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# 24. Specific Performance

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## Abstract

Specific performance is a remedy which orders the defendant to perform his obligations under the contract. It is an equitable remedy which is available in the discretion of the court. This chapter examines the circumstances in which the courts will make a specific performance order. Particular attention is given to the decision of the House of Lords in *Co-operative Insurance Society Ltd* v. *Argyll Stores (Holdings) Ltd* [1998] AC 1. It also considers the question whether English law should develop a more liberal approach to the availability of specific performance and recognize the existence of a general right to specific performance.

**Keywords:** English contract law, specific performance, equitable remedy, remedies, Co-operative Insurance Society Ltd v. Argyll Stores (Holdings) Ltd, discretionary remedies

## Central Issues

1. Specific performance is a remedy which orders the defendant to perform his obligations under the contract. It is an equitable remedy which is available in the discretion of the court. Another equitable, discretionary remedy is an injunction, which may be granted to restrain a breach of a negative stipulation in a contract.

2. Traditionally, specific performance has been perceived as a secondary remedy, only available where damages would be inadequate. This restrictive perception of the role of specific performance has come under challenge recently. An alternative perception of specific performance is that it is available when it is the most appropriate remedy on the facts of the case. One of the aims of this chapter is to examine the circumstances in which the courts will make a specific performance order. Particular attention will be paid to the decision of the House of Lords in *Co-operative Insurance Society Ltd* v. *Argyll Stores (Holdings) Ltd* [1998] AC 1.
3. Finally, the chapter concludes with a consideration of the question whether English law should develop a more liberal approach to the availability of specific performance and recognize the existence of a general right to specific performance.

## 24.1 What is Specific Performance?

The term 'specific performance' in English law is used to denote 'the remedy available in equity to compel a person actually to perform a contractual obligation' (H Beale (ed), *Chitty on Contracts* (35th edn, Sweet & Maxwell, 2023), para 31-017). This definition requires qualification in two respects. In the first place it can be argued that specific performance is not 'specific' at all in that, in the vast majority of cases, the defendant is not ordered 'specifically' to perform a contractual obligation. The obligation that the defendant is ordered to perform generally differs in some way from the initial obligation that was undertaken in the contract. Most
p. 918 claimants do not seek specific performance until the defendant has already broken the ↵ contract, although it is not strictly necessary for a claimant seeking a specific performance order to demonstrate that the defendant has already broken the terms of their contract. In such a case, the defendant obviously cannot perform exactly in accordance with the original contractual obligation in that, at the least, performance will take place at a different time from that originally agreed. On this basis it can be argued that specific performance is a *substitutionary* and not a specific remedy. This point is not an unimportant one in that, if it is correct, it enables a more direct comparison to be made with the damages remedy which clearly aims to provide the claimant with a substitute (in the form of a monetary award) for the performance originally promised. Secondly, not every action to compel a person to perform a contractual obligation falls under the rubric of 'specific performance'. Thus where the obligation sought to be enforced is one to pay money, it is usually described as an action for the price or a claim in debt, not a claim for specific performance. 'Specific performance' is therefore used in a rather restricted sense in English law in comparison with some civilian legal systems where, for example, the remedy of repair or replacement of the goods is sometimes described as a form of specific performance.

In English law specific performance is an equitable remedy. The common law did not specifically enforce a contract, except the obligation to pay money. The equitable origins of the remedy continue to have an impact on the modern law. In the first place, specific performance is a discretionary remedy. It is not available as of right, unlike the action for damages at common law. However, it does not follow from this that one can never predict when specific performance will be ordered by the courts. There are 'well-established principles' that govern the exercise of the court's discretion (see, for example, the speech of Lord Hoffmann in *Co-operative*

*Insurance Society Ltd* v. *Argyll Stores (Holdings) Ltd* [1998] AC 1, 24.4). Thus one can find situations where specific performance is either routinely available (for example, in favour of a purchaser under a contract for the sale of land) or generally unavailable (for example, contracts for 'personal services', on which see 24.3.1). The discretion is therefore a structured one. However, in the final analysis, the remedy lies in the discretion of the court and it is always necessary to pay careful attention to the facts and circumstances of the individual case. Secondly, the courts have had to work out the relationship between the equitable remedy of specific performance and the common law remedies. The traditional formula used by the courts is that 'specific performance will not be ordered when damages are an adequate remedy'. This formula requires further elaboration.

## 24.2 Specific Performance and the Adequacy of Damages

The statement that specific performance will not be ordered when damages are an adequate remedy prompts two questions. First, when are damages an adequate remedy? Second, must a court refuse to make a specific performance order where damages are an adequate remedy?

The courts tend not to answer the first question directly; that is to say they do not spell out the circumstances in which damages are an adequate remedy. Rather, they identify the circumstances in which damages are inadequate. Damages may be inadequate where the loss which the claimant has suffered is either difficult to quantify or to prove (*Adderley* v. *Dixon* (1824) 1 Sim & St 607) or where the claimant is only entitled to recover nominal damages in respect of the defendant's breach (as in *Beswick* v. *Beswick* [1968] AC 58, discussed at
p. 919 25.3.2.1). The case that is usually cited by way of illustration of the 'inadequacy of damages' ↵ rule is the case of the contract for the sale of unique goods. The contract in *Falcke* v. *Gray* (1859) 4 Drew 651 was for the sale of two china jars. Although the court refused to make a specific performance order on the facts of the case, the Vice-Chancellor stated that:

> [i]n the present case the contract is for the purchase of articles of unusual beauty, rarity and distinction, so that damages would not be an adequate compensation for non-performance; and I am of opinion that a contract for articles of such description is such a contract as this Court will enforce; and, in the absence of all other objection, I should have no hesitation in decreeing specific performance.

It is an unresolved question whether uniqueness includes goods that are commercially unique, in the sense that there are no other goods with the same characteristics available in the market. Support for the proposition that 'uniqueness' encompasses commercial uniqueness can be gleaned from *Behnke* v. *Bede Shipping Co Ltd* [1927] 1 KB 649. The plaintiffs sought an order for specific performance of a contract for the purchase of a ship named *City*. Wright J made the order sought. He stated (at p. 661):

> In the present case there is evidence that the *City* was of peculiar and practically unique value to the plaintiff. She was a cheap vessel, being old, having been built in 1892, but her engines and boilers were practically new and such as to satisfy the German regulations, and hence the plaintiff could, as a German shipowner, have her at once put on the German register. A very experienced ship valuer has said that he knew of only one other comparable ship, but that may now have been sold. The plaintiff wants the ship for immediate use, and I do not think damages would be an adequate compensation. I think he is entitled to the ship and a decree of specific performance in order that justice may be done.

A different result was, however, reached in *Société des Industries Metallurgiques SA* v. *The Bronx Engineering Co Ltd* [1975] 1 Lloyd's Rep 465, where the Court of Appeal held that the fact that the buyers would have to wait between nine and twelve months for a replacement delivery did not of itself establish that the goods were unique. Lord Edmund Davies quoted from the judgment of Wright J in *Behnke* and continued (at p. 468):

> By way of contrast with that case, the real substance of the plaintiffs' claim here is that were they now obliged to go to another manufacturer they would probably have to wait another 9–12 months before they could get delivery of such new machinery and that, by reason of that delay and other factors, they would stand to lose a substantial sum. There has been no suggestion of financial inability in the defendants to satisfy such a money judgment (whatever its dimensions) as might be awarded against them to cover all such items of damages as the plaintiffs could legitimately rely upon. While sympathising with the dilemma in which the plaintiffs find themselves, I see nothing which removes this case from the ordinary run of cases arising out of commercial contracts where damages are claimed.

The reason for making a specific performance order in cases such as *Behnke* is that the lack of an available substitute makes it extremely difficult for a court to assess the damages payable with any degree of accuracy and these problems of assessment can be avoided by making a specific performance order. On the other hand, damages are likely to be an adequate remedy where the claimant can obtain the promised performance from another source and then ↵ recover the difference in the cost of the alternative performance from the defaulting party. It is important to note that the fact that damages are inadequate does not of itself entitle the claimant to a specific performance order. A court may nevertheless, in its discretion, refuse to make such an order. On this view inadequacy of damages is a necessary but not a sufficient condition for the making of a specific performance order.

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The proposition that inadequacy of damages is a necessary condition for the making of a specific performance order has, however, come under some challenge in recent years. That challenge was led by the House of Lords in *Beswick* v. *Beswick* [1968] AC 58 (see 25.3.2.1) where emphasis was placed on the appropriateness of specific performance on the facts of the case or the justice of making the order rather than on the inadequacy of the damages remedy (see to similar effect *Tito* v. *Waddell (No 2)* [1977] Ch 106, 322). This was most explicit in the speech of Lord Pearce. He alone of the judges was of the view that the plaintiff was entitled to substantial damages but he stated (at p. 88) that it was not 'necessary to consider the amount of damages more closely, since this is a case in which … the more appropriate remedy is that of specific performance'. The point being made by Lord Pearce is not that the adequacy, or inadequacy, of the damages

remedy should be disregarded entirely. Rather, it is that it should remain a relevant factor but that it should no longer be a necessary ingredient of a claim for specific performance. Disquiet with the traditional 'adequacy of damages' formula is based on a number of grounds. The first is that a claimant, as the innocent party, should be entitled to choose the remedy that is most appropriate on the facts of the case and should not have his choice constrained by an unnecessary restriction. Secondly, a claimant runs an inevitable risk in arguing that the damages to which he is otherwise entitled are inadequate. Should the court in its discretion decide not to make the specific performance order, then he will be left with a measure of damages which, by his own admission, is inadequate. A claimant should not be put in the position of having to make the potentially damaging concession that damages are inadequate in order to substantiate his claim to a completely different remedy, namely specific performance. Thirdly, to the extent that the courts continue to develop the remedy of damages in order to further the goal of ensuring that claimants receive full compensation for the losses suffered as a result of a breach of contract (on which see 23.3), this will result, on the traditional formula, in a reduction in the availability of specific performance because claimants will find it increasingly difficult to demonstrate that damages are an inadequate remedy. Reform of the law of damages should not carry with it, as a necessary by-product, a reduction in the availability of specific performance.

The law is therefore in a state of flux. The judges are no longer confined to asking themselves whether or not damages would be an adequate remedy on the facts of the case. They can take account of a broader range of factors when deciding whether or not to make a specific performance order (see the summary of factors given by Akenhead J in *Transport for Greater Manchester* v. *Thales Transport & Security Ltd* [2012] EWHC 3717 (TCC), 146 Con LR 194, [17]). The adequacy of damages to the claimant remains a very important factor in making this decision but it should no longer be regarded as decisive. Nevertheless, in the vast majority of cases, one would not expect a court to make a specific performance order where damages would be an adequate remedy for the claimant. In this respect it may be said that the modern emphasis on the 'appropriateness' of the remedy on the facts of the case is no more than a change of label. Thus in *Rainbow Estates Ltd* v. *Tokenhold Ltd* [1998] 2 All ER 860, 868 Lawrence Collins QC, sitting as a deputy judge of the High Court, stated that 'the remedy should be available when damages are not an adequate remedy or, in the more modern formulation, when specific performance is the appropriate remedy'. But it would perhaps be premature to write this change off as one
p. 921 that is devoid of substance. It widens ↵ the field of inquiry and it relieves the claimant of the need positively to establish that damages would not be an adequate remedy (albeit that the adequacy of damages remains an important factor in deciding whether or not to make the specific performance order).

## 24.3 The Range of Factors to Which the Courts Will Have Regard

The proposition that specific performance should be available when damages are not an adequate remedy or when it is the most appropriate remedy on the facts of the case does not, however, tell the whole story. The cases reveal that there are a number of circumstances in which the courts will refuse to make a specific performance order. The weight to be attached to these different 'circumstances' is variable. Some weigh much more heavily on the scales than others and are sometimes described as 'bars to specific performance'. Thus, while acknowledging that there are exceptions of varying scope in each case, Treitel states (*The Law of Contract* (15th edn, Sweet & Maxwell, 2020, edited by Edwin Peel), paras 21-039–21-053) that the following are not specifically enforceable, namely (i) contracts involving personal service, (ii) contracts requiring constant

supervision, (iii) contracts which are too vague, (iv) building contracts, (v) contracts specifically enforceable in part only, (vi) a contract which the defendant is entitled to terminate in any event or which is subject to a condition precedent not within the control of the party seeking specific performance, and (vii) promises made without consideration. Treitel also lists the following as factors that are taken into account by the courts in the exercise of their discretion when deciding not to make a specific performance order, namely (i) the order would cause 'severe hardship to the defendant'; (ii) the contract has been procured 'by means that are unfair, even though they do not amount to grounds on which the contract can be invalidated'; (iii) the consideration for the defendant's promise to perform is inadequate (although Treitel concedes at para 21-034 that the legitimacy of taking this factor into account is now doubtful given that it is clear that '*mere* inadequacy of consideration is not a ground for refusing specific performance'); (iv) the conduct of the claimant, in the sense that if the claimant has himself acted unfairly or improperly this may be used as a basis for denying the remedy on the ground that the claimant has not come to court 'with clean hands'; and (v) the fact that it is impossible for the defendant to comply with the terms of the order. This list of factors does not purport to be exhaustive and, indeed, other authors have drawn up a list in slightly different terms (see, for example, A Burrows, *Remedies for Torts, Breach of Contract, and Equitable Wrongs* (4th edn, Oxford University Press, 2019) pp. 402–436). For present purposes these differences can be put to one side; they are largely matters of detail into which it is not necessary for us to enter. The list performs the function of indicating, in broad terms, the range of factors taken into consideration by the courts when deciding whether or not to make a specific performance order.

The more difficult points relate to, first, the weight to be given to some of the factors that have been relied upon in the past to justify a decision not to order specific performance and, secondly, the scope of some of the acknowledged 'bars' to specific performance. The cause of these difficulties is that some of the bars are of some antiquity and they are, to modern eyes, reflective of an unduly restrictive approach to the availability of specific performance. In order to illustrate this point we shall examine three of the grounds on which the courts have refused to order specific performance. In the first two instances (namely, personal service
p. 922 contracts and mutuality) we can see the courts gradually cutting back on the scope of the ↵ bar to specific performance. The third example, namely hardship to the defendant, demonstrates that this more liberal approach is not without its limits and that the courts continue to take account of the interests of defendants when deciding whether or not it is appropriate to make a specific performance order. We shall then move on in the next section to consider the leading modern authority on specific performance, namely the decision of the House of Lords in *Co-operative Insurance Society Ltd* v. *Argyll Stores (Holdings) Ltd* [1998] AC 1.

### 24.3.1 Personal Service Contracts

A contract involving personal service (for example, a contract of employment) will not generally be specifically enforced. Thus section 236 of the Trade Union and Labour Relations (Consolidation) Act 1992 provides:

> No court shall, whether by way of—
>
> (a) an order of specific performance or specific implement of a contract of employment, or
>
> (b) an injunction or interdict restraining a breach or threatened breach of such a contract,
>
> compel an employee to do any work or attend at any place for the doing of any work.

It should be noted that section 236 applies both to specific performance orders and to injunctions, although, as we shall see, the courts have, in fact, been willing in certain cases to grant an injunction, the effect of which is to restrain the employer from terminating the contract of employment with the claimant employee. In so far as the law wishes to avoid turning a contract of employment into a form of slavery, the proposition that the courts should not make a specific performance order or grant an injunction is readily understandable (see, for example, *De Francesco* v. *Barnum* (1890) 45 Ch D 430, 438). And, from an employer's perspective, one can see that an employer may well wish not to continue to employ a worker in whom he no longer has any trust and confidence. But it does not follow from this that the courts should never have the power at common law to order the continued performance of a contract of employment. As Lord Hoffmann acknowledged in *Johnson* v. *Unisys Ltd* [2001] UKHL 13, [2003] 1 AC 518, [35], it is now recognized that 'a person's employment is usually one of the most important things in his or her life. It gives not only a livelihood but an occupation, an identity and a sense of self-esteem.' Consistently with this, the unfair dismissal legislation, first introduced in 1971, provides for the remedies of reinstatement and re-engagement (see now sections 113–117 of the Employment Rights Act 1996) as well as compensation. This commitment in principle to reinstatement as a remedy has not, however, been reflected in practice. As Lord Steyn observed in *Johnson* ([23]), the level of reinstatement may be as low as 3 per cent of all unfair dismissal applicants. The reasons for the low take-up of reinstatement are complex. Many employees prefer to be compensated rather than be faced with the prospect of returning to their old place of work; employment tribunals appear to be reluctant to make use of the remedy; and an employer can ultimately resist a reinstatement order provided that it is prepared to pay an enhanced level of compensation (section 117 of the Employment Rights Act 1996). Of course, it does not follow from the fact that employment tribunals have been given a statutory power to order reinstatement that the courts should have such a power at common law. On the contrary, section 236 of the Trade Union and Labour Relations (Consolidation) Act 1992 states that they have no such power.

p. 923 ↵ However, one can find modern examples of cases in which the courts have been prepared to grant an injunction, the effect of which was to restrain the employer from terminating the contract of employment with the employee. One such case is *Irani* v. *Southampton and South West Hampshire Health Authority* [1985] ICR 590. The defendant employer purported to terminate the plaintiff's contract of employment in breach of a statutory appeal procedure that was applicable to the plaintiff. The plaintiff sought, and obtained, an interlocutory injunction restraining the defendant from terminating his contract of employment without first exhausting the procedure laid down in section 33 of the Whitley Council's Conditions of Service. It is, however, important to note the terms of the injunction proposed by Warner J, namely:

> Injunction restraining defendant until trial or further order from implementing notice dated 8 June 1984 purporting to determine plaintiff's employment with defendant as from 23 July 1984 before carrying out procedure under section 33 of Whitley Council's Conditions of Service.
>
> Plaintiff undertaking not to present himself for work at any establishment of defendant's pending trial.

An important feature of this injunction is that it refrains from ordering the defendant to provide the plaintiff with work. On the contrary, the plaintiff expressly undertook not to turn up for work. The plaintiff was protected in so far as his status as an employee was preserved and the employer remained liable to pay his salary, but he could not compel the employer to provide him with work (see also *Robb* v. *Hammersmith and Fulham LBC* [1991] ICR 514, where the terms of the injunction were similarly limited). The limited nature of the injunction granted may simply reflect the reality that the law should be slow to require parties to co-operate with each other in the face of evidence that the trust and confidence which once existed between them has evaporated. Conversely, where it appears that the relationship of trust and confidence continues to subsist between the employer and the employee, the court may not require the employee to give an undertaking that he will not present himself for work: see, for example, *Hill* v. *C A Parsons Ltd* [1972] Ch 305, where the cause of the dismissal was the intervention of a trade union and the relationship between the employer and employee appeared to remain a strong one.

Thus we can conclude from cases such as *Irani*, *Robb*, and *Hill* that there is no longer an absolute bar to a court granting an injunction to restrain the termination of an employment relationship, at least where the party seeking the injunction is an employee. Further evidence in support of the existence of a more liberal approach can be gleaned from the expansion of public law remedies which has enabled a number of workers to obtain judicial review of the decision to dismiss them (see, for example, *Stevenson* v. *United Road Transport Union* [1977] ICR 893).

In the light of these cases it may now be appropriate to reconsider the justifications for the proposition that the courts should not specifically enforce a contract for personal services. The case for (limited) reform was best put by Megarry J in *C H Giles & Co Ltd* v. *Morris* [1972] 1 WLR 307, 318 when he stated:

> One day, perhaps, the courts will look again at the so-called rule that contracts for personal services or involving the continuous performance of services will not be specifically enforced. Such a rule is p. 924 plainly not absolute and without exception, nor do I think that it can be ↵ based on any narrow consideration such as difficulties of constant superintendence by the court. Mandatory injunctions are by no means unknown, and there is normally no question of the court having to send its officers to supervise the performance of the order of the court. Prohibitory injunctions are common, and again there is no direct supervision by the court. Performance of each type of injunction is normally secured by the realisation of the person enjoined that he is liable to be punished for contempt if evidence of his disobedience to the order is put before the court; and if the injunction is prohibitory, actual committal will usually, so long as it continues, make disobedience impossible. If instead the order is for specific performance of a contract for personal services, a similar machinery of enforcement could be employed, again without there being any question of supervision by any officer of the court. The reasons why the court is reluctant to decree specific performance of a contract for personal services (and I would regard it as a strong reluctance rather than a rule) are, I think, more complex and more firmly bottomed on human nature. If a singer contracts to sing, there could no doubt be proceedings for committal if, ordered to sing, the singer remained obstinately dumb. But if instead the singer sang flat, or sharp, or too fast, or too slowly, or too loudly, or too quietly, or resorted to a dozen of the manifestations of temperament traditionally associated with some singers, the threat of committal would reveal itself as a most unsatisfactory weapon; for who could say whether the imperfections of performance were natural or self-induced? To make an order with such possibilities of evasion would be vain; and so the order will not be made. However, not all contracts of personal service or for the continuous performance of services are as dependent as this on matters of opinion and judgment, nor do all such contracts involve the same degree of the daily impact of person on person. In general, no doubt, the inconvenience and mischief of decreeing specific performance of most of such contracts will greatly outweigh the advantages and specific performance will be refused. But I do not think that it should be assumed that as soon as any element of personal service or continuous services can be discerned in a contract the court will, without more, refuse specific performance.

### 24.3.2 Mutuality

Sir Edward Fry, in the first edition of his book *Specific Performance* published in 1858, stated that:

> A contract to be specifically enforced by the Court must, as a general rule, be mutual,—that is to say, such that it might, at the time it was entered into, have been enforced by either of the parties against the other of them.

This proposition was subject to much academic criticism but it did not receive sustained judicial consideration until 1977 in the form of the decision of the Court of Appeal in *Price* v. *Strange* [1978] Ch 337. A number of criticisms were levelled against Fry's proposition, of which it suffices to mention two. The first was that it was not supported by the cases cited by Fry, and the cases also demonstrated that there were a number of exceptions to the rule. Secondly, it was argued that the focus of attention should not be on the time at which

the contract was concluded but on the position of the parties at the time of judgment. At the time at which it gives judgment the court ought to consider the relative positions of the parties; and, to the extent that there are obligations of the claimant that remain unperformed, the court should consider the remedies available to
p. 925 the defendant to ensure that it is adequately compensated in the event of non-performance by ↵ the claimant. In the light of these criticisms Buckley LJ in *Price* v. *Strange* [1978] Ch 337, 367–368 concluded:

> I can discover nothing in principle to recommend the *Fry* proposition, and authority seems to me to be strongly against it. Accordingly in my judgment it should be regarded as wrong. The time at which the mutual availability of specific performance and its importance must be considered is, in my opinion, the time of judgment, and the principle to be applied can I think be stated simply as follows: the court will not compel a defendant to perform his obligations specifically if it cannot at the same time ensure that any unperformed obligations of the plaintiff will be specifically performed, unless, perhaps, damages would not be an adequate remedy to the defendant for any default on the plaintiff's part.

Subsequent courts have followed the lead given by Buckley LJ. In *Rainbow Estates Ltd* v. *Tokenhold Ltd* [1998] 2 All ER 860, 865–866 Lawrence Collins QC, stated that:

> as regards the requirement of mutuality, it is now clear that it does not follow from the fact that specific performance is not available to one party that it is not available to the other; want of mutuality is a discretionary, and not an absolute, bar to specific performance. The court will grant specific performance if it can be done without injustice or unfairness to the defendant.

The importance of the judgment of Lawrence Collins QC lies in its recognition of the fact that want of mutuality is no longer, if it ever was, an absolute bar to making a specific performance order; it is simply a factor to be taken into account by the court in the exercise of its discretion. The modern position is perhaps best summed up (*Anson's Law of Contract* (31st edn, Oxford University Press, 2020, edited by J Beatson, A Burrows, and J Cartwright), p. 581) in the following way:

> [L]ack of mutuality is now only relevant if, at the date of the hearing, the claimant has not performed its obligations under the contract and could not be compelled for some reason to perform its unperformed obligations specifically. Even where mutuality in this sense does not exist, the Court may possibly, in the exercise of its discretion, order specific performance if damages would be an adequate remedy to the defendant for any default on the claimant's part.

### 24.3.3 Undue Hardship

A court may refuse to make a specific performance order on the ground that it will cause severe hardship to the defendant. The difficulty which the courts face here lies in discerning what constitutes 'severe hardship' for this purpose. The hardship need not be of sufficient severity to entitle the defendant to set aside the contract (in such a case the defendant could attack the validity of the contract rather than merely rely on a defence to the application for specific performance). But how far below the threshold for the validity of a

contract can the court go? It is impossible to produce a hard-and-fast rule here. Much depends on the facts of the individual case. An illustration of a court considering a defence based on hardship is provided by the decision of Goulding J in *Patel* v. *Ali* [1984] Ch 283. The defendant and a Mr Ahmed entered into a contract to sell the defendant's matrimonial home to the plaintiffs (the property was registered in the name of Mr
p. 926 Ahmed). The contract was concluded in July ↵ 1979, with a completion date of 28 August 1979. Completion did not, however, take place on 28 August. The plaintiff issued a writ seeking specific performance of the contract on 11 August 1980 but did not apply for summary judgment until 4 July 1983. The reasons for the delay were not conclusively established, but appeared to be caused by two principal factors. The first was that the defendant's husband had been adjudicated bankrupt in May 1979 and his trustee in bankruptcy succeeded in obtaining an injunction restraining completion of the sale. Her husband was not released from that injunction until 21 July 1980. Secondly, the plaintiffs had difficulty in effecting service of proceedings on Mr Ahmed, as he had returned to Pakistan. However, in this intervening period the defendant suffered considerable misfortune. In July 1979 she was 23 years old, had one child, was in apparent good health, and spoke very little English. But in 1980 it was discovered that she had bone cancer in her right thigh which led to the amputation of her right leg at the hip joint in July of that year. At that time she was heavily pregnant and she gave birth to her second child in August 1980. Then in 1981 her husband was sent to prison for a year and she gave birth to her third child in 1983, after her husband's release from prison. In these circumstances the defendant asked the court to refuse the plaintiffs' application for specific performance and to leave the plaintiffs to their remedy in damages. After considering the authorities Goulding J concluded that his discretion was wide enough to entitle him to refuse to make a specific performance order on the ground of 'hardship subsequent to the contract and not caused by the plaintiff'. He acknowledged that 'mere pecuniary difficulties … afford no excuse from performance of a contract' and continued (at p. 288):

> The important and true principle, in my view, is that only in extraordinary and persuasive circumstances can hardship supply an excuse for resisting performance of a contract for the sale of immovable property. A person of full capacity who sells or buys a house takes the risk of hardship to himself and his dependants, whether arising from existing facts or unexpectedly supervening in the interval before completion. This is where, to my mind, great importance attaches to the immense delay in the present case, not attributable to the defendant's conduct. Even after issue of the writ, she could not complete, if she had wanted to, without the concurrence of the absent Mr Ahmed. Thus, in a sense, she can say she is being asked to do what she had never bargained for, namely to complete the sale after more than four years, after all the unforeseeable changes that such a period entails. I think that in this way she can fairly assert that specific performance would inflict on her a 'hardship amounting to injustice' to use the phrase employed by James LJ, in a different but comparable context, in *Tamplin* v. *James* (1880) 15 Ch D 215 at 221. Equitable relief may, in my view, be refused because of an unforeseen change of circumstances not amounting to legal frustration, just as it may on the ground of mistake insufficient to avoid a contract at law.
>
> In the end, I am satisfied that it is within the court's discretion to accede to the defendant's prayer if satisfied that it is just to do so. And, on the whole, looking at the position of both sides after the long unpredictable delay for which neither seeks to make the other responsible, I am of the opinion that it is just to leave the plaintiffs to their remedy in damages if that can indeed be effective.

An important feature of *Patel* was the plaintiffs' delay in seeking a specific performance order. It was thus the *combination* of hardship to the defendant and delay by the plaintiffs (although the two were strongly linked on the facts) that led Goulding J to conclude that it would not be just to make the order. It is a more difficult question whether or not hardship alone would have sufficed to justify a refusal to make a specific
p. 927 performance order. ↵ It is suggested that it would not. Hardship is a factor which the courts will consider alongside other factors but it is unlikely on its own to have sufficient weight to justify a decision to refuse to make an order for specific performance.

## 24.4 *Co-operative Insurance Society Ltd* v. *Argyll Stores (Holdings) Ltd*

The leading modern authority on specific performance is the decision of the House of Lords in *Co-operative Insurance Society Ltd* v. *Argyll Stores (Holdings) Ltd* [1998] AC 1. The case is particularly important for its consideration of, and re-characterization of, the 'constant supervision' bar to the making of a specific performance order. But the significance of the case transcends this particular issue. In the course of a broad-ranging speech Lord Hoffmann surveyed the nature and extent of the discretion exercised by the court when deciding whether or not to make a specific performance order, the supposed contrast between common law and civil law systems in their approach to specific performance, and the impact which the sanction of contempt of court has on the willingness of the court to make a specific performance order. The commentary which follows the extract explores the issues largely in the order in which they are raised by Lord Hoffmann.

***Co-Operative Insurance Society Ltd v. Argyll Stores (Holdings) Ltd***
[1998] AC 1, House of Lords

The facts of the case are set out in the speech of Lord Hoffmann.

## Lord Hoffmann

My Lords,

### 1. The issue

In 1955 Lord Goddard CJ said:

> 'No authority has been quoted to show that an injunction will be granted enjoining a person to carry on a business, nor can I think that one ever would be, certainly not where the business is a losing concern': *Attorney-General* v. *Colchester Corporation* [1955] 2 QB 207, 217.

In this case his prediction has been falsified. The appellant defendants, Argyll Stores (Holdings) Ltd ('Argyll'), decided in May 1995 to close their Safeway supermarket in the Hillsborough Shopping Centre in Sheffield because it was losing money. This was a breach of a covenant in their lease, which contained in clause 4(19) a positive obligation to keep the premises open for retail trade during the usual hours of business. Argyll admitted the breach and, in an action by the landlord, Co-operative Insurance Society Ltd ('C.I.S.') consented to an order for damages to be assessed. But the Court of Appeal [1996] Ch 286, reversing the trial judge, ordered that the covenant be specifically performed. It made a final injunction ordering Argyll to trade on the premises during the remainder of the term (which will expire on 3 August 2014) or until an earlier subletting or assignment. The Court of Appeal suspended its order for three months to allow time for Argyll to complete an assignment which by
p. 928 that ↵ time had been agreed. After a short agreed extension, the lease was assigned with the landlord's consent. In fact, therefore, the injunction never took effect. The appeal to your Lordships is substantially about costs. But the issue remains of great importance to landlords and tenants under other commercial leases.

### 2. The facts

A decree of specific performance is of course a discretionary remedy and the question for your Lordships is whether the Court of Appeal was entitled to set aside the exercise of the judge's discretion. There are well-established principles which govern the exercise of the discretion but these, like all equitable principles, are flexible and adaptable to achieve the ends of equity, which is, as Lord Selborne LC once remarked, to 'do more perfect and complete justice' than would be the result of leaving the parties to their remedies at common law: *Wilson* v. *Northampton and Banbury Junction Railway Co* (1874) LR 9 Ch App 279, 284. Much therefore depends upon the facts of the particular case and I shall begin by describing these in more detail.

The Hillsborough Shopping Centre consists of about 25 shops. Safeway was by far the largest shop and the greatest attraction. Its presence was a commercial benefit to the smaller shops nearby. The lease was for a term of 35 years from 4 August 1979 with five-yearly rent reviews. Clause 4(12)(a) contained a negative covenant as to the user of the premises:

> 'Not to use or suffer to be used the demised premises other than as a retail store for the sale of food groceries provisions and goods normally sold from time to time by a retail grocer food supermarkets and food superstores. …'

Clause 4(19) was the positive covenant enforced in this case:

> 'To keep the demised premises open for retail trade during the usual hours of business in the locality and the display windows properly dressed in a suitable manner in keeping with a good class parade of shops.'

Competition in the supermarket business is fierce and in 1994 Argyll undertook a major review of its business and decided to reduce the scale of its operations. The management was to be reorganised, 27 loss-making or less profitable supermarkets closed and thousands of employees made redundant. Hillsborough, which according to Argyll's management accounts had made a loss of about £70,000 in the previous year, was on the list for closure. For administrative reasons, as well as to avoid the demoralising effect of successive closure announcements, it was decided to close all the supermarkets at once and try to negotiate the disposal of their sites as a package. In early April 1995 Argyll announced that Hillsborough and the other supermarkets would close on 6 May 1995.

As soon as C.I.S. heard of the impending closure, it protested. On 12 April 1995 Mr Wightman, the regional surveyor of the investment department, wrote to Mr Jefferies of Safeway:

> 'Whilst obviously there is little point in trying to influence your corporate decision with regard to the closure of this unit I am dismayed at the short period of notice given which will undoubtedly have immediate impact on the Centre and all the other tenants trading therein.'

He drew attention to the covenant to keep open, invited Safeway to agree to continue trading until a suitable assignee had been found, offered to negotiate a temporary rent concession and asked for a reply by return of post.

Unfortunately he received no answer. Mr Jefferies had himself fallen victim to the reorganisation; he had been made redundant. No one else dealt with the letter. On Saturday, 6 May ↵ 1995 the supermarket closed and over the next two weeks its fittings were stripped out. On 22 May 1995 C.I.S. issued a writ claiming specific performance of the covenant to keep open and damages.

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### 3. The trial ...

The judge refused to order specific performance. He said that there was on the authorities a settled practice that orders which would require a defendant to run a business would not be made. ...

### 4. The settled practice

There is no dispute about the existence of the settled practice to which the judge referred. It is sufficient for this purpose to refer to *Braddon Towers Ltd* v. *International Stores Ltd* [1987] 1 EGLR 209, 213, where Slade J said:

> 'Whether or not this may be properly described as a rule of law, I do not doubt that for many 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.'

But the practice has never, so far as I know, been examined by this House and it is open to C.I.S. to say that it rests upon inadequate grounds or that it has been too inflexibly applied.

Specific performance is traditionally regarded in English law as an exceptional remedy, as opposed to the common law damages to which a successful plaintiff is entitled as of right. There may have been some element of later rationalisation of an untidier history, but by the 19th century it was orthodox doctrine that the power to decree specific performance was part of the discretionary jurisdiction of the Court of Chancery to do justice in cases in which the remedies available at common law were inadequate. This is the basis of the general principle that specific performance will not be ordered when damages are an adequate remedy. By contrast, in countries with legal systems based on civil law, such as France, Germany and Scotland, the plaintiff is prima facie entitled to specific performance. The cases in which he is confined to a claim for damages are regarded as the exceptions. In practice, however, there is less difference between common law and civilian systems than these general statements might lead one to suppose. The principles upon which English judges exercise the discretion to grant specific performance are reasonably well settled and depend upon a number of considerations, mostly of a practical nature, which are of very general application. I have made no investigation of civilian systems, but a priori I would expect that judges take much the same matters into account in deciding whether specific performance would be inappropriate in a particular case.

The practice of not ordering a defendant to carry on a business is not entirely dependent upon damages being an adequate remedy. In *Dowty Boulton Paul Ltd* v. *Wolverhampton Corporation* [1971] 1 WLR 204, Sir John Pennycuick V-C refused to order the corporation to maintain an airfield as a going concern because: 'It is very well established that the court will not order specific performance of an obligation to carry on a business': see p. 211. He added: 'It is unnecessary in the circumstances to discuss whether damages would be an adequate remedy to the company': see p. 212. Thus the reasons which underlie the established practice may justify a refusal of specific performance even when damages are not an adequate remedy.

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The most frequent reason given in the cases for declining to order someone to carry on a business is that it would require constant supervision by the court. In *J C Williamson Ltd* v. *Lukey and Mulholland* (1931) 45 CLR 282, 297–298, Dixon J said flatly: 'Specific performance ↵ is inapplicable when the continued supervision of the court is necessary in order to ensure the fulfilment of the contract'.

There has, I think, been some misunderstanding about what is meant by continued superintendence. It may at first sight suggest that the judge (or some other officer of the court) would literally have to supervise the execution of the order. In *CH Giles & Co Ltd* v. *Morris* [1972] 1 WLR 307, 318 Megarry J said that 'difficulties of constant superintendence' were a 'narrow consideration' because:

> 'there is normally no question of the court having to send its officers to supervise the performance of the order. ... Performance ... is normally secured by the realisation of the person enjoined that he is liable to be punished for contempt if evidence of his disobedience to the order is put before the court;. ...'

This is, of course, true but does not really meet the point. The judges who have said that the need for constant supervision was an objection to such orders were no doubt well aware that supervision would in practice take the form of rulings by the court, on applications made by the parties, as to whether there had been a breach of the order. It is the possibility of the court having to give an indefinite series of such rulings in order to ensure the execution of the order which has been regarded as undesirable.

Why should this be so? A principal reason is that, as Megarry J pointed out in the passage to which I have referred, the only means available to the court to enforce its order is the quasi-criminal procedure of punishment for contempt. This is a powerful weapon; so powerful, in fact, as often to be unsuitable as an instrument for adjudicating upon the disputes which may arise over whether a business is being run in accordance with the terms of the court's order. The heavy-handed nature of the enforcement mechanism is a consideration which may go to the exercise of the court's discretion in other cases as well, but its use to compel the running of a business is perhaps the paradigm case of its disadvantages and it is in this context that I shall discuss them.

The prospect of committal or even a fine, with the damage to commercial reputation which will be caused by a finding of contempt of court, is likely to have at least two undesirable consequences. First, the defendant, who ex hypothesi did not think that it was in his economic interest to run the business at all, now has to make decisions under a sword of Damocles which may descend if the way the business is run does not conform to the terms of the order. This is, as one might say, no way to run a business. In this case the Court of Appeal made light of the point because it assumed that, once the defendant had been ordered to run the business, self-interest and compliance with the order would thereafter go hand in hand. But, as I shall explain, this is not necessarily true.

Secondly, the seriousness of a finding of contempt for the defendant means that any application to enforce the order is likely to be a heavy and expensive piece of litigation. The possibility of repeated applications over a period of time means that, in comparison with a once-and-for-all inquiry as to

damages, the enforcement of the remedy is likely to be expensive in terms of cost to the parties and the resources of the judicial system.

This is a convenient point at which to distinguish between orders which require a defendant to carry on an activity, such as running a business over a more or less extended period of time, and orders which require him to achieve a result. The possibility of repeated applications for rulings on compliance with the order which arises in the former case does not exist to anything like the same extent in the latter. Even if the achievement of the result is a complicated matter which will take some time, the court, if called upon to rule, only has to examine the finished work and say whether it complies with the order. This point was made in the context of relief against forfeiture in *Shiloh Spinners Ltd* v. *Harding* [1973] AC 691. If it is ↵ a condition of relief that the tenant should have complied with a repairing covenant, difficulty of supervision need not be an objection. As Lord Wilberforce said, at p. 724:

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> '[W]hat the court has to do is to satisfy itself, ex post facto, that the covenanted work has been done, and it has ample machinery, through certificates, or by inquiry, to do precisely this.'

This distinction between orders to carry on activities and orders to achieve results explains why the courts have in appropriate circumstances ordered specific performance of building contracts and repairing covenants: see *Wolverhampton Corporation* v. *Emmons* [1901] 1 KB 515 (building contract) and *Jeune* v. *Queens Cross Properties Ltd* [1974] Ch 97 (repairing covenant). It by no means follows, however, that even obligations to achieve a result will always be enforced by specific performance. There may be other objections, to some of which I now turn.

One such objection, which applies to orders to achieve a result and a fortiori to orders to carry on an activity, is imprecision in the terms of the order. If the terms of the court's order, reflecting the terms of the obligation, cannot be precisely drawn, the possibility of wasteful litigation over compliance is increased. So is the oppression caused by the defendant having to do things under threat of proceedings for contempt. The less precise the order, the fewer the signposts to the forensic minefield which he has to traverse. The fact that the terms of a contractual obligation are sufficiently definite to escape being void for uncertainty, or to found a claim for damages, or to permit compliance to be made a condition of relief against forfeiture, does not necessarily mean that they will be sufficiently precise to be capable of being specifically enforced. So in *Wolverhampton Corporation* v. *Emmons*, Romer LJ said, at p. 525, that the first condition for specific enforcement of a building contract was that

> '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.'

Similarly in *Morris* v. *Redland Bricks Ltd* [1970] AC 652, 666, Lord Upjohn stated the following general principle for the grant of mandatory injunctions to carry out building works:

> '[T]he court must be careful to see that the defendant knows exactly in fact what he has to do and this means not as a matter of law but as a matter of fact, so that in carrying out an order he can give his contractors the proper instructions.'

Precision is of course a question of degree and the courts have shown themselves willing to cope with a certain degree of imprecision in cases of orders requiring the achievement of a result in which the plaintiffs' merits appeared strong; like all the reasons which I have been discussing, it is, taken alone, merely a discretionary matter to be taken into account: see Spry, *Equitable Remedies*, 4th ed. (1990), p. 112. It is, however, a very important one.

I should at this point draw attention to what seems to me to have been a misreading of certain remarks of Lord Wilberforce in *Shiloh Spinners Ltd* v. *Harding*, at p. 724. He pointed out, as I have said, that to grant relief against forfeiture subject to compliance with a repairing covenant involves the court in no more than the possibility of a retrospective assessment of whether the covenanted work has been done. For this reason, he said:

> 'Where it is necessary, and, in my opinion, right, to move away from som[e] 19th century authorities, is to reject as a reason against granting relief, the impossibility for the courts to supervise the doing of work.'

p. 932 This is plainly a remark about cases involving the achievement of a result, such as doing repairs, and, within that class, about making compliance a condition of relief against forfeiture. ↵ But in *Tito* v. *Waddell (No 2)* [1977] Ch 106, 322 Sir Robert Megarry V-C took it to be a generalisation about specific performance and, in particular, a rejection of difficulty of supervision as an objection, even in cases of orders to carry on an activity. Sir Robert Megarry V-C regarded it as an adoption of his own views (based, as I have said, on incomplete analysis of what was meant by difficulty of supervision) in *C H Giles & Co Ltd* v. *Morris* [1972] 1 WLR 307, 318. In the present case [1996] Ch 286, 292–293, Leggatt LJ took this claim at face value. In fact, Lord Wilberforce went on to say that impossibility of supervision 'is a reality no doubt, and explains why specific performance cannot be granted of agreements to this effect ... '. Lord Wilberforce was in my view drawing attention to the fact that the collection of reasons which the courts have in mind when they speak of difficulty of supervision apply with much greater force to orders for specific performance, giving rise to the possibility of committal for contempt, than they do to conditions for relief against forfeiture. While the paradigm case to which such objections apply is the order to carry on an activity, they can also apply to an order requiring the achievement of a result.

There is a further objection to an order requiring the defendant to carry on a business, which was emphasised by Millett LJ in the Court of Appeal. This is that it may cause injustice by allowing the plaintiff to enrich himself at the defendant's expense. The loss which the defendant may suffer through having to comply with the order (for example, by running a business at a loss for an indefinite period) may be far greater than the plaintiff would suffer from the contract being broken. As Professor R J Sharpe explains in 'Specific Relief for Contract Breach', ch. 5 of *Studies in Contract Law* (1980), edited by Reiter and Swan, p. 129:

> ‘In such circumstances, a specific decree in favour of the plaintiff will put him in a bargaining position vis-à-vis the defendant whereby the measure of what he will receive will be the value to the defendant of being released from performance. If the plaintiff bargains effectively, the amount he will set will exceed the value to him of performance and will approach the cost to the defendant to complete.’ …

It is true that the defendant has, by his own breach of contract, put himself in such an unfortunate position. But the purpose of the law of contract is not to punish wrongdoing but to satisfy the expectations of the party entitled to performance. A remedy which enables him to secure, in money terms, more than the performance due to him is unjust. From a wider perspective, it cannot be in the public interest for the courts to require someone to carry on business at a loss if there is any plausible alternative by which the other party can be given compensation. It is not only a waste of resources but yokes the parties together in a continuing hostile relationship. The order for specific performance prolongs the battle. If the defendant is ordered to run a business, its conduct becomes the subject of a flow of complaints, solicitors’ letters and affidavits. This is wasteful for both parties and the legal system. An award of damages, on the other hand, brings the litigation to an end. The defendant pays damages, the forensic link between them is severed, they go their separate ways and the wounds of conflict can heal.

The cumulative effect of these various reasons, none of which would necessarily be sufficient on its own, seems to me to show that the settled practice is based upon sound sense. Of course the grant or refusal of specific performance remains a matter for the judge’s discretion. There are no binding rules, but this does not mean that there cannot be settled principles, founded upon practical considerations of the kind which I have discussed, which do not have to be re-examined in every case, but which the courts will apply in all but exceptional circumstances. As Slade J said, in the passage which I have quoted from *Braddon Towers Ltd* v. *International Stores Ltd* [1987] 1 EGLR 209, 213, lawyers have no doubt for many years advised their clients on this basis. In the present case,
p. 933 Leggatt LJ [1996] Ch 286, 294 remarked ↵ that there was no evidence that such advice had been given. In my view, if the law or practice on a point is settled, it should be assumed that persons entering into legal transactions will have been advised accordingly. I am sure that Leggatt LJ would not wish to encourage litigants to adduce evidence of the particular advice which they received. Indeed, I doubt whether such evidence would be admissible

## 5. The decision of the Court of Appeal

I must now examine the grounds upon which the majority of the Court of Appeal [1996] Ch 286 thought it right to reverse the judge. In the first place, they regarded the practice which he followed as outmoded and treated Lord Wilberforce’s remarks about relief against forfeiture in *Shiloh Spinners Ltd* v. *Harding* [1973] AC 691, 724 as justifying a rejection of the arguments based on the need for constant supervision. Even Millett LJ, who dissented on other grounds, said, at p. 303, that such objections had little force today. I do not agree. As I have already said, I think that Lord Wilberforce’s remarks do not support this proposition in relation to specific performance of an obligation to carry on an activity and that the arguments based on difficulty of supervision remain powerful.

The Court of Appeal said that it was enough if the contract defined the tenant's obligation with sufficient precision to enable him to know what was necessary to comply with the order. Even assuming this to be right, I do not think that the obligation in clause 4(19) can possibly be regarded as sufficiently precise to be capable of specific performance. It is to 'keep the demised premises open for retail trade'. It says nothing about the level of trade, the area of the premises within which trade is to be conducted, or even the kind of trade, although no doubt the tenant's choice would be restricted by the need to comply with the negative covenant in clause 4(12)(a) not to use the premises 'other than as a retail store for the sale of food groceries provisions and goods normally sold from time to time by a retail grocer food supermarkets and food superstores. ...' This language seems to me to provide ample room for argument over whether the tenant is doing enough to comply with the covenant.

The Court of Appeal thought that once Argyll had been ordered to comply with the covenant, it was, as Roch LJ said, at p. 298, 'inconceivable that they would not operate the business efficiently'. Leggatt LJ said, at p. 292, that the requirement:

> 'was quite intelligible to the defendants, while they were carrying on business there. ... If the premises are to be run as a business, it cannot be in the defendants' interest to run it half-heartedly or inefficiently. ...'

This treats the way the tenant previously conducted business as measuring the extent of his obligation to do so. In my view this is a non sequitur: the obligation depends upon the language of the covenant and not upon what the tenant has previously chosen to do. No doubt it is true that it would not be in the interests of the tenant to run the business inefficiently. But running the business efficiently does not necessarily mean running it in the way it was run before. Argyll had decided that, from its point of view, the most efficient thing to do was to close the business altogether and concentrate its resources on achieving better returns elsewhere. If ordered to keep the business open, it might well decide that the next best strategy was to reduce its costs as far as was consistent with compliance with its obligations, in the expectation that a lower level of return would be more than compensated by higher returns from additional expenditure on more profitable shops. It is in my view wrong for the courts to speculate about whether Argyll might voluntarily carry on business in a way which would relieve the court from having to construe its order. The question of certainty must be decided on the assumption that the court might have to enforce the order according to its terms.

p. 934 ↵ C.I.S. argued that the court should not be concerned about future difficulties which might arise in connection with the enforcement of the order. It should simply make the order and see what happened. In practice Argyll would be likely to find a suitable assignee (as it in fact did) or conduct the business so as to keep well clear of any possible enforcement proceedings or otherwise come to terms with C.I.S. This may well be true, but the likelihood of Argyll having to perform beyond the requirements of its covenant or buy its way out of its obligation to incur losses seems to me to be in principle an objection to such an order rather than to recommend it. I think that it is normally undesirable for judges to make orders in terrorem, carrying a threat of imprisonment, which work only if no one inquires too closely into what they mean.

The likelihood that the order would be effective only for a short time until an assignment is an equivocal argument. It would be burdensome to make Argyll resume business only to stop again after a short while if a short stoppage would not cause any substantial damage to the business of the shopping centre. On the other hand, what would happen if a suitable assignee could not be found? Would Argyll then have to carry on business until 2014? Mr Smith, who appeared for C.I.S., said that if the order became oppressive (for example, because Argyll were being driven into bankruptcy) or difficult to enforce, they could apply for it to be varied or discharged. But the order would be a final order and there is no case in this jurisdiction in which such an order has been varied or discharged, except when the injuncted activity has been legalised by statute. Even assuming that there was such a jurisdiction if circumstances were radically changed, I find it difficult to see how this could be made to apply. Difficulties of enforcement would not be a change of circumstances. They would have been entirely predictable when the order was made. And so would the fact that Argyll would suffer unquantifiable loss if it was obliged to continue trading. I do not think that such expedients are an answer to the difficulties on which the objections to such orders are based.

Finally, all three judges in the Court of Appeal took a very poor view of Argyll's conduct. Leggatt LJ said [1996] Ch 286, 295, that they had acted 'with gross commercial cynicism'; Roch LJ began his judgment by saying that they had 'behaved very badly' and Millett LJ said, at p. 301, that they had no merits. The principles of equity have always had a strong ethical content and nothing which I say is intended to diminish the influence of moral values in their application. I can envisage cases of gross breach of personal faith, or attempts to use the threat of non-performance as blackmail, in which the needs of justice will override all the considerations which support the settled practice. But although any breach of covenant is regrettable, the exercise of the discretion as to whether or not to grant specific performance starts from the fact that the covenant has been broken. Both landlord and tenant in this case are large sophisticated commercial organisations and I have no doubt that both were perfectly aware that the remedy for breach of the covenant was likely to be limited to an award of damages. The interests of both were purely financial: there was no element of personal breach of faith, as in the Victorian cases of railway companies which refused to honour obligations to build stations for landowners whose property they had taken: compare *Greene* v. *West Cheshire Railway Co* (1871) LR 13 Eq 44. No doubt there was an effect on the businesses of other traders in the Centre, but Argyll had made no promises to them and it is not suggested that C.I.S. warranted to other tenants that Argyll would remain. Their departure, with or without the consent of C.I.S., was a commercial risk which the tenants were able to deploy in negotiations for the next rent review. On the scale of broken promises, I can think of worse cases, but the language of the Court of Appeal left them with few adjectives to spare.

It was no doubt discourteous not to have answered Mr Wightman's letter. But to say, as Roch LJ did, at p. 299, that they had acted 'wantonly and quite unreasonably' by removing their fixtures seems to me
p. 935 an exaggeration. There was no question of stealing a march, or ↵ attempting to present C.I.S. with a fait accompli, because Argyll had no reason to believe that C.I.S. would have been able to obtain a mandatory injunction whether the fixtures had been removed or not. They had made it perfectly clear that they were closing the shop and given C.I.S. ample time to apply for such an injunction if so advised.

> ### 6. Conclusion
>
> I think that no criticism can be made of the way in which Judge Maddocks exercised his discretion. All the reasons which he gave were proper matters for him to take into account. In my view the Court of Appeal should not have interfered and I would allow the appeal and restore the order which he made.
>
> ***Lords Browne-Wilkinson***, ***Slynn***, ***Hope***, and ***Clyde*** agreed with the speech of Lord Hoffmann.

## Commentary

Lord Hoffmann sought to strike a balance between certainty and flexibility. The emphasis which he placed on the fact that there are 'well-established principles which govern the exercise of the discretion' and his evident reluctance to disturb a 'settled practice', especially where parties have entered into transactions on the basis of legal advice as to the existence of such a 'settled practice', reflect a concern for certainty. On the other hand, the emphasis on the need to have regard to the facts of the individual case and the statement that there are no 'binding rules' in this area demonstrate his awareness of the need to preserve a significant degree of flexibility so that the judge is able to do justice on the facts of the individual case.

Lord Hoffmann relied upon a number of factors in reaching his conclusion: (i) there was a settled practice that a specific performance order would not be made the effect of which would be to require a defendant to run a business, (ii) an order compelling the defendants to trade could have exposed them to enormous losses, (iii) the task of framing the order was not an easy one, (iv) there was the possibility of wasteful litigation over compliance, (v) it was oppressive to the defendants to have to run a business under the threat of proceedings for contempt, and (vi) it was not in the public interest to require someone to carry on a business at a loss if there was a plausible alternative by which the other party could be compensated for the loss it had suffered. Cumulatively these factors demonstrated that the settled practice not to make a specific performance order was based on 'sound sense' and that the trial judge had acted within his discretion in refusing to grant the order that the plaintiffs sought. This balancing exercise is a feature of cases concerned with specific performance. The factors taken into account by the courts overlap (to some extent) and they can point in different directions. For example, in *Co-operative Retail* itself, the lack of precision pointed against making the order, whereas the wilful conduct of the defendants (on which see later) could be said to have pointed in favour of making the order. The task of the judge is to have regard to the relevant factors and to balance them and this, in the final analysis, depends, to a large extent, upon the facts of the individual case.

Lord Hoffmann stated that in practice there may be less difference between common law and civil law systems in this area than one might suppose (a point developed in more detail at 24.6). This statement does not command universal assent. Thus Lord Clyde, while he stated that he agreed that the appeal should be
p. 936 allowed for the reasons given by Lord ↵ Hoffmann, was careful to add a reservation in relation to the approach that might be adopted by 'civilian systems'. This reservation was clearly made with Scots law in mind. Lord Clyde's reservation proved to be well judged. The Inner House of the Court of Session has since refused to follow *Co-operative Retail Insurance* in *Highland and Universal Properties Ltd* v. *Safeway Properties Ltd* 2000 SLT 414, where it was held that a covenant to keep retail trading premises open for a significant period of time was specifically enforceable. The case underlines the different approach that is applicable to specific

performance in civilian systems and it demonstrates that the differences in emphasis between common law systems and civilian systems can have practical consequences. As Lord President Rodger stated in his judgment:

> [L]egal advisers of prospective developers and tenants will have little difficulty in identifying any relevant difference between the two systems and in handling any resulting problems in either system. The mere fact that the two systems may come to different results in particular cases is not in my view a sufficient reason for saying that this court should remould our law so as to reach the same result as would be reached under English law in a particular situation.

Further support for the proposition that there are important differences between common law and civilian jurisdictions can be gleaned from academic studies of the issue. Thus Professor Solène Rowan in her book *Remedies for Breach of Contract: A Comparative Analysis of the Protection of Performance* (Oxford University Press, 2012) concludes (at p. 52) that the view 'that there are few differences between the English and French approaches to specific performance is fundamentally misguided' given the vivid differences that exist between the two systems. A more cautious approach has been taken by Professor Vanessa Mak in her comparison of English law relating to what she entitles 'performance-oriented remedies' in English, Dutch, and German law (*Performance-Oriented Remedies in European Sale of Goods Law* (Hart Publishing, 2009)). While she acknowledges (at p. 108) that 'there is indeed an overlap between the considerations taken into account by courts in common law and civil law systems in deciding whether specific performance would be inappropriate in a particular case', she notes (at p. 95) that the starting points are very different. In English law the restrictions 'apply to a notion of specific performance that is already subject to severe limitations' whereas in civil law countries 'they seek to restrict an otherwise general entitlement to specific performance' and this difference 'may lead to different outcomes in cases that are otherwise very similar'.

An important issue in *Co-operative Insurance Society Ltd* was the so-called 'constant supervision' objection to the making of a specific performance order. The courts have traditionally refused to grant a specific performance order that would require 'constant supervision' by the court (see, for example, *Ryan* v. *Mutual Tontine Association* [1893] 1 Ch 116). This objection or bar must be re-cast in the light of Lord Hoffmann's speech. He noted that there has been 'some misunderstanding' as to the meaning of this phrase and pointed out that the supervision is undertaken by the parties and not by the courts. The role of the court is to rule on applications made to it and it is the prospect of a court being required to give an 'indefinite series of such rulings' that lies at the heart of the desire to restrict the availability of specific performance in these cases.

Lord Hoffmann then turned to the role of contempt of court as a sanction. The problem here is that contempt of court is too Draconian a sanction, involving, as it does, the possibility of imprisonment. If contempt were to
p. 937 be removed as a sanction (and emphasis placed ↵ on other means of enforcement, as in many civilian systems) one might expect the courts to become more willing to make a specific performance order.

The distinction drawn between an obligation to carry on an activity and an obligation to achieve a result was obviously of crucial significance for Lord Hoffmann. In many cases it will not be difficult to distinguish the two categories. But in some cases it will be. *Posner* v. *Scott-Lewis* [1987] Ch 25 provides an illustration of the problems that might lie ahead. In *Posner* the plaintiff tenants sought specific performance of a covenant (clause 3.11) by the defendant landlord to

> employ … a resident porter for the following purposes and for no other purposes:– (a) To keep clean the common staircases and entrance hall landings and passages and lift (b) To be responsible for looking after and stoking the central heating and domestic hot water boilers (c) To carry down rubbish from the properties to the dustbins outside the building every day.

The defendants admitted that they did not employ a resident porter but they contended that they were not in breach of clause 3.11 because the duties were being discharged by a non-resident porter. Mervyn Davies J rejected this submission on the ground that clause 3.11 clearly required the employment of a 'resident' porter and the defendants had, on their own admission, not employed a resident porter. Turning to the remedy, Mervyn Davies J concluded that clause 3.11 was a provision susceptible of specific performance. The defendants relied on the factually similar case of *Ryan* v. *Mutual Tontine Association* [1893] 1 Ch 116 but Mervyn Davies J dismissed the objection based on constant supervision. He stated:

> I do not see that such an order will occasion any protracted superintendence by the court. If the defendants without good cause fail to comply with the order in due time, then the plaintiffs can take appropriate enforcement proceedings against the defendants.

It is not easy to tell on which side of Lord Hoffmann's line *Posner* falls. Is it an example of a breach of an obligation to carry on an activity or a breach of an obligation to achieve a result?

One consequence of the decision of the House of Lords is that it is now extremely unlikely that a court will make an order which requires a defendant to run a business. Lord Hoffmann gave a number of reasons in support of his conclusion that such an order should not be made. One of them was that one effect of making an order requiring the defendant to carry on a business might be to 'enable the plaintiff to enrich himself at the defendant's expense'. This is not a straightforward proposition. Had a specific performance order been made on the facts, C.I.S. would only have received the performance for which it had contracted. What is wrong with that?

Lord Hoffmann concluded that clause 4(19) was insufficiently precise to be capable of specific performance. Two points should be noted here. The first is the link drawn between the vagueness of the obligation imposed by the contract upon the defendant and the 'constant supervision' objection as re-characterized by Lord Hoffmann. The two issues are linked on the basis that, if the terms of the court's order cannot be precisely drawn, the possibility of wasteful litigation over compliance is increased and the likelihood of the court making a specific performance order diminishes. Secondly, it is important to note the disagreement between the Court of Appeal and the House of Lords in relation to the precision of clause 4(19). The Court of Appeal held that the clause was sufficiently precise to be specifically enforceable and relied on the fact that the parties had
p. 938 operated the lease for a number of years ↵ without apparent difficulty. But, as Lord Hoffmann stated, past practice is not necessarily a good guide to future problems. In his view, the court must examine the language of the contract and not focus upon what the tenant had previously chosen to do. The question of the certainty of the term sought to be enforced must therefore be decided on the assumption that the court might have to enforce the order according to its terms. The court should not shut its eyes to future difficulties.

Lord Hoffmann attached far less significance to the conduct of the defendants than did the Court of Appeal. Is the effect of his speech to encourage commercial parties to engage in cynical, non-co-operative behaviour? Should the law of contract not do more in terms of encouraging commercial parties to behave in a more ethical manner?

The effect of the decision was to confine the plaintiffs to a claim for damages. Yet there is a question here as to the adequacy of the damages remedy. Suppose that the departure of the defendants led to such a loss of trade that other tenants were forced to close. Would the plaintiffs have been entitled to recover the loss of rent from such tenants from the defendants? Should the House of Lords not have held that the plaintiffs were entitled to the remedy of specific performance in order to avoid these problems of proof of loss? Assume that you are acting for the landlord of a major shopping centre. What steps can you take to ensure that, as far as possible, the anchor tenant does not terminate its tenancy before the end of the period of the lease? Alternatively, how do you ensure that an adequate remedy is available in the event of the tenant leaving the site early?

## 24.5 Injunctions

A claimant who wishes to restrain a breach of a negative stipulation in a contract or to restrain a defendant from breaking a term of the contract may apply to the court for an injunction. As is the case with specific performance, an injunction is an equitable remedy and, as such, is a discretionary remedy. An injunction will not be granted the effect of which would be specifically to enforce a contract in a situation where the remedy of specific performance would not have been available.

Injunctions come in different shapes and sizes and the willingness of a court to grant an injunction depends, in part, on the nature of the injunction sought. The most straightforward is a prohibitory injunction which, as its name suggests, orders the defendant not to do something. Typically, it will prohibit the defendant from performing certain acts which would otherwise amount to a breach of contract. More difficult to obtain is a mandatory injunction which orders the defendant to do something, such as to undo the consequences of an earlier breach of contract. Courts can be very reluctant to make such an order, especially in the case where the cost of undoing the breach is high and likely to lead to significant waste. A court will also exercise caution before issuing an interim injunction. An interim injunction is one sought prior to the trial of the action and which may apply until final judgment is given. Interim injunctions are often sought by claimants who need to take immediate steps to protect their interests. In such cases the court will consider the 'balance of convenience' between the competing interests of the claimant and the defendant when deciding whether or not to grant the relief sought.

A case which illustrates the potential practical importance of injunctions (and, in particular, of interim injunctions) is *Araci* v. *Fallon* [2011] EWCA Civ 668, [2011] All ER (D) 37 (Jun). The claimant racehorse owner
p. 939 obtained an interim injunction to restrain the ↵ defendant jockey from breaching his contract with the claimant by riding another horse in the Derby. The defendant had entered into a 'Rider Retainer Agreement' with the claimant under which the defendant agreed 'not [to] ride any other horse where [the defendant] has been retained to ride Native Khan under this retainer'. Notwithstanding the fact that he had been retained to

ride Native Khan in the Derby, the defendant agreed to ride a rival horse, Recital. The Court of Appeal, on the day of the race, granted an injunction to restrain the defendant from riding any horse other than Native Khan in the Derby.

It was accepted by both parties that, in the case of a negative stipulation (such as the undertaking not to ride any other horse after the defendant had been retained to ride Native Khan in a race), a prohibitory injunction to restrain future breaches of contract will be granted as a matter of course, unless the grant of an injunction would be oppressive to the defendant or would cause him particular hardship. It was also agreed that the balance of convenience test applies to an application for an interim injunction except 'where there is a clear and uncontested breach of a covenant not to do a particular thing'. Finally, where the grant of an injunction amounts 'in substance to a final determination at an interim stage, the court will take into account the strengths and weaknesses of the respective cases, and the likelihood of the claimant's eventual success at trial'.

In deciding to grant to the claimant an injunction, the Court of Appeal attached significance to the fact that the defendant had voluntarily entered into a contract 'for substantial reward containing both positive and negative obligations'. Further, there was 'nothing special' about the racing world which entitled the defendant 'to act in flagrant breach of contract'. The claimant had not been guilty of undue delay or culpable conduct. The agreement sought to be enforced did not operate in unlawful restraint of trade, nor was it contrary to public policy. Although the grant of an injunction would be a 'grievous blow' for the defendant, it could not be said that it would be oppressive or unjust since the defendant had voluntarily entered into the agreement. It was also observed that damages would not be an adequate remedy for the claimant, given the uncertainty surrounding the assessment of damages (for example, who would have won the Derby if the defendant had been riding (i) Native Khan or (ii) Recital?). But this was not a material factor because, as Elias LJ observed, the adequacy of damages is not generally a relevant consideration when the injunction restrains a breach of a negative covenant.

## 24.6 Future Directions

Should English law continue to develop a more liberal approach to the availability of specific performance and recognize the existence of a general right to specific performance? Professor Schwartz ('The Case for Specific Performance' (1979) 89 *Yale LJ* 271, 277) has argued that the law should develop in this direction. In his view:

> [the] restrictions on the availability of specific performance cannot be justified on the basis that damage awards are usually compensatory. On the contrary, the compensation goal implies that specific performance should be routinely available. This is because damage awards actually are undercompensatory in more cases than is commonly supposed; the fact of a specific performance request is itself good evidence that damages would be inadequate; and courts should delegate to promisees the decision of which remedy best satisfies the compensation goal.

p. 940 ↵ Others have been more hesitant (see, for example, A Burrows, *Remedies for Torts, Breach of Contract, and Equitable Wrongs* (4th edn, Oxford University Press, 2019), pp. 412–415; A Kronman, 'Specific Performance' (1978) 45 *U Chicago L Rev* 351, and SA Smith, 'Performance, Punishment and the Nature of Contractual Obligation' (1997) 60 *MLR* 360). The principal arguments against the recognition of a general right to specific performance are that the present law is congruent with the intention of contracting parties and so reduces transaction costs (Kronman), the fact that the mitigation rule does not apply to claims for specific performance so that a general right to specific performance would not encourage claimants to take reasonable steps to minimize their loss (Burrows), that specific performance constitutes a greater infringement of individual liberty than a remedy in damages to the extent that it requires the defendant to carry out an act that he is no longer willing to perform (Burrows), and that forced performance is 'self-defeating' because the bonds created by the voluntary undertakings contained in the contract can only be realized by performance that is itself voluntary (Smith).

It is difficult to strike a balance between these competing arguments. The argument that specific performance amounts to an infringement of individual liberty can be countered by the argument that the initial promise was voluntarily given so that there is, in fact, no violation of individual liberty because the defendant is only being ordered to do that which he had already promised to do. The argument that mitigation does not apply to specific performance is true but against that must be weighed the argument that claimants have a strong incentive not to seek specific performance in practice because 'a breaching promisor is reluctant to perform and may be hostile' (Schwartz, 'The Case for Specific Performance' (1979) 89 *Yale LJ* 271, 277). This incentive to seek performance elsewhere from a willing contracting party should counter the temptation not to take reasonable steps to mitigate loss.

The argument that the present law is congruent with the intention of contracting parties is more difficult to assess, largely because of the lack of empirical evidence as to the intentions of contracting parties. However, it has been argued (Kronman, 'Specific Performance' (1978) 45 *U Chicago L Rev* 351) that the present rules relating to specific performance do reflect the wishes of contracting parties as to the availability of the remedy and hence reduce the cost of negotiating contracts. Professor Kronman notes that the 'most important common feature' of the cases where specific performance is available is that the subject matter of the contract is unique and he argues that it is only where the goods are unique that the parties will wish to contract for specific performance. This reasoning has been convincingly criticized by Professor Schwartz ('The Case for Specific Performance' (1979) 89 *Yale LJ* 271). It is likely that no one factor can be identified that conclusively determines the parties' remedial preferences; they are, in large part, context dependent. This being the case, it is very difficult to rely on the intention of the parties either in support of the current rule or as part of an attempt to widen the availability of specific performance.

Nevertheless, it may be the case that English law should, in fact, pay greater attention to the wishes of the contracting parties, at least where that intention is expressed in the terms of the contract. At present the decision whether or not to order specific performance lies in the discretion of the court: the parties cannot exercise that discretion on behalf of the court. In *Quadrant Visual Communications Ltd* v. *Hutchison Telephone UK Ltd* [1993] BCLC 442, 451 Stocker LJ stated that 'once the court is asked for the equitable remedy of specific performance, its discretion cannot be fettered' by the stipulation of the parties. The parties could not, by the terms of their contract, confine the role of the court to that of a 'rubber stamp'. While it is right that the courts
p. 941 should not be bound by the stipulation of ↵ the parties, it can be argued that they should treat it with

considerable respect, particularly where the parties are of equal bargaining power, and only refuse to give effect to it where there are strong countervailing policy considerations (the case for attaching stronger weight to the agreement of the parties has been made by S Rowan, 'For the Recognition of Remedial Terms Agreed Inter Partes' (2010) 126 *LQR* 448, esp. pp. 449–455). In this respect, the facts of *Quadrant Visual Communications* might provide an illustration of such countervailing policy considerations. The plaintiff was held not to be entitled to specific performance on the ground that it was guilty of some 'trickery' in failing to disclose to the defendants an agreement which the court held that it should have disclosed to them.

A further factor fuelling the demand for a more liberal availability of specific performance is the impact of comparative law. The secondary role accorded to specific performance in English law contrasts with civilian systems where specific performance (or specific implement, as it is known in Scotland) is a primary remedy. While there appears to be a high degree of correlation between the situations in which the different legal systems refuse to order specific performance (in that courts are generally reluctant to order specific performance where performance of the contract would be impossible, unlawful, or expose the performing party to severe hardship), the difference between the systems lies, not so much in the circumstances in which the courts generally refuse to order specific performance, but in the starting point for the reasoning of the court. In most civilian jurisdictions specific performance is a primary remedy so that the court will assume that the claimant is entitled to the remedy unless the defendant can show that, for some reason, the claimant is not entitled to it. In England, on the other hand, it is for the claimant to establish his entitlement to specific performance. It could be said that this is no more than a difference in the location of the burden of proof. In England it is the claimant who bears the burden of establishing his entitlement to specific performance, whereas in civilian systems it is for the defendant to show that the claimant is not entitled to the remedy. The stronger view is that the difference is a matter of substance and not simply a matter relating to the burden of proof.

It has proved to be very difficult to bridge the gulf between common law and civilian systems when drafting international conventions on contract law. Article 28 of the Vienna Convention on Contracts for the International Sale of Goods states:

> If, in accordance with the provisions of this Convention, one party is entitled to require performance of any obligation by the other party, a court is not bound to enter a judgement for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by this Convention.

This provision is clearly a compromise between common law and civil law systems in that it entitles a court asked to make a specific performance order to have regard to its own domestic or national law and does not require it to make a specific performance order in circumstances where it would not do so were it applying domestic law. Rather than attempt to bridge the gap between the common law and civil law, Article 28 draws attention to that gap by leaving the problem to national law.

Rather more progress was, however, made by those responsible for drafting the Principles of European Contract Law. Article 9:102 states:

p. 942

**Non-monetary Obligations**

(1) The aggrieved party is entitled to specific performance of an obligation other than one to pay money, including the remedying of a defective performance.

(2) Specific performance cannot, however, be obtained where:

(a) performance would be unlawful or impossible; or

(b) performance would cause the obligor unreasonable effort or expense; or

(c) the performance consists in the provision of services or work of a personal character or depends upon a personal relationship; or

(d) the aggrieved party may reasonably obtain performance from another source.

(3) The aggrieved party will lose the right to specific performance if it fails to seek it within a reasonable time after it has or ought to have become aware of the non-performance.

This provision also represents a compromise but it is a rather more elaborate one than that found in the Vienna Convention (a similar compromise is to be found in Article 7.2.2 of the Unidroit Principles of International Commercial Contracts). Paragraph (1) recognizes the existence of a general entitlement to specific performance (thus reflecting the approach taken in civil law systems) while paragraphs (2) and (3) take account of (at least some of) the concerns of English lawyers by providing that, in certain circumstances, specific performance is not to be ordered (although it should be noted that it is difficult to tell how far these concerns have been taken into account because much depends on the meaning of phrases such as 'unreasonable effort or expense' and the weight to be given to these factors—for example, how would the *Co-operative Insurance Society* case have been decided under Article 9:102?).

Article 9:102 attempts to strike a balance between the competing interests at stake, and the reality is that a balance must be struck between these interests in all legal systems (whether common law or civilian). On the one hand, we have the interest of the claimant in obtaining the performance for which he contracted and to which he claims to be entitled. On the other hand, to require the defendant to perform his contractual obligations may cause him unnecessary hardship or result in an inefficient use of resources. It is no easy task to strike the right balance. While English law has moved some way from its original, restrictive approach to specific performance, it still has some way to go before it can be said to have struck the right balance. As cases such as *Co-operative Insurance Society* demonstrate, the courts can still, on occasion, give insufficient emphasis to the performance interest of the claimant.

## Further Reading

KRONMAN, A, 'Specific Performance' (1978) 45 *U Chicago L Rev* 351.

SCHWARTZ, G, 'The Case for Specific Performance' (1979) 89 *Yale LJ* 271.

SMITH, SA, 'Performance, Punishment and the Nature of Contractual Obligation' (1997) 60 *MLR* 360.

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