains the accepted positon that once " you have a valid contract for sale, the vendor becomes in equity a trustee for the purchaser of the estate sold, and the beneficial ownership passes to the purchaser" (doctrine of equitable conversion).[30] The basis for the creation of that (constructive) trust is said to be a tacit acceptance that a contract for sale of land would be enforced specifically, equity looking upon things agreed to be done as actually performed. As has been stated illuminatingly[31], the test for the availability of the remedy at this stage of the performance of the contract is (i) formation and performance is legal (ii) there is valuable consideration (iii) the subject matter of the contract is "unique." It will be readily appreciated that the absence of this last quality presumptively undermines the orthodox position.

3.13. That has two consequences.

3.13.1. *Firstly*, if the exchange of contracts no longer giving rise to a proprietary equitable right, the parties cannot protect that interest against third party's by way of the registration of notice or caveat. The purchaser's status presumptively becomes personal rather than proprietary.

3.13.2. *Secondly*, the operation of so-called rule in *Walsh v Lonsdale* arguably ceases to apply. That provides that an imperfectly created legal lease may nevertheless be a validly created equitable lease, capable of governing the landlord's and tenant's rights under the covenants of the draft lease contained in the agreement. This principle again relies upon the notional availability of SP, which in part rests upon the perceived uniqueness of the land demised.

Mitigation

3.14. A further difficulty is thrown up by the Canadian Supreme Court decision in the case of ***Southcott Estate Inc. v Toronto District School Board***.[32] In that case, the Supreme

30 ***Lysaght v Edwards*** *(1876) 2 Ch D 499 at 506*

31 *LQR (2012) 582; P G Turner*

32 *[2012] SCC 51*

Court upheld the Ontarian Court of Appeal's assessment of the Plaintiff's loss as $1. The SPV purchaser had sought SP and damages in the alternative. SP was refused at first instance and damages were awarded on the basis of a loss of chance calculation of the potential profit from the scheme. That award was reversed on the grounds that the plaintiff could have acquired an alternative site upon which to carry out the development. Its failure to do so amounted to a failure to mitigate.

3.15. Is it fair to use the plaintiff's choice to elect to apply for a remedy, legitimately open to it, as grounds for refusing damages in the alternative? Why would a purchaser seeking an order for SP, at the same time go out and buy an alternative piece of land? The act of filing a claim for SP is inconsistent with taking steps to acquire a new property. Ultimately as the dissenting Justice (McLachlin CJ) said that it was appropriate for a party to maintain a suit for SP "instead of mitigating."

3.16. Consequently, the established position in Canada is that a purchaser faces a double risk. It may fail on a claim for SP for the property's want of uniqueness. Worse still, the very fact of the court's refusal of SP may lead to the conclusion that there had been a failure to mitigate. So if the Court determines that seeking the remedy of SP was itself unreasonable, then a plaintiff seeking SP (that logically would not have sought to make an alternative purchase) will be held to have failed to mitigate. The innocent party in such a situation may get neither the land it contracted for nor any damages to reflect the loss of its bargain. A surprising end-point and surely wrong?

4. THE IMPACT OF DISCRETIONARY FACTORS

4.1. In England, we are yet to abandon the traditional notion of land as invariably unique. Rather, the Courts' focus, particularly in vendor claims, has been upon the discretionary questions of impossibility, futility and hardship.

4.2. 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 a claimant's claim for SP, a principle endorsed by HHJ Davies in the relatively recent case of ***Matila Ltd v Lisheen Properties Ltd***.[33]

33 *[2010] EWHC 1832 (Ch)*

4.3. In ***Patel v Ali***,[34] the Court (Goulding J) allowed appeal against the granting of an order for SP. The ground for so-doing 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.

4.4. 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. It is clear that hardship that the purchaser brings upon himself, will not be considered: ***Francis v Cowcliffe Ltd.***[35]

4.5. It will only be in very rare circumstances that the purchaser will be able to rely upon hardship[36]. The much more commonly pleaded 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 an apartment) 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.

4.6. To what extent would this constitute a good reason for refusing SP?

4.7. In ***North East Lincolnshire BC v Millennium Park (Grimsby) Ltd***,[37] 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 satisfied[38], and the case was settled before Trial.

4.8. These are the only English authorities of which I am aware that deal with these issues. A survey of some of the other common law jurisdictions is instructive. Whilst such

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34 *[1984] Ch 283*

35 *[1976] 33 P & CR 368*

36 *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"*

37 *[2002] EWCA Civ 719*

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

decisions are not of course binding upon the English Courts. In searching for ruling principles, the usefulness of foreign judgments has been described[39] in pragmatic terms as "[*English*] *judges tak[ing] their good where they find it.*"

4.9. **Inability to Pay**

4.9.1. That inability to pay may form the basis for refusing SP has been accepted at trial in Ireland (***Aranbel Ltd v Darcey & Crampton***[40]); Australia (***Bovino Pty Ltd v The Casey Group Holdings Pty Ltd***[41]) and New Zealand (***BOS International (Australia) Ltd v Griffiths***[42]***).***

4.9.2. 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.

4.9.3. 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

4.9.3.1. In ***Boyarsky v Taylor***,[43] 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).

4.9.3.2. In ***Rural View Developments Pty Limited v Fastfort Ltd***,[44] 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.

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39 *By Sir Carleton Kemp Allen in Law in the Making (1964)*
40 *[2010] IEHC 272 per Clarke J*
41 *[2009] QSC 250 per Judd J*
42 *High Court, Auckland Registry, 21 December 2009*
43 *[2008] NWSC 1415*
44 *[2009] QSC 244*

4.9.3.3. In ***Matarangi Beach Estates Ltd v Dawson***,[45] 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 could be used as security for the mortgage that afterwards could be discharged by selling one of the parcels.

4.9.4. In a difficult 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.

4.10. Impossibility, futility and hardship

4.10.1. In some of the cases, it appears that these concepts become conflated in the Judges' reasoning. For instance:

4.10.2. In ***Aranbel***, Clarke J observed 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.

4.10.3. 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.

4.10.4. Clearly, they are distinct concepts:

4.10.4.1. 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;

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45 *[2008] NZHC 1445*

4.10.4.2. Impossibility is premised upon the ability of the purchaser to comply with the order;

4.10.4.3. 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 monies[46] (although clearly this the primary consideration) so that:

4.10.4.3.1. 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);

4.10.4.3.2. If SP were refused, a 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 a vendor's point of view.

4.10.5. Where 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:

4.10.5.1. The purchaser goes into occupation, his equity being subject to an unpaid vendor's lien.

4.10.5.2. The vendor is divested of the responsibility of occupation and ownership.

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

46 *This may also be a basis for arguing that s.4 Debtors Act 1868 should not apply given that completion of the contract is concerned with matters other than simply that of the payment of completion monies*

4.10.6. The vendor may 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.

5. SUMMARY JUDGMENT

5.1. One of the attractive aspects of a claim for SP is the relative speed with which a party 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, (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.

5.2. In setting out[47] 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*

5.3. In circumstances where the purchaser's evidence in reply cannot be tested, it may be difficult to do this. This is 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). It cannot be the subject-matter of any meaningful scrutiny or investigation. 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, that 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.

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47 *In* ***Ngai Tahu Property Ltd v Dykstra*** *[2009] NZHC 1474*

5.4. 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.

5.5. If the Court were to refuse the remedy at SJ, it is likely give judgment for the alternative remedy for damages (assuming that it is pleaded and only SP is resisted). However, in the New Zealand case of ***Prime Resources Co Ltd v Kumar***,[48] the Court confirmed the principle taken from ***Gillespie Projects v Prestidge***[49] 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 trial. The case of ***Cable Bay Sections Ltd v Wu***[50] 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.

5.6. If a summary order were granted, another possible pitfall is identifiable from the dicta of Deeny J in the Northern Irish Case of ***Titanic Quarter Ltd v Rowe***[51]. It has been uncontroversial since ***Johnson v Agnew***[52] that a vendor in possession of an award of SP may be return to court and seek its dissolution in the event that the purchaser does not comply, by 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".

5.7. 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.

5.8. The same judge considered the issue further in ***Fernhill Properties (Northern Ireland) Ltd v Mulgrew*** [53] 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

48 *[2007] NZHC 439*
49 *Auckland Registry 2/10/01*
50 *[2009] NZHC 656*
51 *[2010] NICh 14*
52 *[1980] AC 367*
53 *[2010] NICh 20*

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.

6. SANCTION FOR NON-COMPLIANCE

6.1. What happens if a purchaser simply does not comply with the order? Non-compliance with an order of the court may be sanctioned by an ordered for committal. 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.

6.2. In England and Wales, there is a difficulty in that the power to commit pursuant to RSC Order 45 is made expressly subject[54] to the provisions of the Debtors Act 1869 and 1878. Imprisonment for debt was abolished by section 4 of the Debtors Act 1869[55] 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 exception[56] is untested insofar as I am aware).

6.3. If the court cannot commit a defendant 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.

6.4. As an alternative, a vendor is still entitled to obtain a declaration, as part of the order for SP, as to the existence of an unpaid vendor's lien. Pursuant to that, a transfer could be executed in the purchaser's name, the property being sold pursuant to the unpaid

54 *By r.5(1)(iii)*

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

56 *"[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"*

vendor's lien. In one case of which I am aware,[57] a Chancery Master trenchantly described this as "a pointless way to raise the money for the Claimant."

6.5. That ignores 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). 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.

6.6. Where there is non-compliance and the vendor is not prepared to wait for the completion monies, the best option may be 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-sell[58] (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)[59]. 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***[60], Nourse J stated that an order of dissolution was "no mere formality" and could be refused where dissolution would cause injustice to the purchaser.

6.7. If a vendor seeks to hold on to his order for SP, it may deny the purchaser the opportunity 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/subdivision and the subject unit is disposed of by way of a discounted bulk sale. The advantages of this may be out-weighed by the considerable delay it causes.

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

58 ***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))*

59 *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 Zealand Developments Auckland*** *Registry 15 October 2010;* ***Vincent Street Trustee v De Jongh HC Auckland*** [2010] NZHC 1082

60 *[1985] 2 EGLR 181*

6.8. The vendor might be better off mitigating some of his loss by a sale to a third party and recovering the balance of the price in damages. 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 will be in a smaller sum that the sum required to complete under an order for SP.

6.9. That is the outcome that would have been achieved if the vendor had simply sought damages in the first place (and deals with the difficulties that arose in the Southcott case).

7. CONCLUSIONS

7.1. SP is a discretionary remedy that requires the Claimant to justify its award by reference to the uniqueness of the subject-matter and inadequacy of damages

7.2. In England and Wales, the prima facie position is that the remedy will be granted in relation to a contract for the sale of land (save in an arbitration to which the AA 1996 applies) almost as of right and regardless of the nature of the property.

7.3. The position in some other Commonwealth jurisdictions (Canada, New Zealand and Singapore) has changed or is changing and the presumption has been displaced. Potentially, that creates a number of problems that have not arisen previously

7.4. Where SP is available, obtaining summary judgment may be an attractive option; however, available defences and evidential questions reduce the chances of obtaining judgment from a strong possibility to debatable, creating a risk on costs.

7.5. Purchasers particularly may be able to pray in aid hardship, impossibility or futility, particularly the latter two.

7.6. There are practical problems with enforcing against recalcitrant defendants and unwinding an order for SP is not without its difficulties.

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