

REMEDIES OF SPECIFIC PERFORMANCE FOR LAND CONTRACTS: LEGAL DEVELOPMENT

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Abstract

This paper discusses the relief of specific performance (SP) and deals with types and nature of contracts that may be ordered by the court to be specifically performed and those that cannot be specifically performed. Specifically, this paper analyses the circumstances in which the courts decide to grant SP and not to grant SP for land contract. Under the law the remedy of SP is discretionary, and such discretion is to be exercised according to well established principles. Employing doctrinal legal research, this study analyses the relevant provisions under the Specific Relief Act 1950 and identifies how the courts applied the provisions to case laws thus developing a precedent on SP for immoveable property. It is found out that the right to sue for specific performance in equity is quite distinct from a cause of action at common law. Specific performance is granted when there are circumstances justifying it. The grant of SP is always subject to conditions. SP is said to be the best remedy for breach of contract for immoveable property. For example, land is normally deemed by the law to have a special value, the loss of which may not be adequately measured or compensated by damages or money (S 11(2) of the Act) unless and until the contrary is performed. All the above must be read subject to section 20 of the same Act that provides for circumstances where SP cannot be granted.

Keywords: *Specific performance, land contract, Specific Relief Act 1950, damages*

1. INTRODUCTION

When a vendor fails to perform his part of contract relating to land, the purchaser may choose to force him to continue performing his contract or agree with the circumstance of the vendor and opts for a remedy to compensate his losses. It is the duty of the lawyer to determine whether the proposed remedies structure would produce a viable remedy for his client. Thus, specific performance (SP) is a type of an equitable remedy where the court orders the parties in breach to actually perform the contract. There are two options either, remedies under the law in monetary form or remedies under equity such as SP. SP is governed by sections 11 to 29 of the Specific Relief Act 1950 (SRA 1950) and must be read with other laws such as the Contracts Act 1950, the National Land Code 1965 and the Rules of Court 2012, the Companies Act 1965 and the Arbitration Act 2005. Despite the well-established principles with preference for equity, courts have in various occasions give preference to award damages to an aggrieved purchaser. This may arise in situation where either the purchaser does not favour SP or because the vendor was unable to complete his part of the contract.

2. RESEARCH METHODOLOGY

This study employs a doctrinal and qualitative legal research which involves analysis of the secondary and primary sources of laws. This method involves analysis of the relevant provisions under the Specific Relief Act 1950, the case law as well as the equitable principles.

3. WHY SP IS A PREFERENCE?

SP of contracts was founded on the want of adequate remedy at law by English Court of Chancery.

4. SP AND CONTRACT OF LAND

The SRA 1950 has clearly provided that unless and until the contrary is proved, the court shall presume that the breach of a contract to transfer immovable property cannot be adequately relieved by compensation in money, and that the breach of a contract to transfer movable property can be thus relieved (Section 11 (1)(2)). Following this, the court has developed alternative remedies for breach of land contract i.e. through the payment of damages or the combination of SP and damages.

5. RESULT AND DISCUSSION

5.1 THE APPLICATION OF THE LEGAL PRINCIPLES ON SP

The cause of action for SP arises due to breach of contract and the plaintiff needs to pay for SP or damages.

Apart from the statute, the cases also provide for various judicial guidelines on SP. For instance, the remedy for specific performance as provided in the Specific Relief Act 1950 is entirely discretionary (Sekemas, 1989). SP is also ideal to enforce an agreement, whether in writing or not, for the sale and purchase of a property (Bank of Tokyo, 1991). SP was also held to be effective in ordering the delivery of a strata title (Syed Azman, 1992).

In explaining the problem revolving around SP and emphasizing the importance of the Specific Relief Act 1950 (SRA) relating to SP, Andrew Phang commented: "However, by their very nature, the provisions of the Specific Relief Act go into far more specific details and would obviously be the initial as well as primary focus for any application of the law relating specific performance in the Malaysian context. It should also be noted that the illustrations to the various provisions are extremely helpful in elucidating the operation of the various provisions, but cannot, owing to constraint of space, be set out here" (Phang, 1994).

SP is an equitable relief granted by the court in favour of a plaintiff, to be enforced against the defendant or his representative to perform what he had agreed to do by contract. The relief of SP is only allowed when there is no other relief which will meet the circumstances of the case. The court will only grant SP instead of damages when it can by that means ensure complete justice.

Section 11 spells out circumstances for SP where the court must *prima facie* be satisfied that the circumstances as below are present and mandatory for the grant of SP: The circumstances are:

- i. Where the act agreed to be done is of a trust;
- ii. Where SP is generally denied where monetary compensation is satisfactory;
- iii. When there is no standard to ascertain actual damage for the non performance of the act;
- iv. When it is probable that pecuniary compensation cannot be got for the non performance of the act.

The above provision however must be read with section 20 or section 21(2)(a) or (b) of the SRA 1950 dealing with circumstances where court can decline SP. It is to be noted that the exercise of the discretion is always governed by fixed rules and principles (Caesar, 1984).

5.2 PRESUMPTION THAT COMPENSATION IS NOT AN ADEQUATE REMEDY FOR CASES INVOLVING IMMOVEABLE PROPERTY

Section 11(2) raises a presumption that compensation is not adequate in cases of the transfer of immoveable property. Nevertheless, the defendant may rebut the presumption. On this point, it is important that the defendant raises a reasonable ground such as hardship or produces evidence to rebut the presumption (Loh, 1982). The degree of the presumption cannot be sought to be rebutted by merely making submissions on principles of law (Yang, 2000). The presumption can be said to have been rebutted for a reason which does not allow the SP to be enforced (Ho, 1987). In *Mars Equity Sdn Bhd v Tis Ata Ashar Sdn Bhd* (2005) 1 CLJ 513, the judge explained that section 55 (of the Malaysian Contract Act 1950) is of course of general application when it speaks of the promisor having to pay compensation to the promisee. But, whether compensation is sufficient in a given case depends on the subject

matter of the contract. He further emphasised that in the case where the subject matter is land, a breach of a contract relating to land is rebuttably presumed to be irremediable by monetary compensation; thus the appropriate remedy was the SP.

It is generally believed that section 11(1) and (2) SRA is clear. Nevertheless, it must be read with Section 55 of the SRA 1950 which provides the general remedies for breach of contract.

5.3 CIRCUMSTANCES WHERE COURTS MAY NOT GRANT SP

In *City Investment Sdn Bhd v Koperasi Serbaguna Ceupacs Tanggungan Bhd* [1985] 1 MLJ 245 the court among others viewed that section 15 deals with divisible contracts; a reference was made to the opinion of Lord Sumner in which his Lordship said that s. 16 (Indian SRA 1877) afforded the only ground on which the Court could help him. To make this section applicable it had to be shown that there was a part of the contract, to wit, that relating to plot A which (a) 'taken by itself could and ought to be specifically performed', and (b) 'stood on a separate and independent footing' from the other part of the contract, which admittedly could not be performed. Their Lordships were in the view that before a Court can exercise the power given by s. 16 it must have before it some materials tending to establish these propositions, and cannot apply the section on a mere surmise that, if opportunity were given for further inquiry, such material might be forth-coming and possibly might be found to be sufficient; and that the words of the section, wide as they are, do not authorize the Court to take action otherwise than judicially, and in particular do not permit it to make for the parties or to enforce upon them a contract, which in substance they have not already made for themselves.

Again the court in the same case held that the court may refuse SP on the first agreement to build or to get approval for license but that is not the reason for the court not to award damages for breach of contract. Similarly, as regard to the second agreement to build a few bungalow lots, the court had granted SP for the lots that have not been affected by problems of terrain.

5.4 COMPENSATION OR DAMAGES IN ADDITION TO SP

Section 18 of the SRA 1950 deals with the power of the court to award compensation or decree SP in *Tan Ah Chim and Sons Sdn Bhd v Ooi Bee Tat and Anor* (1993) 3 MLJ 633. Sub-section (1) provides for the right of a party suing for SP to ask for compensation in addition to or in substitution for SP and sub-section (2) deals with the power of the court to award compensation when it decides SP cannot be granted. Sub-section (3) contemplates a situation in which both SP and compensation, respectively, ought to be granted and awarded because SP is found not to be the adequate remedy but always subject to the discretion of the court which rules in order to give justice to the case (Rasiah, 1985).

Another issue pertains to the use of the term 'compensation' or 'damages'. There are many situations where the SRA 1950 and the courts dealing with provisions in SRA 1950 used the word "compensation and damages" synonymously or alternately. It is observed from the

Contracts Act 1950, the word “compensation” is used throughout the provisions. Thus, the use of “compensation” covers a wider scope as compared to the word “damages” under the English law. It includes every pecuniary remedy under the Contract Act 1950 (Tan, 1993). In these cases, the court had awarded compensation but the parties appealed on damages. Thus there is uncertainty to both terms whether it can be used synonymously or both have a different meaning.

The use of ‘compensation’ under this provision seems to be consistent and correct. In general, the word “compensation” must be highlighted and used by judges with understanding of its meaning and application. The Supreme Court in *City Investment* commented on s 18(4) of the SRA 1950 concerning the method of assessing damages. The court was in the opinion that the matter is left to the discretion of the trial judge. In the particular case, since the method has not been shown to be wrong in principle his award must stand.

While the provision uses “compensation” the judge used the word “damages”. Can the two terms be synonymously used? Perhaps, any law student would answer in negative form.

A reading of the whole provision seems to indicate that “a person suing for SP” (S 18(1) is exclusively refers to the plaintiff. Similarly there is no case law that shows the scope covers any other person other than the plaintiff thus; we propose that the words “any other persons” is replaced with “plaintiff”.

5.5 WHAT IF SP IS A PRE-AGREED STIPULATED REMEDY?

If there is any stipulation relating to money in any agreement, the court have decided that such stipulation shall not bar a court to decree SP (Nithyanathan, 1998). Similarly, a stipulation of a sum of money to be paid as damages for breach of contract is not a bar to a claim for SP. This point was made clear by the Privy Council in *Zaibun Sa Syed Ahmad v Loh Koon Moy* [1982] 2 MLJ 92. In this case, the respondents sought SP of a contract for the sale of land against the appellant. The learned judge decided in favour of the respondents but found that there was an oral agreement enabling the respondents to pay damages for breach. He therefore gave damages in favour of the respondents who again appealed to the Federal Court seeking SP of the contract. The Federal Court held that the respondents were entitled to SP. The appellant then appealed to the Privy Council. In dismissing the appeal, the Privy Council held, *inter alia*, that the fact that there was an alternative claim for damages, in an action by the purchaser for SP of a contract for the sale of land, could not be a fact relevant to the exercise of the discretion by the learned judge and the Federal Court was entitled to exercise its discretion and was correct in reversing the decision of the judge and ordering SP. Jones and Goodhart on Specific Performance stated that the mere fact that a contract contains a liquidated damages clause, or a clause of a similar nature, is not generally an admission that damages are an adequate remedy or that one party has an option to pay or perform (Sekamas, 1989). Exceptionally, the court may reach the opposite conclusion and give judgement that SP will nonetheless be granted if it is the appropriate remedy.

In principle, therefore, the court has a discretion to order SP and decree damages in favour of a party. In *Kow Lup Plow & Ors v. Lee Soh Hua* [1982] CLJ 499 the court had ordered the defendant to pay damages apart from SP in a purchaser’s action for SP in respect of a

contract for the sale and purchase of land at a price of RM700,000 which the plaintiff had intended to develop. The court also ordered the defendant to pay RM50,000 damages for wrongful termination of the contract after taking into consideration that it was well over five years since the defendant broke the contract, thus bringing the plaintiffs development project to a standstill for several years. In *Interstate M & E Sdn Bhd & 2 Ors v. Foresight Trading Sdn Bhd & 2 ors* [2007] 1 LNS 220 Abdul Malik Ishak J. granted both SP and compensatory damages.

Section 20 of the SRA provides for types of contracts which cannot be specifically enforced such as a contract for the non-performance of which compensation in money is an adequate relief and the circumstances where SP shall not be considered by the court. As such, this section must be read together with section 11 and section 21 of the same Act. There are 7 circumstances where SP shall not be granted:

- i. Where non performance of a contract can be adequately relieved with money (Sekamas, 1993) ;
- ii. A contract which runs into minutes details, or contract that depend on personal qualification or volition of the parties (*Dayang Nor Faizah bte Awang Dowty v Bintang Sei Sdn Bhd & Ors* [2004] 2 MLJ 39); or court cannot enforce SP of its material terms or contract which court cannot find its reasonable certainty;
- iii. A contract which in its nature revocable;
- iv. A contract made by trustee in excess of power or in breach of trust;
- v. A contract by company or corporation , promoter, which is in excess of its powers;
- vi. A contract the performance of which carries continuous duties which is more than 3 years (Howard, 1742);
- vii. A contract which material part of the subject matter, before it has been made, ceased to exist.

Though in the above situations the court cannot order SP, it does not prohibit the court from awarding damages if breach of contract occurs. It must be read together with sections 11, 19 and 21 of the SRA 1950.

In *Sale and Purchase of Real Property* (1984), Visu Sinnadurai observes that specific performance is a discretionary remedy and over the years the courts have spelt out the circumstances under which the relief may not be granted. These equitable principles are reflected in sections 20 and 21 of the Specific Relief Act 1950. Section 20(1)(a) provides that a contract will not be specifically enforced if the non-performance of it can be adequately relieved by compensation in money. As Professor Sinnadurai correctly pointed out at p 436, this provision has to be read with some reservations in dealing with contracts for the sale and purchase of property. Section 11(2) clearly says that there is a presumption that in contracts for the sale of immovable property monetary compensation cannot be an adequate remedy. It was further shown that s 20(1)(a) is of general application while s 11(2) deals specifically with contracts for the sale of land. It is therefore right that s 11(2) will prevail in cases involving contracts dealing with sale and purchase of property. He further said these two sections provide that it is for the defendant to establish that the plaintiff would be adequately relieved by an award for damages and that specific performance should not be granted. This burden of proof on the defendant is a heavy one and if he fails to satisfy the court of the adequacy of damages, the court will generally grant the relief to the plaintiff unless there are other special grounds against granting it.

SP will not be granted if the court cannot enforce the material terms of the contract. For example, if the facts show that the court will not be able to supervise the work required, or the contractor cannot complete the construction of a house, thus no order of SP will be granted (*Mohammad bin Baee v Pembangunan Farlim Sdn Bhd* [1988] 3 MLJ 211).

Section 20 of the SRA further provides for if the court has decided not to enforce SP based on this provision then would it be possible for the court to allow injunction to prevent breach of the agreement? It was held in several cases that if a contract is such that cannot be specifically enforced thus, injunction cannot be granted (*Puncak Niaga Holding Bhd v NS Water Sdn Bhd & Ors* [2004] 5 MLJ 430; *Marble Terrazo Industries Sdn Bhd v Anggaran Enterprise Sdn Bhd & Ors* [1991] 1 MLJ 253). It is proposed that the illustration to section 20 (1)(b) to be re-arranged to reflect the flow of the sub-sections.

Section 21 provides for court discretion as to decreeing SP which is discretionary. The court is not bound to grant any such relief merely because it is lawful to do so; but the discretion of the court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a court of appeal. The court may properly exercise discretion not to decree specific performance in cases where the circumstances under which the contract is made are such as to give the plaintiff an unfair advantage over the defendant, though there may be no fraud or misrepresentation on the plaintiff's part. The illustration given is in cases where *A contracts to sell to B the interest of C in certain stock-in-trade*. It is stipulated that the sale shall stand good, even though it should turn out that *C's interest is worth nothing*. In fact, the value of *C's interest* depends on the result of certain partnership-accounts, on which he is heavily in debt to his partners. This indebtedness is known to *A*, but not to *B*. Specific performance of the contract should be refused to *A* or where *A contracts to sell*, and *B contracts to buy*, certain land. To protect the land from floods, it is necessary for its owner to maintain an expensive embankment. *B* does not know of this circumstance, and *A* conceals it from him. Specific performance of the contract should be refused to *A*.

A case to show how to properly exercise discretion to decree specific performance is where the plaintiff has done substantial acts or suffered losses in consequence of a contract capable of specific performance. For example, where *A* sells land to a railway company, who contracts to execute certain works for his convenience. The company takes the land and uses it for their railway. Specific performance of the contract to execute the works should be granted by the court in favour of *A*.

In *Ganam d/o Rajamany v Somoo s/o Sinnah* (1984) 2 MLJ 290 FC), the court held that the power of the court in decreeing SP is a discretionary one. The discretion of the court and the jurisdiction to decree SP is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by the court of appeal. Under s 21(2)(b), the courts may refuse to grant the relief of SP to the plaintiff if the granting of it would involve some hardships on the defendant which he did not foresee. Each case must be decided on its merits as facts vary from one case to another. In *RM Venkatachalam Chettiar v NKR Arunasalam Chettiar* ([1953] MLJ 234). Thomson J. as he then was, held that no great hardship would be caused to the vendor's representative to complete the transaction even if it would incur some unanticipated expenditure. In *Osman Abu Bakar v Saiyed Noor Saiyed Mohamed* [1952] MLJ

37, SP was granted. The court rejected the argument that hardship would be caused to the beneficiaries if such an order was granted. The appellant in *Patel v Ali* (1984] 1 All ER 978) was successful in her appeal against an order of SP on ground of hardship. In that case, there was a delay of more than four years. The court was in the opinion that it would be just to leave plaintiffs to their remedy in damages. In *Johnson v Agnew* ([1979] 1 All ER 883), the House of Lords varied the order of the Court of Appeal holding that if a vendor obtained an order for SP and it became impossible to enforce it, he then had the right to ask the court to discharge the order and terminate the contract. On such an application he could be awarded damages at common law for breach of contract since the contract was not rescinded *ab initio* but remained in existence until it was terminated by the court. In *Sekemas Sdn Bhd v Lian Seng Co Sdn Bhd* the Supreme Court agreed with the trial judge's opinion that the hardship had been brought by the appellant himself when he decided to embark on this expensive venture without having secured adequate finance. In this case, the SP decreed by the trial judge was retained by the appeal court.

6. PERSONAL BARS TO THE RELIEF

SP Specific performance of a contract cannot be enforced in favour of a person:

- (a) who could not recover compensation for its breach; or
- (b) a person who has become incapable of performing; or who violates, any essential term of the contract that on his part remains to be performed;
- (c) who has already chosen his remedy and obtained satisfaction for the alleged breach of contract;
- (d) a person who, previously to the contract, had noticed that a settlement of the subject matter thereof (though not founded on any valuable consideration) had been made and was then in force (S. 23 of the SRA).

The SRA 1950 has provided many illustrations to the above provision. For example, if *A*, in the character of acting as an agent for *B*, enters into an agreement with *C* to buy *C*'s house. *A* is in reality acting not as agent for *B* but on his own account. *A* cannot enforce SP of this contract (S 23(a), Illustration).

Although SRA 1950 follows the provision of the repealed Indian Specific Relief Act 1877 (ISRA) where there is no express statement that the averment of readiness and willingness is necessary (as it is in India and England), the development of the cases as regards to section 23(b) seems to fall in line with these two jurisdictions.

In *Caltex Oil (Malaya) Ltd v Ho Lai Yoek & Anor* (1964] MLJ 76, *MMI Industries Sdn Bhd v Let Hin Industries Sdn Bhd* [2010]1CLJ 36; [2009] 1 LNS 890, the court held that where the plaintiff were ready and willing to complete at all times and the purported repudiation of the contract by the vendors had not been accepted by them, they will be entitled to SP. In *Ganam d/o Rajamany v Somoo s/o Sinnah* (1984) 2 MLJ 290 (FC)). In a suit for SP, a party treated and was required by the court to treat the contract as still subsisting. He had in that suit to allege, and if the fact was traversed, he was required to prove a continuous readiness and willingness, from the date of the contract to the time of the hearing, to perform the contract on his part. Failure to make good that averment brought with it the inevitable dismissal of his suit.

Section 25 of the SRA 1950 highlights “fraud” as a ground on the basis of which SP may be refused. Specific performance is dependent on a complete and definite contract. Thus, a contract cannot be specifically enforced if it is suffering from illegality, uncertainty, fraud, undue influence, mistake, misrepresentation or lack of consent. A contract which lacks in any of the three essentials of proposal, acceptance or consideration is also not enforceable. Similarly, varied and vague contracts where the meaning may not be ascertained cannot be enforced.

As the SRA 1950 was modeled upon the repealed Indian Specific Relief Act 1877, the cases from India are relevant for judicial reference with the exception that the doctrine of equitable notice is irrelevant as it is against the spirit and the provisions of the National Land Code 1965. In other words, SP cannot be enforced against any transferee who can prove that he is a party in good faith and has no notice of the original contract. Section 26(2) is based on the decision in *Tiladkhari Lal and Aor v Khedan Lal & Ors* (AIR 1921) which was also adopted in various other Malaysian cases which is *Aik Ming (m) Sdn Bhd and Ors v Chang Ching Chuen and Ors* (1995) 2 MLJ 770; *Keef Gevald Francis Noel John v Mohd Noor Abdullah and Ors* [(1995) MLJ 193]. If the subsequent transferee has given no consideration and is a mere volunteer, he has no right against the first promisee (Banrjee, 1996).

7. CONCLUSION

SP principles and rules as embodied in Ss 11- 28 of the SRA 1950 seem to work well in the system. Although the SRA 1950 prescribes that SP is the best remedy for breach of land contract, the courts have, in many occasions differ with reasons, depending on the circumstances of the cases. Flexibility in trends is sometimes necessary to meet the contemporary developments relating to sale of real estates as well as to ensure justice to the parties. Furthermore, the importance of providing appropriate remedies is timely in meeting global changes.

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