

BEING SPECIFIC ABOUT SPECIFIC PERFORMANCE

Since the landmark decision of the House of Lords in *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd*¹ our highest court has not considered the availability of specific performance in the contractual context. It may be that, following the lead of other jurisdictions,² the Supreme Court could be tempted to restrict the scope of specific performance in the context of contracts for the sale of land. It is to be hoped that such temptations will be resisted.

That approach, however, might go against a perceived, recent trend which favours the award of damages over specific remedies in circumstances where the contrary was previously true. Indeed, the Supreme Court has recently narrowed the ambit of specific equitable remedies, and promoted the award of damages,³ on two occasions. In *AIB v Redler* the Supreme Court considered the remedies available to a beneficiary following the misapplication of trust property by a trustee.⁴ The traditional approach entitled the beneficiary to falsify the wrongful disbursement.⁵ As Lord Sumption explained in *Williams v. Central Bank of Nigeria*, “[i]f the trustee misapplied the assets, equity would ignore the misapplication and simply hold him to account for the assets as if he had acted in accordance with his trust”.⁶ The beneficiary could bring “a suit ...

¹ [1998] AC 1.

² Especially Canada: *Semelhago v. Paramadevan* [1996] 2 S.C.R. 415 (S.C.C.); *Southcott Estates Inc. v. Toronto Catholic District School Board* 2012 SCC 51, [2012] 2 SCR 675; discussed at n 60ff below. See too, for example, developments in New Zealand: *Landco Albany Ltd v Fu Hao Construction Ltd* [2006] 2 NZLR 174 (CA) and Singapore: *EC Investment Holding Pte Ltd v Ridout Residence Pte Ltd & Ors* [2011] SGCA 50, [2012] 1 SLR 32 (CA); *New Dennis Arthur & Or v Greesh Ghai Monty* [2012] SGHC 122.

³ Damages is used for convenience here; nothing turns on the historic distinction between damages awarded at common law and equitable compensation awarded by the chancery courts: cf. *Tang Man Sit v Capacious Investments Ltd* [1996] AC 514 (PC) 520 (Lord Nicholls).

⁴ For discussion of the case see eg L. Ho, ‘Equitable compensation on the road to Damascus?’ (2015) 131 LQR 213; P. Turner, ‘The New Fundamental Norm of Recovery for Losses to Express Trusts’ [2015] CLJ 188; P. Davies, ‘Remedies for Breach of Trust’ (2015) 78 MLR 681; ‘Stay on target: compensation and causation in breach of trust claims’ [2015] Conv 348; P. Watts, ‘Agents’ Disbursal of Funds in Breach of Instructions’ (2016) 1 LMCLQ 118; A Televantos and L Maniscalco, ‘Stay on target: compensation and causation in breach of trust claims’ [2015] Conv 348; P Davies, ‘Compensatory Remedies for Breach of Trust’ (2016) 2 Canadian Journal of Comparative and Contemporary Law 65.

⁵ *Knott v. Cottee* (1852) 16 Beav 77; *Re Massingberd’s Settlement* (1890) 63 LT 296; *In re Dawson (dec’d)* [1966] NSW 211.

⁶ [2014] UKSC 10; [2014] 2 WLR 355 at [13]. See too *Hall v Libertarian* (2013) 16 HKCF 61 (Lord Millett NPJ).

for equitable debt or liability in the nature of a debt”.⁷ Nevertheless, Lord Toulson dismissed the traditional analysis, insisting “that equity only ever really awarded compensation, which was “clothed by the court in the literary costume of equitable debt, the debt being for the amount of the loss caused by the fraud”.⁸ Beneficiaries are now apparently limited to compensatory remedies for loss suffered as a result of the misapplication of trust property, at least where the transaction has been completed.⁹

In *Coventry v Lawrence*,¹⁰ the Supreme Court considered the remedies available for the tort of nuisance. Nuisance is a tort against land; it protects property rights.¹¹ Property rights are concerned primarily concerned with land use rather than land value,¹² and should generally be protected by “property rules” rather than “liability rules”.¹³ Injunctions should therefore be the prima facie remedy available in response to an ongoing nuisance.¹⁴ However, Lord Sumption said:¹⁵

“There is much to be said for the view that damages are ordinarily an adequate remedy for nuisance and that an injunction should not usually be granted in a case where it is likely that conflicting interests are engaged other than the parties’ interests. In particular, it may well be that an injunction should as a matter of principle not be granted in a case where a use of land to which objection is taken requires and has received planning permission.”

This view was not adopted by the majority of the Supreme Court,¹⁶ and would involve a significant re-appraisal of the law of nuisance.¹⁷ But the initial seeds of a change in approach may have been planted. In any event, the Supreme Court clearly thought that damages should be more readily available in lieu of an injunction.¹⁸

⁷ *ex parte Adamson; In re Collie* (1878) 8 Ch D 807 at 819 (James and Baggallay LJ). See too *In re Smith, Fleming & Co.* (1879) 11 Ch D 306 at 311 (James LJ); *Webb v. Stenton* (1883) 11 QBD 518 at 530 (Fry LJ).

⁸ *AIB* at [61]. See too L. Ho, ‘Equitable compensation on the road to Damascus?’ (2015) 131 LQR 213 at 25-216.

⁹ Although for a difficult application of *AIB* see *Main v Giambrone & Law (a firm)* [2017] EWCA Civ 1193; [2018] P.N.L.R. 2; P. Davies, ‘Equitable Compensation and the SAAMCO Principle’ (2018) 134 LQR 165.

¹⁰ [2014] UKSC 13, [2014] AC 822.

¹¹ *Hunter v Canary Wharf* [1997] AC 655.

¹² M Dixon, ‘The Sound of Silence’ [2014] Conv 79, 84.

¹³ This language appears in G Calabresi and A Melamed, ‘Property Rules, Liability Rules and Inalienability: one view of the cathedral’ (1972) 85 Harvard LR 1089.

¹⁴ P Davies, ‘Injunctions in Tort and Contract’ in G Virgo and S Worthington (eds) *Commercial Remedies: Resolving Controversies* (CUP, 2018).

¹⁵ *Coventry v Lawrence* [2014] UKSC 13, [2014] AC 822 [161].

¹⁶ See especially Lord Mance, *ibid* at [168].

¹⁷ E Lees, ‘*Lawrence v Fen Tigers*: Where now for nuisance?’ [2014] Conv 449.

¹⁸ In particular, the Supreme Court thought that the “public interest” may justify an award of damages rather than injunctive relief. Compare *Shelfer v City of London Electric Lighting Company* [1895] 1 Ch 287.

A similar deprecation of specific remedies in favour of damages can be seen in the context of common law remedies too.¹⁹ In *AIB v Redler*, Lord Toulson even said that “a monetary award which reflected neither loss caused nor profit gained by the wrongdoer would be penal”.²⁰ This must be doubted: an action in debt for the agreed sum is not penal. Claims to enforce the primary obligation under a contract, rather than a secondary obligation which arises upon breach, are not at all uncommon.

In any event, the apparent focus upon damages, which incorporates the desirable requirement of mitigation, makes it timely to consider whether the remedy of specific performance in the contractual context will soon come under attack. This is particularly important since such a move has recently been made in Canada and has been flirted with in other jurisdictions too.²¹ In England and Wales, much of the discussion surrounding specific performance has tended to question why specific performance is not *more* readily available, influenced by the approach of other European jurisdictions.²² But Brexit will no doubt quieten calls for harmony with our European neighbours, and there remain good reasons for damages being generally preferred to specific performance where there has been a breach of contract.²³ The focus of this paper is whether specific performance should be *less* readily available, concentrating on contracts for the sale of land. Where property is primarily purchased for its investment or resale value, it is arguable that damages are an “adequate” remedy and that specific performance should not be awarded.²⁴

Such arguments deserve to be considered fully. Any push towards damages rather than specific remedies may be motivated by a wish to encourage innocent parties to take steps to mitigate the consequences of a wrong, and thereby ensure more “efficient” or “fair” outcomes. In Canada, a similar approach has been adopted, but it is suggested that it has not proved to be a very happy one; that approach should be rejected in this jurisdiction, at the very least

¹⁹ Notably in the continued discussion of *White & Carter v McGregor* [1962] AC 413: see recently J Morgan, ‘Smuggling mitigation into *White and Carter v McGregor*: Time to come clean?’ [2015] LMCLQ 575 and *MSC Mediterranean Shipping Co SA v Cottonex Anstalt* [2015] EWHC 283 (Comm), [2015] 2 All ER (Comm) 614 [101] (Leggatt J) and [2016] EWCA Civ 789; [2016] 2 Lloyd’s Rep. 494.

²⁰ *AIB* at [64].

²¹ See note 2 above.

²² Although the decision of the House of Lords in *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* was seen as a “check” on the expansion of specific performance: [1998] AC 1, overturning [1996] Ch 286.

²³ See eg M Chen-Wishart, ‘Specific Performance and Change of Mind’ in G Virgo and S Worthington (eds) *Commercial Remedies: Resolving Controversies* (CUP, 2017).

²⁴ Cf *Midtown Limited v City of London Real Property Company Ltd* [2005] EWHC 33 (Ch) at [76], where Peter Smith J refused to grant an injunction for various reasons, including that the claimant “was only interested in the Property from a money making point of view”.

where it is the purchaser who seeks specific performance. It is less clear whether the vendor should still (presumptively) be able to obtain specific performance.

I Specific performance in English law

In *Makdessi v Cavendish Square Holdings BV*, Lord Sumption and Lord Neuberger said that “specific performance of contractual obligations should ordinarily be refused where damages would be an adequate remedy”.²⁵ This repeats the orthodox view that specific performance will only be awarded where damages are “inadequate”.²⁶ Although this adequacy bar has sometimes been doubted,²⁷ and there is some support for the view that the test for whether to award specific performance depends simply on whether it is the most appropriate remedy,²⁸ in most contractual disputes the court’s first inclination is clearly to award damages, and then only award specific performance if damages are inadequate in some way. This approach might be supported because it better protects the parties’ freedom of action,²⁹ as well as autonomy, since it enables parties to change their minds after the point of entering into a contract.³⁰

It is clear that damages should be the primary remedy where contracts for the sale of generic goods are involved.³¹ This accords with the expectations of commercial parties; often “merchants are buyers one day and sellers the next; plaintiffs in one dispute are defendants in another”.³² Being subject to orders of specific performance to enforce each individual contract would be unduly burdensome. However, an important question is whether a different approach should be adopted for contracts for the sale of land.

²⁵ [2015] UKSC 67 [2016] AC 1172 [30].

²⁶ See too *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1998] AC 1, 11 (Lord Hoffmann).

²⁷ Eg O Odudu and G Virgo, “Inadequacy of Compensatory Damages” [2009] RLR.

²⁸ *Rainbow Estates v Tokenhold* [1999] Ch 64; I Spry, *Equitable Remedies* 9th edn (Thomson Reuters, 2013) pp.62-63; G. Jones and W. Goodhart, *Specific Performance* 2nd edn (Butterworths, 1996) p.5; cf. J. Heydon, M. Leeming and P. Turner, *Meagher Gummow and Lehane’s Equity: Doctrines and Remedies*, 5th edn (Chatswood, NSW: LexisNexis Butterworths, 2015) para. 20-030.

²⁹ Eg D. Kimel, *From Promise to Contract: towards a liberal theory of contract* (Hart, 2003) 95-109.

³⁰ M Chen-Wishart, ‘Specific Performance and Change of Mind’ in G Virgo and S Worthington (eds) *Commercial Remedies: Resolving Controversies* (CUP, 2017).

³¹ Cf A Schwartz, “The Case for Specific Performance” (1979) 89 Yale LJ 271.

³² S. Waddams, *The Law of Contracts* 7th edn (Canada Law Book, 2017) 475.

The uniqueness of property

It is generally thought that specific performance is most appropriate where the subject-matter of the contract is unique.³³ English law has traditionally accepted that each parcel of land is unique, since no parcel of land can be exactly the same as another; as a result, specific performance is available as a matter of course.³⁴ This was explained by Lord Diplock in *Sudbrook v Eggleton*:³⁵

“Since if [the purchasers] do not acquire the fee simple they will not have to pay that price, the damages for loss of such a bargain would be negligible and, as in most cases of breach of contract for the sale of land at a market price by refusal to convey it, would constitute a wholly inadequate and unjust remedy for the breach. That is why the normal remedy is by a decree for specific performance by the vendor of his primary obligation to convey, upon the purchaser's performing or being willing to perform his own primary obligations under the contract.”

This approach to contracts for the sale of land has strong historical roots. By the fifteenth century the jurisdiction to award specific performance was both well-known and well-established, and “most petitioners sought the enforcement of agreements to sell land”.³⁶ Indeed, specific performance may have been especially important at a time when land was relatively difficult to obtain and there was no open market for real property.³⁷

However, the situation may no longer be so clear.³⁸ Land is bought and sold on the open market. And although each parcel of land is unique in the sense that the fixed location of each unit cannot be precisely the same as any other, increasingly for commercial purchasers, at least, one property may be just as

³³ Eg A. Kronman, “Specific Performance” (1978) 45 Univ Chicago LR 351.

³⁴ *Hall v Warren* (1804) 9 Ves 605, 608 (Sir William Grant MR); *Adderley v Dixon* (1824) 1 Sim & St 607; *Rudd v Lascelles* [1900] 1 Ch. 815; *Patel v Ali* 286 (Goulding J); *Graham v Pitkin* [1992] 1 W.L.R. 403 at 406; *AMEC* at 72L; C Harpum, S Bridge and M Dixon, *Megarry & Wade: the law of real property* 8th edn (Sweet & Maxwell, 2012) para 15-115; K Gray & S Gray, *Elements of Land Law* 5th edn (OUP, 2009) 8.1.49; E Peel, *Treitel: The Law of Contract* 14th edn (Sweet & Maxwell, 2015) 21-019; I Spry, *Equitable Remedies* 9th edn (Thomson Reuters, 2013) 63; G. Jones and W. Goodhart, *Specific Performance* 2nd edn (Butterworths, 1996) 32; J. Story, *Commentaries on Equity Jurisprudence: As Administered in England and America* (1st ed, 1836) 24

³⁵ [1983] 1 A.C. 444, 478.

³⁶ G. Jones and W. Goodhart, *Specific Performance* 2nd edn (Butterworths, 1996) 6.

³⁷ P Brenner, “Specific Performance of Contracts for the Sale of Land Purchased for Resale or Investment” (1978) 24 McGill L. J. 513, 516-517; Clark, *Equity* (1919), §42.

³⁸ M Chen-Wishart, ‘Specific Performance and Change of Mind’ in G Virgo and S Worthington (eds) *Commercial Remedies: Resolving Controversies* (CUP, 2017) 122: “English law’s reservation of a special position for land derives from socio-political circumstances that have little relevance today”. J McGhee (ed) *Snell’s Equity* 33rd edn (Sweet & Maxwell, 2015) 17-008: “However, it is unrealistic today to regard land as inevitably a unique item for which damages are an inadequate remedy”

good as another. This may be particularly significant where the intention is to sell the property for a profit, or to rent out the property: two similar properties may be susceptible to the same growth due to a rise in the market, or produce the same rental yield. If the only interest the purchaser has in the property is its financial value, then there may be a strong case for awarding damages rather than specific performance if the vendor breaches the contract to sell.

In contract law generally, the burden should be on the innocent party to show that damages are not adequate and specific performance should be awarded.³⁹ But that burden seems to be reversed in contracts for the sale of land, since the assumption has consistently been that land is unique so damages will not be adequate since no satisfactory substitute can be acquired.⁴⁰ That approach has prevailed even in the commercial context. For example, in the decision of the High Court of Australia in *Pianta v National Finance & Trustees Ltd*, Barwick CJ said:⁴¹

“There was a faint endeavour made on behalf of the appellants to support the refusal of a decree for specific performance on the ground that, because the respondent was a land developer, damages would be an adequate remedy. But in my opinion this proposition is without foundation in law, even if the respondent had had no other business than that of subdividing and selling land and had made a decision to subdivide and sell the subject land.”

The same has been assumed to be true in England.⁴² But as the editors of *Meagher, Gummow and Lehane* have laconically observed, “the situation is different in Canada”.⁴³ The Canadian challenge to this orthodoxy will be considered after considering the availability of specific relief in favour of the vendor.

Specific performance in favour of the vendor

That the desired property is “unique” may explain why the purchaser should be granted specific performance. But it does not explain why the vendor should also be granted specific relief. After all, the vendor is really interested in

³⁹ *The Stena Nautica (No 2)* [1982] 2 Lloyd’s Rep 336, 348

⁴⁰ This apparently extends to transient interests: *Verrall v Great Yarmouth BC* [1981] QB 202.

⁴¹ (1964) 180 CLR 146 at 151.

⁴² G. Jones and W. Goodhart, *Specific Performance* 2nd edn (Butterworths, 1996) 130-131.

⁴³ . J. Heydon, M. Leeming and P. Turner, *Meagher Gummow and Lehane’s Equity: Doctrines and Remedies*, 5th edn (Chatswood, NSW: LexisNexis Butterworths, 2015) 20-030. See too the different views expressed by the Privy Council in *Loan Investment Corp’n of Australiasia v Bonner* [1970] NZLR 724.

receiving money⁴⁴ in return for the property, and, potentially, anyone can provide money for the property: it does not have to be the *purchaser's* money. Indeed, it is generally thought that an obligation to pay money should not be specifically enforced, and these cases concerning the vendor represent an unusual anomaly.⁴⁵

Early authorities appeared to accept that since the vendor only wanted the purchaser's money, he should be limited to remedies at law and specific performance should not be awarded.⁴⁶ At least in situations where the land is readily re-sellable, it is difficult to see what hardship would flow from leaving the vendor to a remedy in damages for losses suffered as a result of having to sell the property to another, combined with appropriate awards of interest (and in any event the purchaser's deposit would be forfeited).⁴⁷

Nevertheless, that early preference for common law remedies over specific performance has been discarded and the current position in English law is that the vendor can “thrust the property down the purchaser's throat”⁴⁸ through an order for specific performance. It is not entirely clear what brought about the change in approach. There may have been some concern about leaving damages to be assessed by a jury,⁴⁹ but even if that was persuasive at one time it is not any longer. The real driver of the change was more likely to have been a new emphasis upon “mutuality”:⁵⁰ since specific performance is available to the purchaser, it should be available to the vendor.⁵¹ Yet in more recent times the requirement of “mutuality” in the law of specific performance

⁴⁴ The consideration provided by the purchaser is virtually always money; in the rare circumstances that the consideration provided is unique then specific performance is much easier to justify.

⁴⁵ E Peel, *Treitel: The Law of Contract* 14th edn (Sweet & Maxwell, 2015) 21-001.

⁴⁶ *Armiger v Clark* Bun 111; *Withy v Cottle* 1 Sim & Stu 174; *Kenney v Wenham* 6 Mad. 315; *Doherty v Waterford and Limerick Ry Co* 13 Ir Eq R 538; *Wilson v Keating* 5 Jur NS 815; E Sugden (known as Lord St Leonards), *Sugden on Vendors and Purchasers* 14th edn (London: H Sweet, 1862) 224

⁴⁷ E Peel, *Treitel: The Law of Contract* 14th edn (Sweet & Maxwell, 2015) 21-019; G. Jones and W. Goodhart, *Specific Performance* 2nd edn (Butterworths, 1996) 33.

⁴⁸ *Hope v Walter* [1900] 1 Ch 257, 258 (Lindley LJ). See too *Walker v Eastern Counties* 67 E.R. 1300; (1848) 6 Hare 594; *Miliangos v George Frank (Textiles) Ltd* [1977] Q.B. 489 at 496; cf *AMEC Properties v Planning Research & Systems* [1992] B.C.L.C. 1149; [1992] 1 E.G.L.R. 70.

⁴⁹ D Bowen, *Elements of the Law Relating to Vendors and Purchasers* (London: Estates Gazette, 1922) 298; *Eastern Counties Rly Co v Hawkes* (1855) 5 HL Cas 331; *Cogent v Gibson* (1864) 3 Beav 557.

⁵⁰ E Hewitt and M Overton (eds), *Dart's treatise on the law and practice relating to vendors and purchasers of real estate*, 8th ed (London: Stevens, 1929) 878: “[The vendor's] case, therefore, is not one in which the relief at Law is inadequate; but, upon the principle of affording mutual remedies, the purchaser being entitled to claim specific performance, Equity will entertain the vendor's bill”. See too *Withy v Cottle* (1823) 1 S&S 174; *Regent's Canal Co v Ware* (1857) 23 Beav 575.

⁵¹ See eg *Lewis v Lord Lechmere* (1722) 10 Mod 503: “upon mutual articles there ought to be mutual remedies: that if the vendee had a remedy both in law and equity, the vendor would not be upon a par with him, unless he had so too: that the remedy the vendor had at law, was not a remedy adequate to what he had in this Court; for at law they only could give him the difference in damages, whereas he might for particular reasons stand in need of the whole sum.”

has been persuasively criticised,⁵² and it is a weak basis for such strong protection in favour of the vendor. The focus should be on whether the court's discretion to grant specific performance should properly be exercised.

Clearly, the vendor may have good reasons for wanting specific performance. It may be difficult to re-sell the property if the property market has crashed, and the vendor may want the hassle of selling an unwanted property to be placed on the (breaching) purchaser rather than himself. But that is true in all sorts of contexts, and it is not clear that real property merits different treatment.⁵³ Indeed, given that the vendor will have already gone through the process of selling the property once, it is strongly arguable that the vendor is better-placed than the purchaser to sell the property after the failed initial transaction.⁵⁴

A different argument in favour of specific performance depends upon the existence of a constructive trust in favour of the purchaser that arises upon an exchange of contracts. As Lord St Leonards put it in *Eastern Counties Rly Co v Hawkes*, “a seller wants the exact sum agreed to be paid to him, and he wants to divest himself legally of the estate, which after the contract was no longer vested in him beneficially”.⁵⁵ The constructive trust that arises due to the creation of a specifically enforceable contract will be discussed further below,⁵⁶ but it is not clear that the existence of that trust should suffice to allow the vendor to force the property on the purchaser.⁵⁷ After all, the exchange of contracts does not bring absolute finality to the transaction, and the vendor still bears certain risks even after exchange.⁵⁸ The trust arises for the protection of the purchaser, not the vendor.

It is therefore arguable that a vendor should not invariably be granted an order of specific performance when confronted with a reneging purchaser. Although damages may be difficult to assess in some cases, that is equally true

⁵² Eg *Price v Strange* [1978] Ch 337; A Burrows, *Remedies for Torts and Breach of Contract* 3rd edn (OUP, 20014) 491-493.

⁵³ Cf *AIB*, the result of which means the hassle of selling the unwanted property now clearly rests with the beneficiary rather than trustee.

⁵⁴ R Sharpe, *Injunctions and Specific Performance* (Thomson Reuters Canada, loose-leaf edn), 8.190.

⁵⁵ (1855) 5 HL Cas 331, 376 (Lord St Leonards). See too E Fry, *A treatise on the specific performance of contracts* (London: Butterworths, 1858) 10.

⁵⁶ See text to nn73-81 below.

⁵⁷ Interestingly, it appears that specific performance may be ordered even if the consideration has been paid since “the right of the vendor to be relieved from liabilities attaching to the ownership of the land will sustain the suit”: E Hewitt and M Overton (eds), *Dart's treatise on the law and practice relating to vendors and purchasers of real estate*, 8th ed (London: Stevens, 1929) 878; *Shaw v Fisher* (1855) 5 D.M.&G. 596; *Cheale v Kenward* (1858) 3 D.&J. 27.

⁵⁸ R Sharpe, *Injunctions and Specific Performance* (Thomson Reuters Canada, loose-leaf edn) 8.130.

in numerous other areas of contract law. It should not be assumed that the risk of error is greater when the contract is for the sale of land.⁵⁹

Nevertheless, there may be good practical reasons for generally granting the vendor specific performance, based upon maintaining the integrity of the system concerning transactions for real property. Property transactions often form part of a longer chain: the vendor may need the money from the purchaser immediately in order to buy a different property, and so on. Absent a quick order of specific performance, it is likely that the vendor would be unable to complete on the other property, and the chain might collapse. In those circumstances, it is suggested that specific performance may still be the more appropriate remedy. The recognition that specific performance will generally be quickly granted may help to keep a number of chains alive, and the very threat of specific performance may discourage a purchaser from backing out, thereby preventing chains from collapsing.

Canada: Moving Away from Specific Performance

The Supreme Court of Canada has endorsed a shift away from specific performance towards damages in some cases. In *Paramadevan v Semelhago*,⁶⁰ a purchaser agreed to buy a house under construction, but the vendor later reneged on the deal. The ratio of the case concerned the assessment of damages in lieu of specific performance. Comments on the availability of specific performance were *obiter*, since both parties were content to proceed on the basis that the purchaser was entitled to specific performance.⁶¹ However, Sopinka J, speaking for six of the seven members of the court,⁶² said:⁶³

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

⁵⁹ Although see W Lewis, “A Vendor’s Right to Specific Performance”, *American Law Register*, Vol 41, NS 65.

⁶⁰ [1996] 2 SCR 415.

⁶¹ *ibid* [23].

⁶² The seventh member, La Forest J, did not wish to express a view on this issue: *ibid* [1].

⁶³ *ibid* [21]-[21].

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. ...”

These important comments marked a substantial change in the law.⁶⁴ The Supreme Court recognised that some properties were effectively interchangeable; indeed, on the facts of *Semelhago*, the building lot under construction appeared interchangeable with any number of others, as the trial judge had observed.⁶⁵ *Semelhago* indicates that real property and personal property should not be treated in fundamentally different ways⁶⁶ and emphasises the presumptive primacy of damages. In order to be granted specific performance, it appears that – applying *Semelhago* – a purchaser will need to show that the relevant land is special in some way.⁶⁷

The comments in *Semelhago* were *obiter* but influential. They were unsurprisingly endorsed by the more recent decision of the Supreme Court in *Southcott v Toronto Catholic School Board*.⁶⁸ The purchaser was a single-purpose company incorporated solely to purchase a specific parcel of land. The vendor later reneged on the agreement to sell the land. The majority of the Supreme Court held that specific performance should not be granted. Instead, the purchaser should be limited to an award of damages. The purchaser had failed to mitigate its losses, and could only recover a nominal sum for breach of contract. McLachlin CJ dissented on the issue of mitigation, and this will be explored more fully below. However, it is important to note that even she recognised that “the common law presumption of the uniqueness of real property no longer holds”.⁶⁹ The shift away from specific performance was endorsed by all members of the Canadian Supreme Court.

The trial judge had clearly found that “the land was nothing more unique to Southcott than a singularly good investment and that this was not a case in

⁶⁴ R Sharpe, *Injunctions and Specific Performance* (Thomson Reuters Canada, loose-leaf edn) 8.40.

⁶⁵ However, the concession made by the vendors regarding the availability of specific performance this issue was understandably not fully pursued by the Supreme Court: [1996] 2 SCR 415 [23].

⁶⁶ *ibid* [21]-[22].

⁶⁷ For criticism that this contravenes a fundamental principle of equality, since the availability of specific performance should not depend upon the desirability of the land sold, see R Chambers, “The Importance of Specific Performance” in S Degeling and J Edelman (eds), *Equity in Commercial Law* (NSW, Lawbook Co, 2004) 437-441.

⁶⁸ 2012 SCC 51, [2012] 2 SCR 675.

⁶⁹ *ibid* [95].

which damages were too speculative or uncertain to be a satisfactory remedy”.⁷⁰ This was supported by the majority. Karakatsanis J held that:

“A plaintiff deprived of an investment property does not have a “fair, real, and substantial justification” or a “substantial and legitimate” interest in specific performance (*Asamera*,⁷¹ at pp. 668-69) unless he can show that money is not a complete remedy because the land has “a peculiar and special value” to him (*Semelhago*, at para. 21, citing *Adderley*,⁷² at p. 240). Southcott could not make such a claim. It was engaged in a commercial transaction for the purpose of making a profit. The property’s particular qualities were only of value due to their ability to further profitability.”

Such an approach clearly makes it much more difficult for commercial developers to obtain specific performance for contracts for the purchase of real property.

Rejecting the Canadian approach

The reasoning of the Supreme Court of Canada is attractively put, but it is suggested that it should not be followed in this jurisdiction. Three main reasons are given: the difficulties it would cause in the conveyancing process; the problems in assessing damages, and especially incorporating the doctrine of mitigation; and the unnecessary uncertainty that would be caused by such a substantial change of approach.

Constructive trust

It is clear as a matter of English law that upon exchange of contracts the vendor of real property holds that property on trust for the purchaser.⁷³ Such a constructive trust arises because the underlying contract is specifically enforceable. If it were not, then no constructive trust could arise: the purchaser would not be able to enforce the transfer of the property.

⁷⁰ [40]. Cf J McGhee (ed), *Snell’s Equity* 33rd edn (Sweet & Maxwell, 2015) para 17-007: “the court will not, without more, order specific performance merely because its rules on the quantification of damages mean that the claimant’s interest in performance is not fully protected”.

⁷¹ *Asamera Oil Corp. v. Seal Oil & General Corp.* [1979] 1 S.C.R. 633.

⁷² *Adderley v. Dixon* (1824), 1 Sim. & St. 607, 57 E.R. 239.

⁷³ See eg *Scott v Southern Pacific Mortgages Ltd* [2014] UKSC 52 (Lord Collins). This has been strongly criticised: see eg W Swadling, ‘The Vendor-Purchaser Constructive Trust’, in S Degeling and J Edelman (eds) *Equity in Commercial Law* (Sydney: Lawbook Co., 2005), but also defended: P Turner, ‘Understanding the Constructive Trust between Vendor and Purchaser’ (2012) LQR 582.

The existence of the constructive trust is important to the conveyancing process, and the assumption of its validity underpins very many contracts.⁷⁴ As a beneficiary under a trust, the purchaser acquires a proprietary interest in the property which can be insured. That proprietary interest can also be protected against third parties by registration of notice or caveat. Moreover, the purchaser would be protected in the event of the vendor's insolvency as a result of his equitable property rights.

All these advantages would be lost if the contract to sell land could not be specifically enforced.⁷⁵ This would be unfortunate, and could lead to complicated attempts to create trusts pending completion of the transaction.⁷⁶ However, it might be queried whether the purchaser should be protected in the event of the vendor's insolvency, for example. After all, purchasers of personal property do not benefit from proprietary protection under a constructive trust. But property can pass in goods as soon as the contract is made,⁷⁷ which in itself offers the purchaser protection if the seller becomes insolvent. The purchaser is instantly protected, and can obtain legal title to the goods straight away. Real property is different. Purchasing land takes some time, especially given the need to carry out inquiries and comply with various formalities. Legal title does not pass immediately upon the exchange of contracts, but only upon registration. The constructive trust offers protection in the period between exchange of contracts and completion. Given how "profoundly depressing and frustrating" the "dreary process" of buying land can be,⁷⁸ it is appropriate to provide the purchaser with protection once binding contracts have been exchanged.⁷⁹

Many rules of property law are based upon the contract to sell land being specifically enforceable.⁸⁰ Shifting away from that approach may "shake the foundations of property law".⁸¹ The current conveyancing system would not

⁷⁴ Indeed, a constructive trust arises not just in contracts of sale, but following any specifically enforceable promise to transfer an asset. Thus contracts to grant a lease, mortgage, profit or easement produce an equitable version of the promised right.

⁷⁵ It would also seem that the rule in *Walsh v Lonsdale* (1882) 21 Ch D 9 would no longer apply, in the context of imperfectly created leases. Furthermore, applications for summary judgment under CPR PD 24 para 7 would be much less likely to succeed.

⁷⁶ Cf *In Re Ralli's Will Trusts* [1964] Ch. 288.

⁷⁷ Provided there is an unconditional contract for the sale of specific goods: Sale of Goods Act 1979, ss 17 and 18 (rule 1).

⁷⁸ *Pitt v PHH Asset Management Ltd* [1994] 1 W.L.R. 327, 333 (Sir Thomas Bingham MR).

⁷⁹ Of course, this does not offer any protection in the potentially very long period between an offer being accepted "subject to contract" and an exchange of contract. The drawn-out and inefficient process of purchasing land begins long before contracts are exchanged, and this was also the subject of Sir Thomas Bingham's MR remarks in *Pitt v PHH Asset Managements Ltd*.

⁸⁰ Unless there is a good reason not to, such as hardship: see eg *Patel v Ali* [1984] Ch. 283.

⁸¹ As Chambers has put it, "Changing the rules for the paradigm case, a contract for the sale of land, may shake the foundations of property law, because it must affect all contracts to transfer assets unless some justification can be found for treating contract of sale differently": R Chambers, "The Importance of Specific Performance"

work satisfactorily if the parties did not know whether specific performance would be granted: it would be difficult for a purchaser to know whether he had an insurable interest, for instance. This would increase the complexity and costs of an already difficult process, with unfortunate results.

Assessment of damages and mitigation

Any shift away from specific performance towards damages makes it necessary to be clear about how damages are to be assessed, and the role of mitigation in their quantification. As Lord Diplock observed,⁸² in many situations the purchaser's loss will be minimal. But where the property market is rising, losses may be substantial. Friedmann has given the example of a contract to buy a house for £100,000.⁸³ The seller later pulls out. At that time, the purchaser could obtain a similar property for about the same price, but instead seeks specific performance and by the time of judgment the value of the house has doubled to £200,000. Clearly, specific performance would provide the purchaser with a property which has doubled in value, and mitigation would be irrelevant. But mitigation would be relevant to the question of damages. It may be that damages would be reduced to nothing since the purchaser failed to mitigate his loss by buying a substitute property.⁸⁴

The example given by Friedmann was effectively played out in *Southcott*, yet the majority of the Canadian Supreme Court never seriously discussed the relationship between specific performance and mitigation.⁸⁵ Karakatsanis J simply observed that “[s]pecific performance is an equitable remedy that is difficult to reconcile with the principle of mitigation”.⁸⁶ The majority of the Supreme Court relied upon its earlier decision in *Asamera Oil Corp. v. Seal Oil & General Corp.*,⁸⁷ in holding that:⁸⁸

in S Degeling and J Edelman (eds), *Equity in Commercial Law* (NSW, Lawbook Co, 2004) 433; see too 442-448. See also M Chen-Wishart, ‘Specific Performance and Change of Mind’ in G Virgo and S Worthington (eds) *Commercial Remedies: Resolving Controversies* (CUP, 2017) 124: “While the historical reasons in support of the rule are largely redundant, important property rules have evolved around it such that change has the potential to wreak havoc with substantial portions of property law”.

⁸² Text to note 35 above.

⁸³ D Friedmann, “Good Faith and Remedies for Breach of Contract” in J Beatson and D Friedmann (eds) *Good Faith and Fault in Contract Law* (OUP, 1997) 409.

⁸⁴ Friedmann also speculates that the court may exercise its discretion to deny specific performance where the purchaser did not act in good faith by failing to mitigate his loss. This seems doubtful: cf *White & Carter v McGregor* [1962] AC 413.

⁸⁵ M McInnes, “Specific performance and mitigation in the Supreme Court of Canada” (2013) 129 LQR 165, 168.

⁸⁶ 2012 SCC 51, [2012] 2 SCR 675 [31].

⁸⁷ [1979] 1 S.C.R. 633.

⁸⁸ 2012 SCC 51, [2012] 2 SCR 675 [36] (emphasis in original).

“there may be situations in which a plaintiff’s inaction is justifiable notwithstanding its failure to obtain an order for specific performance where circumstances reveal “some fair, real, and substantial justification” for his claim or “a substantial and legitimate interest” in seeking specific performance (*Asamera*, at pp. 668-69 (emphasis added)). This does not mean that a plaintiff with such a claim should not attempt to mitigate; rather it recognizes that such a claim for specific performance informs what is reasonable behaviour for the plaintiff in mitigation.”

These criteria are somewhat nebulous. The “legitimate interest” test is often invoked in contract law, but its meaning remains elusive.⁸⁹ The approach of the Supreme Court of Canada is bound to provoke further litigation surrounding the boundaries of these ideas.

Moreover, the approach to mitigation on the facts of *Southcott* is unsatisfactory. The trial judge had found that there were no comparable or profitable properties. Yet the majority overturned this finding, taking a broader approach to substitute properties by including a wider range of sizes and values as being broadly comparable. This was deprecated by the powerful dissent of McLachlin CJ, who saw “no basis on which to conclude that Southcott acted unreasonably in maintaining its suit for specific performance instead of mitigating its loss”.⁹⁰ The Chief Justice emphasised that the onus was very clearly on the vendor to show that alternate properties could have been profitably developed,⁹¹ and that this burden had not been discharged,⁹² meaning that there was no reason to interfere with the findings of the trial judge.

Fundamentally, McLachlin CJ considered that the purchasers did not act unreasonably in seeking specific performance.⁹³ This is important: it is not presumptively unreasonable to press for performance where this is still possible.⁹⁴ Yet, as McLachlin CJ pointed out:⁹⁵

“The act of filing a claim for specific performance is inconsistent with the act of acquiring a substitute property. A plaintiff, acting reasonably, cannot pursue specific performance and mitigate its loss at the same time. It makes no sense for a reasonable plaintiff seeking specific performance to effectively concede defeat and buy a substitute

⁸⁹ See eg *White & Carter v McGregor* [1962] AC 413; *Attorney-General v Blake* [2001] 1 AC 268; *Makdessi v Cavendish Square Holdings BV* [2015] UKSC 67, [2016] AC 1172.

⁹⁰ 2012 SCC 51, [2012] 2 SCR 675 [65].

⁹¹ *ibid* [83]

⁹² *ibid* [81]

⁹³ *ibid* [91]-[97]

⁹⁴ A Dyson and A Kramer, “There is No “Date of Breach Rule”” (2014) 130 LQR 259, 278-279.

⁹⁵ 2012 SCC 51, [2012] 2 SCR 675 [93]

property. The plaintiff could end up with two properties — one it wanted and one it did not. Furthermore, an action for specific performance is often motivated by the unavailability of substitutes in the marketplace. A plaintiff's reasonable claim that substitutes are unavailable is inconsistent with the ability to acquire a substitute in the marketplace.”

Following the approach adopted in Canada, a purchaser is now caught between a rock and a hard place.⁹⁶ If it seeks specific performance, it may end up with nothing. But by abandoning specific performance it may miss out on the benefits of the contract to purchase land it originally entered into. A claim for specific performance, if successful, has the effect of postponing the date of breach,⁹⁷ but it takes time to know whether the court will consider the subject matter of the contract to be sufficiently unique for specific performance to be granted. A simple, clear rule that contracts for the sale of land will be specifically enforced as a matter of course may well seem attractive. The approach in Canada is surprisingly very favourable to vendors who renege on their contracts; in *Southcott*, the vendor caused a loss assessed at \$1,935,500, but was effectively able to breach with impunity.

It should also be observed that even if the purchaser intends to sell the property on very quickly, damages may still be perceived to be inadequate to some extent. After all, some of the re-sale profits may be too remote to be recoverable from the vendor.⁹⁸ And exposing the purchaser to further litigation from a sub-purchaser may have unfortunate consequences, which would be avoided through an order for specific performance.⁹⁹

Generating uncertainty

The approach favoured by the Supreme Court of Canada would generate much uncertainty in this jurisdiction. The measure of damages would be uncertain and it would be unclear when specific performance would be granted. Consequently, purchasers could not be sure whether they enjoy an equitable property right which can be protected on the register, insured, and so on. Of course, certainty is a second-order principle, and rules can be certain and unjust. But even so, certainty should not readily be jettisoned, and it is far from clear that the advantages gained from emphasising the availability of money awards to satisfy the disappointed purchaser's performance interest are sufficient to

⁹⁶ J O'Sullivan, "Mitigation and specific performance in the Canadian Supreme Court" [2013] CLJ 253, 255.

⁹⁷ *Semelhago v. Paramadevan* [1996] 2 S.C.R. 415 (S.C.C.) [15].

⁹⁸ *Hadley v Baxendale* (1854) 9 Exch 341; *Transfield Shipping Inc v Mercator Shipping Inc (The Achilles)* [2008] UKHL 48; [2009] 1 A.C. 61.

⁹⁹ G. Jones and W. Goodhart, *Specific Performance* 2nd edn (Butterworths, 1996) 130-131.

outweigh the costs and problems that inevitably flow from fears of uncertainty. As Chambers has observed:¹⁰⁰

“The move away from a certain and settled rule towards the exercise of judicial discretion is almost always undesirable. Uncertainty in the law favours the rich over the poor and the strong over the weak. The costs of litigation, both financially and emotionally, can be ruinous for the ordinary citizen. It is important that, as often as possible, people are able to ascertain their legal rights and obligation, with the aid of legal advice if necessary, but without resort to litigation.”

It may be that some divide could be drawn between “residential” and “commercial” purchases,¹⁰¹ and the Canadian approach limited to the latter context, but this would not be easy. Perhaps where the relevant property is intended for mixed use, the courts should err towards characterising a transaction as “residential” rather than “commercial” if that would maintain the availability of specific performance.¹⁰² In any event, however, “commercial” purchases may have a number of different purposes. For example, property may be bought to be resold very quickly. If the court is confident that it has sufficient information to determine the market value of the property in question at the hypothetical disposition date, perhaps damages could be assessed with a degree of confidence. But this is unlikely to account for many cases. It is more likely that the property will be held over a longer time-frame and the rental income would need to be calculated for an indeterminate period of time. Specific performance may still be the more appropriate remedy.¹⁰³ After all, even if the purchaser has no subjective attachment to a particular parcel of land, the purchaser has clearly used its own judgment about the income-producing qualities of the particular parcel of land, and that might suffice to render the land unique.¹⁰⁴

Sharpe has observed that “[e]ven in commercial cases, the practical effect of *Semelhago* had been limited”, noting a “tendency to apply a relaxed version

¹⁰⁰ R Chambers, “The Importance of Specific Performance” in S Degeling and J Edelman (eds), *Equity in Commercial Law* (NSW, Lawbook Co, 2004) 434.

¹⁰¹ D Clark, “Will that be Performance ... Or Cash?: *Semelhago v. Paramadevan and The Notion of Equivalence*” (1999) 37 *Alta LR* 589.

¹⁰² Where a property is intended to be a home, not a commodity, there may be a number of further features that make the land unique and special for the purchaser.

¹⁰³ See too P Brenner, “Specific Performance of Contracts for the Sale of Land Purchased for Resale or Investment” (1978) 24 *McGill L. J.* 513, 545-548.

¹⁰⁴ Although it may be queried how difficult it is to determine objective land values for investment purposes: see R Sharpe, *Injunctions and Specific Performance* (Thomson Reuters Canada, loose-leaf edn) 8.70.

of the uniqueness test”.¹⁰⁵ This calls into question whether there is much to be gained from converting currently straightforward cases where specific performance is granted into complicated disputes which demand further inquiry into the availability of substitute properties and what constitutes reasonable steps of mitigation. It is interesting to note that Canadian law reform bodies have recommended legislation to restore traditional orthodoxy¹⁰⁶ and that “[d]espite *Semelhago*, courts have tended to continue to award specific performance to purchasers of residential properties”.¹⁰⁷ But commercial entities may also have particular and idiosyncratic reasons for preferring one particular property which should not lightly be ignored, especially since even mass-produced units are not liquid assets and can be time-consuming and difficult to sell on.

The Saskatchewan Court of Appeal has held that “*Semelhago* does not ... stand for the proposition that the presumption of uniqueness has been supplanted by a presumption of replaceability”.¹⁰⁸ But one significant effect has been “to open the door to a critical inquiry as to the nature and function of the property in relation to the prospective purchaser”.¹⁰⁹ This inquiry generates uncertainty, and makes the resolution of disputes more complex, time-consuming and expensive. Even if it is the case that courts will generally be generous in granting specific performance and take a relaxed view of “uniqueness” in the context of commercial property, the danger of a decision such as *Southcott* remains, and leaves purchasers in a very uncomfortable position indeed.

Conclusion

The traditional position that each parcel of land is unique, such that specific performance of contracts for the sale of land will be granted as a matter of course, should be maintained in English law. Ditching the established position in favour of the Canadian approach would only generate uncertainty, litigation, and a revision of key property rules that would have unclear

¹⁰⁵ R Sharpe, *Injunctions and Specific Performance* (Thomson Reuters Canada, loose-leaf edn) 8.60. See eg *McCarthy v Amiss* (1997) 14 RPR (3d) 27 (BCSC); *1252668 Ontario Inc v Wyndham Street Investments Inc* (1999) 27 RPR (3d) 58 (Ont SCJ).

¹⁰⁶ Alberta Law Reform Institute, *Contracts for the Sale and Purchase of Land: Purchasers' Remedies* Final Report No 97, 2009 (revised 2011) and Manitoba Law Reform Commission, *The Remedy of Specific Performance and the Uniqueness of Land in Manitoba*, Informal Report No 26, 2010 (revised 2011).

¹⁰⁷ R Sharpe, *Injunctions and Specific Performance* (Thomson Reuters Canada, loose-leaf edn) 8.50.

¹⁰⁸ *Raymond v Raymond Estate* (2008) 318 Sask R 65 at [14], cited with approval in *Youyi Group Holdings (Canada) Ltd v Brentwood Lanes Canada Ltd* (2014) 377 DLR (4th) 701 at [56].

¹⁰⁹ *904060 Ontario Ltd v 529566 Ontario Ltd* (1999) 85 ACWS (3d) 1195 (Low J).

consequences. As regards residential purchases, the chosen property will invariably be considered to be unique anyway: purchasers spend a long time choosing one particular property over another for reasons that should be respected. And the same reasoning should apply, albeit in attenuated form, as regards commercial property: specific performance should generally be granted.

Sharpe has written that “[c]ertainty is not the only legal value worth pursuing in the remedial context and perhaps the courts are appropriately confident that identifiable principles of sufficient clarity underlie recent decisions which question the traditional presumption” favouring specific performance.¹¹⁰ But the Canadian experience does not instil confidence that those principles can clearly be enunciated. Simple, clear guidance should be preferred. Specific performance should be recognised to be the more appropriate remedy in the context of contracts for the sale of land. Admittedly, that is easier to explain where it is the purchaser who seeks specific performance rather than the vendor. Where the contract is a “stand-alone” agreement and the vendor’s interest is purely financial, then damages may be the appropriate remedy. But where the contract of sale is part of a larger chain of contracts, there are good reasons to consider that the vendor should be able to obtain an order of specific performance.

In any event, it is suggested that if there is to be a move away from specific performance in the context of contracts for the sale of land, this should only be effected judicially by the Supreme Court. But it is unlikely that the Supreme Court would have available an “impact assessment” of such a step, despite the consequences being potentially very serious indeed. This alone might make the Supreme Court understandably wary, even though the law in this area is clearly judge-made rather than statutory. A full review by a body such as the Law Commission would be desirable before contemplating restricting the scope of awards of specific performance in this jurisdiction. In the meantime, English courts should resist the temptation to follow their Canadian counterparts: contracts for the sale of land should, generally, be specifically enforced.

¹¹⁰ R Sharpe, *Injunctions and Specific Performance* (Thomson Reuters Canada, loose-leaf edn) 8-100.