

Whether Specific Performance Should be Exceptional or Should the Court be more Willing to Grant It as a Remedy?

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ABSTRACT

Specific performance is traditionally regarded in the English Law as an exceptional remedy. The principles upon which the English Judges exercise the discretion, to grant specific performance are reasonably well- settled and depend upon a number of considerations, mostly practical nature, which are of very general application. As Lord Hoffmann gave the remarkable judgment in *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd*. As the well settled purpose of the Contract Law is not always to punish the wrongdoing, but to satisfy the expectation of the party entitled to performance. In this paper, we are to discuss and explain the principle upon which the judges exercise their discretion to grant specific performance.

KEY WORDS: Specific performance, discretion, court, precedent, remedy, contract.

INTRODUCTION

Specific performance is a discretionary remedy available in appropriate circumstances. It is a court order requiring a litigant in legal proceedings to do something to meet the needs of justice. Specific performance is an order made by a court exercising its equitable jurisdiction to compel a person to do an act.¹ Specific performance can be in the form of any type of forced action, usually used to complete a previously established transaction. Orders of specific performance are granted when damages are not an adequate remedy, and in some specific cases such as land sale. Such orders are discretionary, as with all equitable remedies, so the availability of this remedy will depend on whether it is appropriate in the circumstances of the case².

JUDICIAL APPROACH

A decree of specific performance is a discretionary remedy as Lord Hoffman said in the case of *Argyll* (which is the subject of the question), there are well established principles governing the exercise of the discretion. As with all equitable principles they are adaptable and flexible to achieve the ends of equity, which are to remedy the unjustness of the common law remedy of damages. In *Wilson v Northampton and Banbury Junction Railway Co*³

Lord Selborne holds

“the purpose of equity was to do more perfect and complete justice than would be the case if the parties were left to their common law remedies”.

In *Braddon Towers Limited v International Stores Ltd*⁴,

Slade J held:

“That he had no doubts that for several years practitioners have advised their clients that “it is the settled and invariable practice of this court never to grant mandatory injunctions requiring persons to carry on business”.

However, this presumption has been challenged by the House of Lords in the *Argyll case*.

The accepted practice of not ordering a defendant to carry on a business is not totally dependent upon damages not being an adequate remedy.

In *Dowty v Boulton Paul Ltd v Wolverhampton Corporation*⁵, Pennycuik V-C, reiterated that it was well established that courts would not order specific performance of an obligation to carry on a business and it was not necessary to consider whether damages were an adequate remedy.

¹ Solicitors and Lawyers Legal Dictionary.

² Chitty on Contract. 30th Edition.

³ (1874) L.R. 9 Ch. App. 279, 284

⁴ (1987) 1 E.G.L.R. 209, 213

⁵ (1971) 1 W.L.R. 204

The most common reason for the courts' refusal to order specific performance of running a business is that it would require constant supervision by the court. In *J. C. Williamson Ltd. V Lukey and Mulholland*⁶, Dixon J said "specific performance is inapplicable when the continued supervision of the court is necessary to ensure the fulfillment of the contract". The House of Lords in the *Argyll* case remarked that "constant supervision" meant rulings by the court rather than physical supervision undertaken by an officer of the court. Rather, it is the possibility of the court having to give an indefinite succession of rulings in order to ensure that the order is carried out, which would prove undesirable. This undesirability is further exacerbated by the fact that the only means of enforcing the order is the quasi criminal punishment for contempt of court. This punishment is a very heavy handed way for the court to determine whether a business is being operated under the terms of the court order. This option of the heavy handed deterrent is so powerful that it is often seen as unsuitable as a means of adjudicating as to whether or not a business is being run in accordance with the court's order. The repercussion of this method of enforcement is a consideration for the court when deciding to exercise its discretion over the granting of a specific performance order. The prospect of committal said Lord Hoffman, would have two undesirable consequences. Firstly a defendant who did not want to run his business as it was not economically viable would now feel forced to run it under the threat of committal if the court order was breached. Next a finding of contempt is very serious and any application to enforce the order will probably involve vast expense with lengthy proceedings.

It is pertinent to distinguish between an order which requires a defendant to carry on an activity and one which requires him to achieve an end result. There is no scope for repeated applications for ruling on compliance where a result has to be achieved as there is where the defendant is ordered to carry on a business. In *Shiloh Spinners Ltd v Harding*⁷ a case involving relief against forfeiture, the tenant had to comply with a repairing covenant and at p 274 Lord Wilberforce said that the court--- "has ample machinery, through certificates, or by inquiry" to satisfy itself that the defendant had carried out the work. This differentiation explains why the courts have often ordered specific performance of repairing covenants and building contracts. However it is not guaranteed that an obligation to achieve results will automatically be enforced by specific performance. One stumbling block is imprecision in the terms of the order. An imprecise order will lead to an increased likelihood of wasteful litigation over compliance. In *Wolverhampton Corporation v Emmons*⁸ Romer L.J said that the first condition for specific enforcement of a building contract was "the particulars of the work are so far definitely ascertained that the court can sufficiently see what is the exact nature of the work of which it is asked to order the performance". In *Redland Bricks Ltd. v Morris*⁹ the court said that when considering whether to grant a mandatory injunction for carrying out building works the defendant must know as a matter of fact, what he has to do in carrying out the order so that he can give his contractor's proper instructions.

Another consideration that the courts consider when looking at whether to grant an order requiring the defendant to run a business is that it may be unfair by permitting the claimant to profit at the expense of the defendant.

In *Isenberg v East India House Estate Co Ltd*¹⁰ Lord Westbury L.C. refused to grant a mandatory injunction to force the defendant to demolish part of a new building which interfered with the plaintiff's light and awarded damages instead. He said that it was not the duty of the court to make an order which would be an extortionate demand on the defendant and instead inquired into what would be an appropriate measure of damage that had actually been sustained. Although the defendant has put himself in the predicament by his own action, it would not be fair to put him in the position where he is punished for his wrongdoing, but rather the correct result is to satisfy the expectations of the party entitled to the performance. Lord Hoffman, when considering the case of *Isenberg*, said that it cannot be in the public interest for the courts to order someone to continue running a business at a loss if there is a viable alternative by which the aggrieved party can be given monetary compensation. He said that not only was it a waste of resources, but it prolonged hostilities between the parties. The specific performance order continues the battle with solicitors letters and affidavits which is a drain on the court and expensive for the parties. However an award of damages concludes the litigation and halts the battle and hopefully heals the parties' wounds.

⁶ (1931) 45 C.L.R. 282, 297-298

⁷ (1973) A.C. 691

⁸ (1901) 1 Q.B. 515

⁹ (1970) A.C. 652, 656

¹⁰ (1863) 3 De G.J. & S 263

Another consideration that judges take into account is the conduct of the parties. Let he who comes to equity come with clean hands, is a maxim that is often quoted.

In the *Argyll*¹¹ case, the judges in the Court of Appeal all took a very dim view of the defendant's conduct with Leggatt L.J. saying, that they had acted "with gross commercial cynicism". Although the principles of equity have always had a strong ethical content, and in cases of gross breach of personal behavior or where attempts to use the threat of non performance amount to extortion, then the settled practice of taking conduct into account remains. However, in the *Argyll* case Lord Hoffman pointed out that the landlord and tenant were both large commercial companies whom he thought were also aware that an award of damages would be the appropriate remedy for breach of the covenant rather than an order for specific performance. In this case, each party had only financial interests in the arrangement and the element of breach of personal faith was lacking. Lord Hoffman compared the *Argyll* case with the last century cases of railway companies who had reneged on their obligations to construct stations for landowners whose property they had taken, citing *Greene v West Cheshire Railway Co.* So this is an example of Lord Hoffman examining the application of equity in the modern day and recognising that industry and society have altered since the Victorian days and adopting the criteria around specific performance to fit the modern era.

In the case of *Akai Holdings Ltd v RSM Robson Rhodes LLP*¹² a client and expert witness were in dispute with each other after the firm of experts advised of its intention to merge with the firm acting for the other party to the litigation. The court refused to grant an injunction preventing the experts terminating its retainer as this would have amounted to ordering specific performance of a contract for breach of personal services,

The court was prepared to grant an injunction to prevent breach of the conflict of interest clause in the retainer agreement which in effect encouraged the firm to perform the services that the court would not enforce directly. So the court continues with its long held tradition of not directly enforcing a clause for personal services, but it achieves that effect by enforcing another clause which does not amount to enforcing a personal services clause.

I think that putting a positive burden on a business owner will not always achieve the desired effect and in today's economic climate, it would be suicidal from a business point of view. The important thing with an equitable remedy is to adapt it to achieve a

Fair solution when the common law cannot assist because of its rigidity.

It is very difficult to say that as a general rule the remedy should be more widely available and each case has a unique set of facts which need to be examined against the well established principles. The ultimate achievement is to effect as fair a solution as possible in the circumstances and within the confines of the court's powers.

If specific performance was granted more readily in cases where a business was not trading in accordance with its lease, then it could be counter productive as the owner might well decide to run it down and insolvency or bankruptcy would be the result. Unless the courts want to involve themselves in deciding how much stock the business should have on display and how many staff ought to be operating the tills, then specific performance will be counter productive, and an award of damages will be the best remedy. The misery which accompanies insolvency is something that the courts would try to avoid.

Possibly courts should grant specific performance more readily for situations where the defendant has to achieve an outcome rather than carry on a line of business for a long period of time. There will not be the same degree of repeated applications for rulings on compliance in the former situation so the problem with supervising the order is not an issue.

As we have seen, specific performance is readily used in building contracts so long as the extent and nature of the works are clear. Again, as this is a situation where a result will be achieved, then it seems equitable to award specific performance in such cases.

CONCLUSION

I do not think that specific performance orders should be granted as a matter of course with possibly very few safeguards in force. When considering a specific performance order, the court should not allow the plaintiff to enrich himself at the defendant's expense.

¹¹ [1998] AC1; [1997]2WLR898; [1997]3 All ER 297

¹² (2007) EWHC 1641

The purpose of the law is not to punish wrongdoing, but to satisfy the expectations of the party entitled to performance.

Where personal services are concerned, the courts are holding with their long established precedent of not enforcing a positive obligation. However, courts have recently been leaning towards enforcing negative obligations which often have the effect of coercing the defendant into performing his obligations under a contract. This seems to be an acceptable practice of persuading the defendant that he should honour his contractual obligations.

I agree with the court in *Warren v Mendy*¹³, who commented that although statements of the principle on which the discretion ought to be exercised in some particular area are usually authoritative, they are principles of practice as against principles of law, whose application can be rendered inappropriate by the finest of factual variations between one case and another.

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