

## SPECIFIC PERFORMANCE

Chapter 19, Prof Fabunmi

## SPECIFIC PERFORMANCE

### MEANING AND SCOPE

An order of specific performance is one, which compels the person against whom it is made to carry out his obligation under the contract.

It was developed in the Court of Chancery as an alternative remedy to the award of damages, which in some cases, may not be an adequate compensation.

The remedy applies to executory contracts (i.e. Agreement to sell or purchase, lease, mortgage, etc), only since it is merely intended to compel the performance of the contract.

~~Francis Ude - £1800 pounds s.p granted~~

The basis of the jurisdiction for the grant of specific performance is the inadequacy of the Common law remedy and the ability of equity to give relief in that circumstance.

Hence, it will not be granted where damages are inadequate. See L.S.D.P.C & Ors v Nigerian Land Sea Foods Ltd (1992) 6 NWLR 243; Osagie v Oyeinka & Ors (1987) 3 NWLR (pt 59) 144; Beswick v Beswick (1968) AC 58

But the provision for liquidated damages in a contract does not necessarily bar the grant of specific performance. See Archbong v Duke (1923) 4 NLR 92

### DISCRETIONARY CHARACTER OF THE REMEDY

*Re Scott & Alvarer's contract*

*Lemare v Dixon*

It is a well-established principle that the decree of specific performance will not be granted if the remedy at law is adequate.

As emphasised by Rigby LJ in Re Scott and Alvarer's contract (1895) 2 Ch 603 at 615, 'from the very first when specific performance was introduced, it has been treated as a question of discretion. Whether it is better to interfere and give a remedy which the Common Law knows nothing about at all, or leave the parties to their rights in a Court of Law'. See also Lord Parker of Waddington in Stickney v Keeble (1915) AC 386

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The discretionary nature of the remedy means that unlike the Common Law remedy of damages, it cannot be obtained as of right.

However, this discretion is not arbitrary, but must be exercised according to settled rules and principles. See Lord Chemsford in Lemare v Dixon (1873) LR 6 HL 414

This means that where the parties are not under any disability and have complied with the rules and principles governing specific performance, and where the contract on which it is based is valid, the decree of specific performance is certain in equity, as damages are at law.

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Limitation

The courts have limited the remedy to those contracts which involve the transfer of property, and have refused to extend it to contracts which will result in some measure of constraint on the personal freedom of one of the parties to the Contract. See De Francesco v Barnum (1890) 45 Ch 430

- 1) It be limited to contracts which involve transfer of property
- 2) Will be granted if the court won't be able to supervise
- 3) Won't be granted to contracts of personal service

Similarly, the court will not grant the specific performance of a contract if it is incapable of supervising performance (Powell Duffryn Steam Coal Co v Taff Vale Railway Co); for the same reason, the court will not grant specific performance of contract of personal service<sup>②</sup>

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#### CONTRACTS OF WHICH SPECIFIC PERFORMANCE CAN BE GRANTED

The remedy will be granted in respect of the following contracts, but the list is not exhaustive, and there are other contracts, which may be specifically enforced.

##### Contracts for the Sale of Land

The remedy is often sought where the contract involves the sale of land because money cannot be an adequate compensation in view of the scarcity and unique character of land. See Brett, J.S.C. in Fakoya v St Paul's Church (1966) 1 ALR Comm 461

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The decree of specific performance has been granted in relation to contract of sale of land outside jurisdiction when the defendant is within the jurisdiction on the basis that the remedy is against the person. See Richard West v Dick (1969) 1 All E.R. 943; British Bata Shoe Co. Ltd v Melikan (1956) 1 FSC 100

##### Separation Deed

The courts will grant specific performance of a separation deed. See Wilson v Wilson (1848) 1 HLC 538

But an agreement which is immoral or illegal, cannot be specifically enforced. Accordingly, it will not grant a specific performance of an agreement for future separation. See Cartwright v Cartwright

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##### Contracts for the transfer of Chattels and Contracts relating to patents

Generally, the court will not grant such a decree for the transfer of chattels, partly because in most cases, damages is a sufficient remedy, and partly because it is difficult to secure the transfer or the continued existence of the chattel

But the decree may be granted if the chattel is unique or has a special value to the claimant. See Falcke v Gray ; British Nylon Spinners Ltd v Imperial Chemical Ind. Ltd (1955) Ch 37; s 52, Sale of Goods Act 1893

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##### Building Contracts

The court will not such order partly because of the difficulty in supervision, and partly because, damages would be an adequate remedy

However, it can be granted if the work to be done is clearly defined, the plaintiff has an interest in its execution, damages would not compensate him for the defendant's failure to execute the contract, and the defendant has obtained possession of the land on which the work is to be done. See Wolverhampton Corp v Emmons (1901) 1 K.B. 515

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##### e) Arbitrator's Award

An award by an arbitrator is specifically enforceable.

However, a decree will not be made where the award is payment of a sum of money to be enforceable, the award must direct to be done, an act such as the conveyance of an estate, the assignment of securities, or some similar transactions. See Doleman & Sons v Osset Corp (1912) 3 KB 257

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#### DEFENCES TO AN ACTION OF SPECIFIC PERFORMANCE

##### Absence of writing

§ 5(2) Law Reform (Contracts) Law, S 67 PCL and S 4 Statute of Fraud 1677, require that certain contracts shall not be enforceable by action unless the contract or some memorandum or note in respect thereof, is in writing, and is signed by the party to be charged therewith or some other person lawfully authorised by him.

These statutory provisions apply inter alia to contracts for the sale, lease and mortgage of land

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The requirement of a written note or memorandum does not mean that the document need to be formal

Any written evidence will be a sufficient memorandum provided that it is signed by the party to be charged or his agent.

Thus, a letter (Buxton v Rust), or a purchase receipt (Okunubi v Assaf (1951) 13 WACA 226), provided the information contained in the receipt meets the requirement of s 4 Statute of Fraud, is a sufficient memorandum. See Nleweditim v Uduma (1995) 6 SCN 72.

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The information contained in the memorandum must include the names of the parties, the description of the property, consideration for agreement, material terms of the agreement, and the signature of the parties.

It is possible where the evidence required by the statutory provisions, is contained in more than one document, to join those documents or papers together to make one complete memorandum provided that such document is signed by the defendant or his agent. See Okoro v Ntui (1964) 8 ENLR 99

Failure to comply with the statutory provisions renders the contract unenforceable at Law.

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Hence, it is a defence to an action for specific performance to show that there is no written memorandum or note of the agreement.

This defence must be specifically pleaded by the defendant, and failure to plead it will result in the loss of his right to set up the defence which cannot be subsequently revived. See Molomo v Olusola (1955) 15 WACA 12

Unlike Law, equity takes a less formalistic view and will order specific performance of a contract even when the requirement of writing has not been complied with, *provided the plaintiff has part performed his contract, and the contract is one to which the doctrine of part performance applies*. See Mba-Ede v Okufo (1990) 2 NWLR 787; Anaeze v Anyoso (1993) 6 SCN 72. but see Nleweditim v Ndumia, (where a payment receipt coupled with unauthorised possession was held not to constitute an act of part performance)

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The basis of this intervention is that it will be a fraud on the defendant's part to escape from the contract by pleading absence of writing, for equity will not allow a statute to be used as an instrument of fraud as 'equity looks at the substance rather than the form'.

The acts of part performance must have been done by the plaintiff or his authorised agent as the basis of the intervention is that the plaintiff has altered his position as a result of the agreement, and that it is inequitable for the defendant to take advantage of the agreement not being in writing. See *Caton v Caton*

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The acts must be exclusively referable to the existence of the contract alleged. See *Maddison v Alderson* (1883) 8 AC 467; *Wakeman v Mackenzie* (1968) 1 WLR 1175; *Rawlinson v Ames* (1925) Ch 96; *Shelle v Rosseck* (1938) 14 NLR 80

Note that payment of money is an equivocal act, which may not be indicative of contract concerning land, until the connection is established by parole evidence. See *Madison v Alderson*; *Kadiri v Akeju* (1937) 13 NLR 186

If the plaintiff is let into possession by the defendant, this will amount to a sufficient act of part performance. See *Ogunvambi v Abowaba* (1951) 13 WACA 222

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But where a tenant pays rent in advance under an agreement for a lease which was unaccompanied by entry into possession, the court will not regard such payment as a sufficient act of part performance. See *Thursley v Eccles*

Similarly, rent paid in pursuance of a court order is not a sufficient act of part performance. See *Izoni v Ezekwu* (1960) WRNLR 142.

The doctrine of part performance can only be invoked in respect of a contract of which specific performance can be granted. See *Britain v Rossiter* (1879) 11 QBD 17; *Apara v UAC Ltd* (1951) 20 NLR 17

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##### b) Incompleteness

Since specific performance operates in the field of contracts, it is essential that there must be a concluded contract, complete and certain, in accordance with the law of contract. See *Pellant v Morgan* (1952) All ER 951, *LSDPC v Nigerian Land and Sea Food Ltd*.

Hence, unless there is a valid existing contract, the court will not decree specific performance. See *Tella v Akere* (1958) WRNLR 26, *Savage v Uwechi* (1961) 1 All ER 830

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##### (c) Supervision of the Court must not be necessary

- The remedy like injunction, will not be granted if it involves continued supervision by the court. See *Ryan v Mutual Tontine Ass.* (1883) 1 Ch 116
- Thus, the court will not grant specific performance of contracts of personal service
- The underlying reason are that enforcement of the contract will involve the supervision of the court, and also the undesirability of compelling the parties to continue a relationship, which for all practical purposes, is against their will. See *Lumley v Wagner*; *Apara v UAC Ltd*

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### The Doctrine of Mutuality

This means that the plaintiff must be capable of enforcing the contract. Hence, if from personal incapacity or nature of the contract, or any other cause the contract cannot be enforced against one party, that party cannot enforce it against the other.

Generally, an infant cannot compel specific performance of a contract because the court will not enforce the contract against him. See *Flight v Bolland*.

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Similarly, where consent is required to a transaction, and the consent is not obtained, an order of specific performance will not be ordered to enforce such contract. See *LSDPC v Nigerian Land and Sea Food Ltd*

### Inadequacy of consideration

A defendant in an action for specific performance may plead that the contract cannot be enforced against him because there is no consideration (*Kuri v Kuri* (1923) 4 NLR 78), or consideration is inadequate.

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This alone may not afford a good defence unless it is such as would give rise to an inference of fraud. See *Adabte v Conde* (1938) 14 NLR 57.

Note also that past consideration is insufficient to support contract for the sale of land so as to make it enforceable. See *Savage v Uwechia; Sanusi v Daniyan*

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### Impossibility of performance

The remedy may not be of any value to the plaintiff if the defendant is unable to carry out the order. In such a case, the court will not grant specific performance as 'equity does not act in vain'. See *Adetona v Total Oil Products Ltd* (1966) 1 ALR Comm 262

Hence, where a defendant can show that he has sold the property in question to a 3<sup>rd</sup> party for a valuable consideration, no specific performance can be enforced against him. See *Taylor v Arthur* (1947) 12 WACA 179.

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But the decree will be ordered where the 3<sup>rd</sup> party is aware of the existence of the contract for which specific performance is ordered as 'he comes to equity, must come with clean hands'. See *Ajoke v Oba* (1962) 1 All NLR 73

### Misdescription

Misdescription, which consists of an error either as to the title of the vendor, or the acreage of the property, may be a defence to an action for specific performance

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Equity distinguishes between substantial and slight misdescription. Specific performance will not be granted where the former is involved. See *Smith v Land and House Property Corp* (1884) 28 Ch.D 7; *Sodipo v Coker* (1932) 11 NLR 138

misdescription is substantial if the interest in the property is different from what is alleged to be as for example, where it is described as leasehold when in fact, it is a freehold; or an investigation of title reveals that the vendor has no title to a part of the land; or there is misstatement of the area of the land; or there is non-disclosure of onerous covenants.

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#### Mistake

Mistake may also be a ground for defence. See *Webster v Cecil*.

thus, if a party makes a mistake which is fundamental in his offer or acceptance, and the mistake is known to the other party, the *consensus ad idem* necessary in the formation of contract is precluded. The court will neither award damages nor grant specific performance of such contract.

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Mistakes which are not sufficiently grave and so do not preclude the existence of contract, may operate in equity as a ground for either refusing specific performance, or allowing rescission with or without conditions. This is so if enforcement of the contract will cause hardship to the defendant. The plaintiff's remedy lies in damages. See *Grist v Baily* (1967) Ch 532

Mistakes which arises while the oral agreement is being committed into writing, but which does not affect the subject matter of the contract maybe rectified. See *Nolan v Graves* (1946) 1 ER 376

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#### hardship

The court will not grant an order if it will cause hardship to the defendant. See *Pogge v White*.

The hardship must exist at the date of the contract and any hardship that arises after the conclusion of the contract will probably not be a defence. See *City of London v Nash*

#### Defective title

The court will not grant an order in favour of a vendor who fails to show a good title to the property. The purchaser can repudiate the contract and claim the purchase price he had paid

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But if the defect is removed before the purchaser repudiates, an order of specific performance can be made. See *Halkett v Earl of Dudley* (1907) 1 Ch 590

A purchaser may repudiate if there are undisclosed restrictive covenants which will be binding upon him when he completes the contract. *Re Nisbet and Potts Contract* (1906) 1 Ch 386

A purchaser may also repudiate if the defect in the vendor's title cannot be removed unless a 3<sup>rd</sup> party's concurrence is necessary, and the vendor has no power to compel such concurrence. See *Re Bryant and Bannigham's Contract* (1890) 44 Ch.D. 218

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#### Want of fairness

Specific performance will not be granted if the contract is unfair, and the plaintiff will be left to his common law remedy of damages.

While unfairness will disentitle the plaintiff from obtaining an order of specific performance, fraud will enable the affected party rescind the contract.

Injustice must exist at the time the contract is entered into, for it to be a ground for resisting specific performance.

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However, it will not affect the contract, if it arises after the contract has been concluded, even if it makes the performance of the contract inequitable or specially difficult. See *Smith v Harrison*.

#### The Plaintiff's Laches

A plaintiff who fails to pursue his remedy promptly may fall on round of his laches, for he may be taken to have abandoned the contract.

Consequently, he will be unable to claim specific performance. See *Mills v Haywood*

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#### IMAGES IN LIEU OF SPECIFIC PERFORMANCE

See S 2 Chancery Amendment Act, s 24 Judicature Act, s 10 High Court Law, Lagos State, etc.

See also *Williams v Smith & Ors* (1948) 19 NLR 21; *Nassar v Moses* (1960) LLR 170