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## **Contracts for the Sale of Land: Understanding the Impecuniosity Defence**

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## **CONTRACTS FOR THE SALE OF LAND: UNDERSTANDING THE IMPECUNIORITY DEFENCE**

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The Great Recession from which some western economies are slowly and painfully emerging was accompanied by a considerable fall in real estate asset prices. That fall was preceded by a considerable rise in those same asset prices. Beyond question that rise encouraged many people to buy houses, apartments and other landed property, sometimes stretching their ability to pay to and beyond realistic limits. The subsequent fall placed many of these purchasers in positions where they were unable to pay the contract price of the property they were purchasing. This was sometimes because their jobs or livelihoods were lost in the economic recession caused to some extent by the property collapse and in other cases because they were unable to borrow enough to fund the purchase. A lender will demand security for the loan required to purchase the property but will lend against the value of the property and not the contract sale price. Where an apartment for example is sold 'off the plans' before the apartment building is constructed, a process that may take about two years, the market value of that dwelling may be appreciably more or less than the contract price when the time comes to complete the contract. If it is less and the purchaser is unable to raise close to the full contract price on mortgage and has no other assets that can be easily liquidised, he or she may be unable to complete the purchase. If the contract contains a 'subject to finance' clause the purchaser will be able to walk away from the purchase without penalty but in many of the cases that will be discussed below there was no 'subject to finance' clause in the contract and purchasers remained bound to complete.

In most common law jurisdictions the usual remedy for breach of a contract for the sale of an interest in land remains specific performance, whether the party in breach is vendor or purchaser. As the vendor's interest is purely financial, in a rising market the vendor will often be content to forfeit the purchaser's deposit and resell. But in the falling market conditions of recent times the forfeiting of a deposit has not always made up for the difference between contract price and current realistic resale price and so this has proved to be an unattractive remedy for vendors. Vendors have thus tended to sue for specific performance of the contract or for damages in lieu of specific performance. Often the vendor will be aware that the purchaser is going to plead impecuniosity as their defence but not all vendors have been prepared to accept that the purchaser is unable to pay, and so they commence immediate negotiations for the release of the purchaser from his or her obligations. This is not necessarily unreasonable because some purchasers have been known to find appreciating assets affordable but the same asset unaffordable once it depreciates.<sup>1</sup> The purchaser's circumstances may not otherwise have changed significantly since the contract was signed and he or she may have other assets that if liquidised would allow for completion of the purchase. So litigation often ensues and this question of whether the purchaser really cannot raise the money to complete the purchase has to be confronted.

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<sup>1</sup> This was so in the New Zealand case of *Wealth Buy Property Ltd v Stevenson* [2012] NZHC 1609.

The fall in property markets provides an excellent opportunity to review developments in the law governing the specific performance of contracts for the sale of land, especially those relating to purchasers' difficulties in raising the purchase money. Three approaches to specific performance will be discussed, giving consideration both to their general merits and to their utility in terms of addressing the impecuniosity problem. The first approach considered is one followed by courts in both Irish jurisdictions and also to a wide extent in Australia and New Zealand. This is the recognition of a specific 'impecuniosity' defence to a vendor's specific performance application, where the court will refuse specific performance and leave the vendor to a remedy in damages where it appears that the purchaser is simply unable to pay the price. The extent to which this defence is truly an 'impossibility' defence will be discussed, or whether 'impossibility' really means 'extreme hardship'. Discussion of the second and third approaches below consider whether this housing crisis and the 'impecuniosity' defence above represent an opportunity to think again about specific performance in the context of contracts for the sale of an interest in land. The second approach considers a development from Canada where the *Semelhago* principle holds that specific performance should not be the preferred remedy for breach of such contracts, no matter whether the applicant be the vendor or the purchaser. The third approach accepts that specific performance should continue to be the preferred remedy for purchasers but challenges the assumptions based on the mutuality principle that it should continue to be the normal remedy for vendors. The latter is the approach recommended as the way forward in this area. But first some more of the wider economic context affecting this debate will be sketched out in a little more detail.

### **Housing as an Investment Asset**

Home ownership is the dominant form of housing in most western societies. The sources drawn upon in this section are British and Irish but there is no reason to suppose that the phenomena highlighted are not replicated at least to the level of noteworthy feature in the housing provision of other common law jurisdictions.

In the United Kingdom the growth in home ownership began after the First World War. In 1919 about 90% of households in the United Kingdom were privately rented.<sup>2</sup> Rent controls imposed through the Increase of Rent and Mortgage Restriction Act 1915<sup>3</sup> and subsequent enactments made private letting unprofitable for landlords. Council housing began taking the place of private letting after the First World War and home ownership became the experience for most who could afford it. By 1979 when the Thatcher government came to power owner occupied homes comprised 55% of all homes in Britain, with public rented accommodation coming to 32% and the private rented sector 13%.<sup>4</sup> Conservative housing policies, largely followed by Labour after 1997, favoured home ownership and resulted in the transfer of some 2 million council houses to home ownership under 'right to buy' schemes. By 2001 the level

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<sup>2</sup> ADH Crook & PA Kemp, 'The revival of private rented housing in Britain' (1996) *Housing Studies* 11:1, 51.

<sup>3</sup> This was a war time measure designed to maintain morale among serving soldiers.

<sup>4</sup> David Mullins & Alan Murie, *Housing Policy in the UK* (2006, Palgrave Macmillan), 36.

of home ownership in Britain had reached 69.4%.<sup>5</sup> In Ireland the 2006 Census indicated a 75% incidence of home ownership. Rural (farming) home ownership is largely the product of the Land Purchase Scheme of the early twentieth century which bought out the landlords of large estates and enabled tenant farmers to purchase their farms on long term mortgages. In urban areas a mixture of local authority housing and government subsidised owner occupied housing was the order of the day from independence until the Celtic Tiger housing boom began in the 1990s.<sup>6</sup>

The growth in home ownership in the United Kingdom and Ireland has been accompanied by two features of the housing markets in those countries that are very significant in terms of the issues discussed in this article. The first feature is the increasing tendency to view housing not just as a place to live but as an investment asset. The second feature is the enormous rise in the price of housing, particularly in Ireland, and its connection with investment driven speculation on the property market.

In Britain Conservative governments of the 1950s, early 1970s and the 1980s and 1990s strongly favoured home ownership in preference to the more welfare state provision that council housing was perceived to be.<sup>7</sup> Paying rent was 'dead money' and owning one's home offered security for retirement because the mortgage would be paid before income was reduced and the state was relieved of the duty to house people in old age. The Labour governments of 1997-2010 adopted this housing policy<sup>8</sup> and applied it as a means of welfare provision. Instead of the state making welfare provision directly through taxation New Labour facilitated citizen access to asset-based welfare through housing.<sup>9</sup> Professor Susan Smith has shown that the experience of many people living in Britain in the 1990s and 2000s was that the value of their homes was rising faster than their incomes. This enabled them to fund spending for now and saving for the future by taking out mortgages in excess of home values and by re-mortgaging. A house became not just a place to live but an investment asset to spend.<sup>10</sup> In stimulating a buy-to-rent market this phenomenon has resulted in the purchase of housing purely as an investment.

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<sup>5</sup> *Ibid*, 49. Local authority housing stood at 14.5%, housing association 6.5%, and the private rented sector the remainder.

<sup>6</sup> PJ Drudy & Michael Punch, 'Housing Models and Inequality: Perspectives on Recent Irish Experience' (2002) *Housing Studies* 17:4, 657, 663-664; Padraic Kenna, *Housing Law, Rights and Policy* (2011, Clarus Press), ch 2.

<sup>7</sup> *Houses: the Next Step* (Cmnd 8996, HMSO, 1953); Minister for Housing and Local Government, *House Purchase* (Cmnd 571, Sessional Papers, HMSO, 1958); Department of the Environment, *Fair Deal for Housing* (Cmnd 6851, HMSO, 1971); Department of the Environment, *Our Future Homes* (Cm 2901, HMSO, 1995).

<sup>8</sup> Office of the Deputy Prime Minister, *Extending Home Ownership for All* (HMSO, 2005); *Sustainable Communities: Homes for All (A Five Year Plan from the Office of the Deputy Prime Minister)* (HMSO, 2005).

<sup>9</sup> Ray Forrest and Yosuke Hirayama, 'The Uneven Impact of Neoliberalism on Housing Opportunities' (2009) 33 *International Journal of Urban and Regional Research* 998; Alan Finlayson, 'Financialisation, Financial Literacy and Asset-Based Welfare' (2009) 11 *British Journal of Politics and International Relations* 400; Matthew Watson, 'Constituting Monetary Conservatives via the 'Savings Habit': New Labour and the British Housing Bubble' (2008) *Comparative European Politics* 285; Matthew Watson, 'Planning for a Future of Asset-based Welfare? New Labour, Financialized Economic Agency and the Housing Market' (2009) 24 *Planning, Practice & Research* 41.

<sup>10</sup> SJ Smith, *Banking on housing? Speculating on the role and relevance of housing wealth in Britain* (2005, paper prepared for the Joseph Rowntree Foundation, Durham University); Susan J. Smith, 'Risky Business? The Challenge of Residential Mortgage Markets' (2005) *Housing Finance International* 3; Susan J. Smith, Nicole Cook and Beverley A. Searle, *From canny consumer to care-full citizen: towards a nation of home stewardship?* (2006, ESRC/AHRC Cultures of Consumption Programme Working Paper from the Project *Banking on Housing; Spending the Home* RES-154-24-0012); Susan J. Smith, 'Owner-occupation: at home with a hybrid of money and materials'

The Irish property bubble of the 1990s and 2000s very clearly illustrates the baneful consequences of rising house prices and rampant property speculation. Between 1991 and 2006 the population of the Republic of Ireland grew by 20% from 3.525 million to 4.239 million, with the number of households rising from 1.029 million to 1.473 million.<sup>11</sup> The national housing stock grew by 60% between 1992 and 2007<sup>12</sup> and about one quarter of the country's total housing stock of 1.92 million homes in 2008 had been built since 2002.<sup>13</sup> About one quarter of the country's new housing stock built between 2003 and 2009 was in apartments<sup>14</sup> and these accounted for 10% of total housing stock.<sup>15</sup> A phenomenal surge in apartment building also occurred in Belfast in Northern Ireland although accurate statistics do not appear to be available. Real incomes doubled between 1997 and 2007<sup>16</sup> but average new house prices rose fourfold during that time and second hand homes more than fivefold.<sup>17</sup> Between 1994 and 2004 new house prices rose over four times as much as building costs and seven times faster than the Consumer Price Index.<sup>18</sup> *The Economist* produced an index of house prices in June 2005 which showed that in 1997-2005 Ireland had the highest rate of price increase (192%) of all developed countries, followed next by Britain (154%),<sup>19</sup> and in 2007 the International Monetary Fund estimated that houses in Ireland were about 32% over-valued.<sup>20</sup> Many of the new homes constructed in Ireland during this period and a considerable number of others were purchased purely as investments,<sup>21</sup> and beyond doubt speculation has contributed significantly to the price rise. The social costs of this bubble and its subsequent burst have been enormous, especially in terms of making much owner occupied housing unaffordable for many first time buyers, the level of household debt and negative equity, long commutes to work in Dublin from more affordable parts of the country, dislocation of family life and health problems.

The significance of the above in terms of the issues addressed in this article is essentially that the context in which a vendor's application for specific performance and the purchaser's defence of impecuniosity arise are potentially very important to the approach the court should take. A young couple buying an apartment as a residence because this is all they think they can afford would appear to deserve rather more in the way of understanding should they find that they cannot raise the finance to complete the purchase, than the speculative

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(2008) 40 *Environment and Planning A* 520; Susan J. Smith, Beverley A. Searle and Nicole Cook, 'Rethinking the Risks of Home Ownership' (2008) 38 *Journal of Social Policy* 83.

<sup>11</sup> Rob Kitchin, Justin Gleeson, Karen Keaveney, Cian O'Callaghan, *A Haunted Landscape: Housing and Ghost Estates in Post- Celtic Tiger Ireland* (2010, National Institute for Regional and Spatial Analysis).

<sup>12</sup> Kenna, *supra* n. 6, **1.09**.

<sup>13</sup> Derek Brawn, *Ireland's House Party: What the Estate Agents don't want you to know* (2009, Gill & Macmillan), 13.

<sup>14</sup> *Ibid*, 256.

<sup>15</sup> Kenna, *supra* n. 6, **1.08**.

<sup>16</sup> Brawn, *supra* n. 13, 68.

<sup>17</sup> Michael Punch, *The Irish Housing System: Vision, Values, Reality* (2009, Jesuit Centre for Faith & Justice).

<sup>18</sup> PJ Drudy and Michael Punch, *Out of Reach: Inequalities in the Irish Housing System* (2004, Dublin, tasc).

<sup>19</sup> PJ Drudy, 'Housing in Ireland: Philosophy, Affordability and Access' (2007) 36 *Journal of the Statistical and Social Inquiry Society of Ireland* 84, 94.

<sup>20</sup> Brawn, *supra* n. 13, 202.

<sup>21</sup> Drudy & Punch, *supra* ns 6 & 18; Drudy, *supra* n. 19; Michelle Norris & Patrick Shiels, 'Housing Affordability in the Republic of Ireland: Is Planning Part of the Problem or Part of the Solution?' (2007) *Housing Studies*, 22:1; Punch, *supra* n. 17; Kitchin *et al*, *supra* n.11.

investor who could manage to complete the purchase by liquidising other assets. Where there is evidence that a vendor has been engaging in reckless speculation that is also something that arguably should be taken into account in balancing the equities between the parties, as should any hardship the vendor may suffer if the sale cannot go through. It should also be recalled that apartment sales are almost invariably 'off the plans' and not 'subject to finance'.

### **Impecuniosity as a Defence to Specific Performance**

To a limited and rather uncertain extent courts in England, Ireland, Australia and New Zealand have recognised over the last decade or so that the purchaser's inability to pay the purchase price may constitute a defence to a vendor's application for specific performance. Unlike the *Semelhago* principle and the suggestion that the affirmative mutuality principle should be abolished in vendors' application cases discussed below, the impecuniosity defence retains the essential framework of specific performance in the sense that there is a presumption that the vendor should get it unless a reason is shown to rebut that presumption. The approach taken below is to review the case law jurisdiction by jurisdiction and then attempt to distil a set of principles that appear to be reasonably well settled from those decisions. This section of the article will conclude by considering whether these principles are a satisfactory way of dealing with purchasers' inability to pay the purchase price.

#### *England*

It seems that in England the only case that has considered the impecuniosity defence is *Matila Ltd v Lisheen Properties Ltd*.<sup>22</sup> The defendant purchasers of several apartments stated that as a result of delay in completion of the building project and the fall in the market value of the property they were unable to obtain funding to complete the purchases. HHJ Stephen Davies first considered whether the defendants might have a defence based on hardship. The judge referred to the decision of Goulding J in *Patel v Ali*<sup>23</sup> and stated that any hardship had to be of a very severe and extraordinary kind to be capable of amounting to a defence to specific performance. The defendants had not provided sufficient evidence of hardship and so this defence did not avail them. The judge was also of the view that hardship that could not be laid at the door of the claimant, particularly hardship which the defendant brought upon itself, would not normally be of any help to a defendant.<sup>24</sup> In this connection it is worth noting another decision cited by Dr Dowling,<sup>25</sup> *Francis v Cowcliffe Ltd*,<sup>26</sup> which involved an action against a landlord for breach of a covenant to provide and maintain a lift. The defence was

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<sup>22</sup> [2010] EWHC 1832 (Ch).

<sup>23</sup> [1984] Ch 283, at [245] *ibid*.

<sup>24</sup> *Ibid*.

<sup>25</sup> Alan Dowling, 'Vendors' application for specific performance' (2011) *Conveyancer & Property Lawyer* 208, 210-211.

<sup>26</sup> (1976) 33 P & CR 368 (ChD).

hardship based on inability to fund the work required. HHJ Rubin dismissed this in the following terms:-<sup>27</sup>

“[i]f ever there was a case in which the defendants [sic] has brought the hardship on itself, this must be it. The defendants chose to purchase and embark upon an expensive scheme for development of the property without any or any adequate finance and without making any but the most speculative arrangements for such finance.”

Given the undoubted tendency of some purchasers to find ways to afford appreciating assets and find difficulties only in paying for the depreciating this is potentially a telling statement.

The judge then moved on to consider an alternative defence that the purchasers were simply not able to comply with a specific performance order because they could not find the funds to do so. He decided that this could be a defence, that it was not equitable to put the defendant at risk of committal for non-compliance, and that it was an insufficient answer to this that the defendant could apply to discharge the order.<sup>28</sup> However any defendant seeking to rely on such a defence had to make the fullest possible disclosure of their financial position, which the defendants in this case had not done, so specific performance was granted.

### *Republic of Ireland*

Financial difficulties for purchasers were the subject of detailed consideration by the High Court in *Aranbel Ltd v Darcy & Ors*.<sup>29</sup> The three test cases determined in this judgment were all classic examples of investment purchases of apartments ‘off the plans’ and not ‘subject to finance’. Between contract and completion the value of the properties fell by about 50% and the defendant purchasers were experiencing considerable difficulty in raising the purchase price either by borrowing or by a mixture of borrowing and liquidising other assets. A fall in realisable value on this scale clearly made forfeiting the 10% deposit an unsatisfactory remedy for the vendor.

Clarke J decided that specific performance should not be granted where it was clear that the purchaser could not pay the contract price either by borrowing or liquidising other assets or a combination of the two. This is an impossibility defence, not hardship.<sup>30</sup> Hardship is a separate issue to which attention is given below. In relation to impossibility Clarke J indicated that if it appeared that there might be some realistic possibility that the purchaser could pay within a realistic timeframe specific performance could be ordered on the understanding that, if despite best endeavours, it proved impossible to complete, the order could be discharged and damages in lieu assessed. If the failure to comply in these circumstances were due to steps taken or not taken by the purchaser after the order was made the purchaser could face penal sanctions for contempt of court provided the purchaser were culpable in this regard.<sup>31</sup>

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<sup>27</sup> *Ibid*, 375.

<sup>28</sup> [2010] EWHC 1832 (Ch), [248].

<sup>29</sup> [2010] IEHC 272.

<sup>30</sup> *Ibid*, 2.7.

<sup>31</sup> *Ibid*, 2.3-2.10.

Clarke J stressed that the onus of proving an impossibility defence rested squarely on the purchaser who “must put before the court all reasonable evidence necessary to allow the court to assess whether there is a true case of impossibility.”<sup>32</sup> He also made it clear “that inability to complete is not the same thing as inability to complete in the way originally intended.”<sup>33</sup> If a purchaser could not get a mortgage to cover the contract price but could raise the money by liquidising other assets (including a family home) and obtaining a smaller mortgage on the property to be purchased, this would not be a case of impossibility.<sup>34</sup> It might well be a case of hardship to which attention will now be turned.

Clarke J made clear that he was making no definitive ruling on the way in which hardship jurisprudence might apply in cases where the purchaser could not complete although he did say that if the only way a purchaser could complete was by disposing of a family home or business assets “[t]here would be an obvious reluctance on the part of a court to require such a course of action.”<sup>35</sup> In one of the three cases before the court it appeared that after completion was due the defendants came into some property by inheritance. It also appeared that, at that time, the defendants were embarked on an extension to their family home and that much of the inheritance was applied towards discharging liabilities to builders working on that extension. Clarke J took the view that the impossibility question had to be judged at the date of the court order, so even if the defendants had made it impossible to pay the purchase price because they had chosen to apply the inheritance to the builders working on their house extension, a decree of specific performance should be refused.<sup>36</sup> However the judge recognised that the answer might be different where the defendants were relying on hardship arising out of something they chose to do between the date for completion and the date of the court order.<sup>37</sup>

### *Northern Ireland*

An impossibility defence was recognised by the High Court (Deeny J) in *Titanic Quarter Ltd v Rowe*,<sup>38</sup> decided just a few weeks after *Aranbel Ltd v Darcy*. In this case the defendant purchaser was a young professional who owned his own dwelling and who contracted to buy an ‘off the plans’ not ‘subject to finance’ apartment as a more expensive residence. His inability to pay was due to becoming unemployed in the recession that accompanied the property crash, which forced him to sell his current dwelling and move back in with his parents. The vendor brought a summary judgment specific performance application and the defendant pleaded impossibility and hardship in his defence. The hardship defence was abandoned and Deeny J said that he did not propose to comment on whether hardship falling

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<sup>32</sup> *Ibid*, 5.2-5.3. In *Wynn Clons Development Ltd v Cooke* [2012] IEHC 385, [34] (HC) Laffoy J agreed with this statement.

<sup>33</sup> *Ibid*, 5.2.

<sup>34</sup> *Ibid*, 2.8, 5.2.

<sup>35</sup> *Ibid*, 5.6.

<sup>36</sup> *Ibid*, 5.4.

<sup>37</sup> *Ibid*, 5.5. This presumably means that where the hardship is something the defendant brings on himself the court might be less inclined to extend mercy. See *Francis v Cowliffe* n. 26 *supra*.

<sup>38</sup> [2010] NICH 14.



short of *Patel v Ali* might suffice.<sup>39</sup> In holding that the impossibility defence was one that might possibly succeed at trial and thus refusing summary judgment, the judge recognised that in principle this defence is available in Northern Ireland.<sup>40</sup> Any defendant wishing to plead inability to pay must file a full and frank affidavit detailing their financial position.<sup>41</sup> In relation to impossibility the approach taken by courts in Northern Ireland would appear to be on all fours with the Republic of Ireland.

### Australia

The defendant's inability to pay the purchase price is fairly well established as a defence in Australia<sup>42</sup> but it is by no means easy to persuade a court that the presumption in favour of specific performance for the vendor should be displaced.<sup>43</sup> The decisions do not always distinguish between impossibility and hardship<sup>44</sup> but whichever way it is put it is clear that the burden rests upon the purchaser to convince the court that (s)he has insufficient access to funds to be able to complete the purchase.<sup>45</sup> The purchaser must make the fullest disclosure of his or her financial position and if there are any gaps in this evidence or it seems that there may be some way that finance can be obtained specific performance is likely to be granted.<sup>46</sup> Australian<sup>47</sup> and New Zealand courts<sup>48</sup> have been much influenced by the following passage in *Spry, The Principles of Equitable Remedies*:<sup>49</sup>

"It is clearly established that the courts will not require that to be done which cannot be done. ...

But this is not to say that the mere anticipation of possible difficulties leads to a refusal of relief. If, on the materials before the Court, performance may or may not be able

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<sup>39</sup> *Ibid*, [11].

<sup>40</sup> *Ibid*, [22].

<sup>41</sup> *Ibid*, [5]. In Northern Ireland this is referred to as a *Rowe* affidavit.

<sup>42</sup> For a thorough discussion of the Australian and New Zealand material on this subject see Alan Dowling, 'Vendors' application for specific performance' (2011) *Conveyancer & Property Lawyer* 208, 214-220.

<sup>43</sup> *Khash Holdings Pty Ltd v Varma* [2005] NSWSC 1215; *Boyarsky v Taylor* [2008] NSWSC 1415; *Rural View Developments P/L v Fastfort P/L & Anor* [2009] QSC 244; *Fairborne Pty Ltd v Strata Store Noosa Pty Ltd* [2009] QSC 250; *Bovino Pty Ltd v The Casey Group Holdings Pty Ltd* [2010] VSC 391; *Lindaning Pty Ltd v Gore* [2011] QSC 266; *Evans & Anor v Robcorp Pty Ltd* [2014] QSC 26.

<sup>44</sup> *Boyarsky v Taylor* *ibid*; *Bovino Pty Ltd v The Casey Group Holdings Pty Ltd* *ibid*.

<sup>45</sup> *Khash Holdings Pty Ltd v Varma* [2005] NSWSC 1215; *Boyarsky v Taylor* [2008] NSWSC 1415; *Bovino Pty Ltd v The Casey Group Holdings Pty Ltd* [2010] VSC 391; *Lindaning Pty Ltd v Gore* [2011] QSC 266; *Evans & Anor v Robcorp Pty Ltd* [2014] QSC 26.

<sup>46</sup> *Rural View Developments P/L v Fastfort P/L & Anor* [2009] QSC 244 where specific performance was granted because it appeared that the defendant might be able to raise funds from within the defendant's corporate group. To similar effect were *Fairborne Pty Ltd v Strata Store Noosa Pty* [2009] QSC 250 and *Bovino Pty Ltd v The Casey Group Holdings Pty Ltd* [2010] VSC 391. See also *Lindaning Pty Ltd v Gore* [2011] QSC 266 where the various gaps in the defendant's evidence included failure to disclose efforts made to raise finance elsewhere. In *Boyarsky v Taylor* [2008] NSWSC 1415 specific performance was granted because it appeared that the purchaser would acquire a share of property jointly owned with his former wife sufficient to enable completion.

<sup>47</sup> *Boyarsky v Taylor* [2008] NSWSC 1415; *Bovino Pty Ltd v The Casey Group Holdings Pty Ltd* [2010] VSC 391.

<sup>48</sup> *Prime Resources Co Ltd v Kumar* [2007] NZHC 439; *Ngai Tahu Property Ltd v Dykstra & Anor*, High Court of New Zealand, Christchurch Registry, 29 October 2009, CIV-2009-409-000809; *Wealth Buy Property Ltd v Stevenson* [2012] NZHC 1609.

<sup>49</sup> (8<sup>th</sup> ed, 2010, Lawbook Co, Sydney), 128-129.

to be completed, the various probabilities will be taken into account in deciding on the order that is most just in all the circumstances. Thus it may be appropriate to order specific performance in the ordinary manner, so that if necessary the defendant may later approach the Court for a modification or variation by reason of subsequent difficulties or may rely upon them in subsequent proceedings in relation to the enforcement of the order. Again, if at the time of the original application there is shown to be a substantial risk that performance will not be possible, it may be most appropriate to make a conditional order or else to adjourn the proceedings until the position becomes more clear. Finally, if a sufficiently great likelihood is shown that performance will not be possible, and especially if no strong considerations of hardship appear on the part of the plaintiff, it may be most just to make no order for specific performance at all, whether absolute or conditional, and so to confine the plaintiff to remedies in damages.”

The context in which this passage has been relied on has tended to be one where the defendant is urging the court not to grant specific performance because if (s)he proved unable to comply with the order (s)he might be imprisoned for contempt of court. This passage answers those fears by pointing out that contempt is a last resort only to be used in clear cases of wilful disobedience of the court order. Where the defendant can show that performance was in the end impossible the original order can be varied or discharged and the vendor left to damages in lieu of specific performance.<sup>50</sup> Since the contempt sanction is unlikely the court does not want to be acceding to defendants’ pleas of impossibility too readily because then performance will be lost when it could with some ‘tough love’ have been secured.

### *New Zealand*

Dr Dowling has asserted that “[b]y far the richest seam of authority on whether the inability of a purchaser to raise the purchase money affords a defence to an action by a vendor for specific performance is to be found in New Zealand.”<sup>51</sup> With this observation it is impossible to disagree. Eleven High Court decisions within the last decade offer the most lucid explanation of the inability to pay defence currently available. All of these cases were summary judgment applications for specific performance where the vendor had to demonstrate that there was no reasonable chance of the purchaser succeeding with the defence if the matter were to come to trial. The following propositions can be advanced with confidence.

First, on some occasions the High Court has not made any effort to distinguish ‘impossibility’ from ‘hardship’.<sup>52</sup> On the face of it this would not appear to exhibit the kind of lucidity praised above but in reality it does helpfully clarify the ‘inability to pay’ defence. In terms of what the purchaser must prove as a defence there is no realistic difference between impossibility and

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<sup>50</sup> See *Waitarere Rise Ltd v Rangī* [2010] NZHC 403; *Great Northern Land Co Ltd v Crowley* [1944] NZHC 1944; *Wealth Buy Property Ltd v Stevenson* [2012] NZHC 1609.

<sup>51</sup> Alan Dowling, ‘Vendors’ application for specific performance’ (2011) *Conveyancer & Property Lawyer* 208, 216.

<sup>52</sup> *Millbrook Country Club Ltd v SFM Investments Ltd* [2009] NZHC 2502; *Bos International (Australia) Ltd v Griffiths*, High Court of New Zealand, Auckland Registry, 1 December 2009, CIV 2009-404-004911.

hardship because the hardship that the purchaser may rely on is the hardship of having to pay when unable to do so, with the accompanying risk of penal sanctions for failure. If hardship is indistinguishable from impossibility doubt must therefore be expressed as to whether a court should refuse specific performance in the scenario raised by Clarke J in *Aranbel Ltd v Darcy*<sup>53</sup> of the purchaser who could pay the purchase price if other assets (including even a family home) were liquidised. It is noteworthy that summary judgment was entered in *Matarangi Beach Estates Ltd v Dawson*<sup>54</sup> because were the trustee of the purchasers' home to agree to sell it (as seemed likely) the purchasers would be able to raise the remainder of the purchase price for two units by mortgage. The role played by hardship in these cases seems to be more a matter of the hardship that would be suffered by the vendor if specific performance were refused. This is explained more fully below. Finally in this context it should be pointed out that in *Prime Resources Co Ltd v Kumar*<sup>55</sup> futility was distinguished from impossibility as something which provided insufficient probability of benefit to the plaintiff to justify making the order.

Secondly, impossibility is an affirmative defence which at trial the purchaser must prove before specific performance can be refused.<sup>56</sup> In *Ngai Tahu Property Ltd v Dykstra*<sup>57</sup> Osborne JA said that “[a]nything less than a very substantial probability that performance will be impossible is insufficient – anticipation of possible difficulties or even a demonstrated difficulty in finding purchase money is unlikely to constitute a defence of impossibility.” In summary judgment cases the vendor must show that there is no reasonable possibility that the purchaser could establish this defence at trial. In *Cable Bay Sections Ltd v Sufan Wu*<sup>58</sup> the purchaser did just enough to defeat summary judgment but ultimately lost the specific performance issue at trial<sup>59</sup> because it appeared that he could obtain funding from third parties in China. Specific performance was granted on a summary judgment application in *Matarangi Beach Estates Ltd v Dawson*<sup>60</sup> because the purchasers' home was available as funding.<sup>61</sup> A failure to produce full evidence of the purchasers' financial circumstances and efforts made to obtain funding resulted in summary judgment being granted in *Gilbert v Manninen*<sup>62</sup> and *Millbrook Country Club Ltd v SFM Investments Ltd*.<sup>63</sup> In *Wealth Buy Property Ltd v Stevenson*<sup>64</sup> summary judgment was granted because it appeared that the purchasers had access to finance and that their circumstances had not changed significantly since the contract was signed. They had concerns about whether they could keep up payments on a mortgage but Abbott AJ said if that proved to be the case they could sell the property. The case was a classic illustration of being able to afford an appreciating asset but not a depreciating one.

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<sup>53</sup> [2010] IEHC 272, 2.8, 5.2.

<sup>54</sup> High Court of New Zealand, Auckland Registry, 12 September 2008, CIV 2008-404-001817.

<sup>55</sup> [2007] NZHC 439, [24], relying on Spry, *Equitable Remedies* (6<sup>th</sup> ed), 127-129.

<sup>56</sup> *Ngai Tahu Property Ltd v Dykstra*, High Court of New Zealand, Christchurch Registry, 28 September 2009, CIV-2009-409-000809, [12]; *New Generation Homes Ltd v SSD Naidu Investment Ltd* [2010] NZHC 1513.

<sup>57</sup> *Ibid*, [12]. This was approved by Gendall AJ in *Waitarere Rise Ltd v Rangī* [2010] NZHC 403, [11].

<sup>58</sup> [2007] NZHC 1543.

<sup>59</sup> [2009] NZHC 656.

<sup>60</sup> New Zealand High Court, Auckland Registry, 12 September 2008, CIV 2008-404-001817.

<sup>61</sup> A similar outcome was reached in *Waitarere Rise Ltd v Rangī* [2010] NZHC 403.

<sup>62</sup> High Court of New Zealand, Wellington Registry, 17 March 2009, CIV 2009-485-220.

<sup>63</sup> [2009] NZHC 2502.

<sup>64</sup> [2012] NZHC 1609.

Perhaps the most useful feature of the New Zealand decisions is the clear rationale they provide for the inability to pay defence. The purchaser bears a heavy burden of proof that payment is impossible because of the sanctity of contract and the hardship that would be experienced by the vendor trying to resell the property on a falling market.<sup>65</sup> There is little express acknowledgement of the considerations favouring specific performance identified by Professor Chambers below<sup>66</sup> but it is implicit in the courts' reasoning that specific performance is the accepted remedy for sale of land contracts and that contracting parties should receive their legitimate expectations unless there is a very good reason why not. Purchasers ought not to be permitted to avoid honouring their contractual commitments unless there has been a very significant change of circumstances since the contract was signed that makes it impossible for them to perform. In so far as this defence is about hardship, it is more a question of the hardship that would be suffered by the vendor if the property had to be resold on a falling market. Hardship to the purchaser is essentially the same as impossibility in that it is hardship to make someone pay what they cannot but this requires that the purchaser prove that payment cannot be made. It is not a hardship to the purchaser to make a specific performance order only to find out later that the purchaser cannot pay because committal for contempt would only be imposed in clear cases of non-payment despite the means to pay.<sup>67</sup> This conception of hardship does not make it seem likely that a court should be particularly reluctant to grant specific performance on the ground that the purchaser would have to sell a family home to be able to raise the purchase price of another property.

### *Discussion*

From the above case law in England, Ireland, Australia and New Zealand it is possible to state the following propositions. First, the purchaser's inability to raise the purchase price and complete a contract for the sale of land may afford a defence to specific performance. Secondly, the basis of this defence has been expressed as the impossibility of the purchaser complying with the order in any reasonable timeframe. As Dr Dowling has pointed out this concept of impossibility should not be confused with futility.<sup>68</sup> Futility, as explained above,<sup>69</sup> means that no benefit would accrue to the vendor from making the order. The vendor may prefer to have a specific performance order to keep the contract alive and subsequently use the vendor's lien for security of the purchase price to engineer a sale when the market has recovered somewhat. Thirdly, impossibility is not the same thing as hardship, although there is obvious overlap in the sense that hardship is caused by making someone do what they cannot. The sanctity of contract dictates that bargains must be kept where they can. A purchaser who can complete a contract by selling a family home should generally be required to do that. Only a case of extreme hardship, such as forcing a large family to move into a one

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<sup>65</sup> *Prime Resources Co Ltd v Kumar* [2007] NZHC 439; *Ngai Tahu Property Ltd v Dykstra*, High Court of New Zealand, Christchurch Registry, 28 September 2009, CIV-2009-409-000809; *Waitarere Rise Ltd v Rangī* [2010] NZHC 403; *Great Northern Land Co Ltd v Crowley* [2010] NZHC 1944.

<sup>66</sup> *Infra* n.88.

<sup>67</sup> *Waitarere Rise Ltd v Rangī* [2010] NZHC 403; *Great Northern Land Co Ltd v Crowley* [2010] NZHC 1944.

<sup>68</sup> Alan Dowling, 'Vendors' application for specific performance' (2011) *Conveyancer & Property Lawyer* 208, 225.

<sup>69</sup> *Supra*, n. 88.

bedroom apartment, could reasonably justify refusing specific performance here. Fourthly, the burden of proof rests on the purchaser to displace the normal rule of Contract Law by full, clear and convincing evidence that (s)he cannot pay. The benefit of the doubt should go to the vendor because committal for contempt will not follow as an immediate consequence of failure to pay.

The 'impecuniosity' defence is a careful and fundamentally conservative response to a serious crisis in the market for real estate. The first instance judgments discussed above go as far as they reasonably can in adjusting traditional principles to address this crisis. They do not lay down new law. The defence cannot be described as an 'impossibility' defence alone. In the example given above of the large family being forced to sell the family home and move into a small apartment it can be seen that specific performance could well be refused even if payment were possible. What is 'impossible' and whether 'hardship' is sufficiently severe to merit leaving the vendor to a remedy in damages is likely to require much case by case adjudication with accompanying problems in terms of uncertainty and costs. This poses the question of whether a better solution to this problem could be found elsewhere. The remainder of this article addresses this question.

### **A Canadian Approach – the *Semelhago* Principle**

In Canada the courts have abandoned the presumption in real estate contracts that specific performance should be awarded unless some good reason is shown why it should not. The Canadian approach derives mostly from the following dictum of Sopinka J in *Semelhago v Paramadevan*:<sup>70</sup>

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

It is no longer appropriate, therefore, to maintain a distinction in the approach to specific performance as between realty and personalty. It cannot be assumed that damages for breach of contract for the purchase and sale of real estate will be an inadequate remedy in all cases. The common law recognised that the distinction might not be valid when the land had no peculiar or special value.

Specific performance should, therefore, not be granted as a matter of course absent evidence that the property is unique to the extent that its substitute would not be readily available.”

Beginning with purchaser applications for specific performance *uniqueness* means that damages would not be an adequate remedy for the vendor's failure to convey the property

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<sup>70</sup> [1996] 2 SCR 415, 428-429. This statement is strictly speaking *obiter* because the appropriateness of specific performance in that case was assumed, not decided. That it accurately states the law in Canada is confirmed both by subsequent decisions of provincial courts and also by the more recent Supreme Court decision in *Southcott Estates Inc v Toronto Catholic District School Board* 2012 SCC 51.

to the purchaser. It is well established that if the purchaser is buying a property purely as an investment then damages will be an adequate remedy.<sup>71</sup> However pure investment purchases have not been treated in the same way as development purchases. In *John E. Dodge Holdings Ltd v 805062 Ontario Ltd*<sup>72</sup> the purchaser was buying land on which it intended to build a hotel complex. Damages were held to be inadequate and specific performance was awarded because the lands were considered to be especially suitable for the purchaser's development due to the attractive price, advantageous financing, advantageous site and zoning characteristics, good visibility and access, proximity to significant market attractions and commercial and residential development activity, and synergies associated with the purchaser's nearby existing hotel. The purchaser bears the burden of proving *uniqueness* but this does not require proof that there is no exact same property as the one the purchaser wished to buy. The question is whether "the property has a quality (or qualities) that makes it especially suitable for the proposed use that cannot be reasonably duplicated elsewhere."<sup>73</sup> However Professor Berryman has pointed out that as developers' interests are economic they usually fail to show the inadequacy of damages,<sup>74</sup> and on that basis damages would probably have been adequate in that case.

The purchaser of a residence will usually have a better chance of demonstrating some reason why specific performance should be granted.<sup>75</sup> But the mere fact that a property is to be used as a residence will not be sufficient of itself to rebut the presumption in favour of damages. In *Serebrennikov v Sawyer's Landing Investments 1 Ltd*<sup>76</sup> the purchaser entered into a contract to purchase a house to be built. The house was not built and the purchaser bought a fairly comparable property in the same neighbourhood for a higher price. Specific performance of the unbuilt property with abatement of the purchase price was refused notwithstanding the efforts made by the purchaser to show substantial differences between the two properties. What was significant for the court was that the substitute home was an acceptable substitute and that damages could compensate for the higher price.<sup>77</sup>

The *Semelhago* principle does not in itself take away from the mutuality principle at the heart of specific performance for the sale of an interest in land. This is the idea that if the purchaser can get specific performance against the vendor then the vendor must be able to get it against the purchaser. Hence it will come as no surprise to find that the *Semelhago* principle similarly requires a vendor seeking specific performance to demonstrate that the property is unique in the sense that damages would be an inadequate remedy.<sup>78</sup> Specific performance was

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<sup>71</sup> *Domovicz v Orsa Investments Ltd* [1993] 15 OR (3d) 661 (OCGD); *John E. Dodge Holdings Ltd v 805062 Ontario Ltd* [2001] 56 OR (3d) 341 (OSCJ), appeal dismissed [2003] 63 OR (3d) 304.

<sup>72</sup> *Ibid.*

<sup>73</sup> *Ibid.*, at [60]. The Court of Appeal could find no error in this approach [2003] 63 OR (3d) 304. See also *Fossum v Visual Developments Ltd* [1997] AJ No 1255 (QB); *1252668 Ontario Inc v Wyndham Street Investments Inc* [1999] 27 RPR (3d) 58 (OSCJ).

<sup>74</sup> Jeffrey Berryman, *The Law of Equitable Remedies* (2<sup>nd</sup> ed, 2013, Irwin Law), 358-364. The Canadian case law discussed in this section of the article is taken from this text.

<sup>75</sup> *John E. Dodge Holdings Ltd v 805062 Ontario Ltd* [2001] 56 OR (3d) 341, [59] (OSCJ); *Chan v Tu* 2006 BCSC 934. In *Ali v 656527 BC Ltd* 2004 BCCA 350, [29] Lowry JA pointed out that a house that was not one unit in a row of similar townhouses or one of many suites in a high rise building would more likely attract specific performance.

<sup>76</sup> 2010 BCC 1276.

<sup>77</sup> To similar effect was *Singh v 862500 Alberta Ltd* 2009 ABQB 293.

<sup>78</sup> *Scully v Cerney* [1996] 27 BCLR (3d) 123 (BCCA); *Taylor v Sturgeon* (1996) 156 NSR (2d) 147 (NSSC); *Westwood Plateau Partnership v WSP Construction Ltd* [1997] 37 BCLR (3d) (BCSC); *Hoover v Mark Minor Homes Inc* [1998]

awarded to vendors in *Scully v Cerney*<sup>79</sup> and *Westwood Plateau Partnership v WSP Construction Ltd*<sup>80</sup> because the contracts were partly executed so far as the purchaser had gone into possession and made substantial improvements to the land. Termination of the contract would have meant that the vendor did not get back the same thing that would have been conveyed had the contract been specifically performed. In *Hoover v Mark Minor Homes Inc*<sup>81</sup> and *Comet Investments Ltd v Northwind Logging Ltd*<sup>82</sup> specific performance was awarded because the land was sufficiently unique that there was a very limited market for its sale.<sup>83</sup> In *Inmet Mining Corp v Homestake Canada Inc*<sup>84</sup> the issue was whether damages should be awarded in lieu of specific performance (assessed at the date of judgment) or at common law (assessed at the date of breach).<sup>85</sup> For the former the property had to be shown to be unique so as to make the case in principle suitable for specific performance.<sup>86</sup> It was held that uniqueness had been demonstrated because the mine produced the lowest grade of gold mined in North America. Professor Berryman has doubted whether the difficulty in selling property is a sufficient reason for awarding specific performance. Rarely will there be no market, the vendor's loss is essentially economic and thus capable of being compensated by damages, and this approach treats the vendor of real estate more favourably than the seller of goods.<sup>87</sup>

### *Discussion*

Mention of investment purchases and the economic interests of vendors prompts consideration of the question whether the *Semelhago* principle might offer a solution to the problem of purchasers' inability to raise the purchase price. It seems that vendors are likely to find it more difficult than purchasers to show that damages are an inadequate remedy for the purchaser's failure to perform and would thus not be successful in obtaining specific performance very often. In the end, however, this is not truly a solution to this problem. It confuses the vendor's difficulty in obtaining an adequate remedy for losing the sale with the purchaser's difficulty in raising the price. A vendor might well find itself in a position similar

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75 OTC 165 (Gen Div); *Comet Investments Ltd v Northwind Logging Ltd* 1998 CanLII 3903 (BCSC); *Moore v Walker* 2001 BCSC 1119; *Inmet Mining Corp v Homestake Canada Inc* 2002 BCSC 61.

<sup>79</sup> *Ibid.*

<sup>80</sup> [1997] 37 BCLR (3d) 82 (BCSC).

<sup>81</sup> (1998) 75 OTC 165 (Gen Div).

<sup>82</sup> 1998 CanLII 3903 (BCSC).

<sup>83</sup> The land was a four acre unit specially created at the vendor's request.

<sup>84</sup> 2002 BCSC 61 (BCSC).

<sup>85</sup> This is puzzling because as Jones and Goodhart have pointed out there is no inflexible rule that common law damages are assessed at the date of breach. This is the general rule but a different date is chosen if this is more suitable. Where a contracting party fairly and reasonably seeks specific performance but this proves to be impracticable at trial then the latter date is chosen as the date for assessing damages. As *Johnson v Agnew* [1980] AC 367 makes clear there is no fundamental difference between the way damages are assessed at common law and under Lord Cairns' Act. See Gareth Jones and William Goodhart, *Specific Performance* (2<sup>nd</sup> ed, 1996, Butterworths, London), 281-282. If the question is asked then why have different bases for awarding damages the answer lies in the fact that damages in substitution for specific performance may be awarded where there would be no claim for common law damages, e.g. the widow's claim in *Beswick v Beswick* [1968] AC 58. See Jones and Goodhart p. 284.

<sup>86</sup> It was impracticable to decree specific performance as the vendor had continued to extract gold from the mine the subject of the contract of sale for four years after contract.

<sup>87</sup> Berryman, *supra* n. 74 at 370-371.

to the vendors' in the *Hoover* and *Comet Investments* cases above but seeking specific performance against a purchaser simply unable to pay.

*Semelhago* should be rejected both as a solution to the 'can't pay' problem and also in general terms for the reasons advanced by Professor Chambers in his sustained attack on the *Semelhago* principle.<sup>88</sup> The fundamental criticism levelled here is that the previous remedial regime had not been shown to be broken and did not need to be fixed. Three unwelcome consequences follow from the Supreme Court's poorly thought through change of direction. First, by treating purchasers differently according to their reasons for wanting to buy the property and whether they could show the inadequacy of damages in those circumstances *Semelhago* introduces unwelcome uncertainty into the law. This was identified above as a problem with the 'impecuniosity' defence. Secondly, it presents purchasers with a difficult decision to make as to whether to seek specific performance. A purchaser who is held to have done so unreasonably may be treated as someone who failed to mitigate their loss. This would result in damages being assessed as the difference between contract price and market price at or shortly after the date of breach. In a rising market this might well make it difficult for the purchaser to afford a comparable property after trial.<sup>89</sup> Thirdly, the abolition of the 'right' to specific performance would have profound consequences for the legal relationship between vendor and purchaser between contract of sale in the first instance and conveyance and payment of the purchase price subsequently. This relationship was described by Jessel MR in *Lysaght v Edwards* as follows:-<sup>90</sup>

"It appears to me that the effect of a contract for sale has been settled for more than two centuries ... [T]he moment you have a valid contract for sale the vendor becomes in equity a trustee for the purchaser of the estate sold, and the beneficial ownership passes to the purchaser, the vendor having the right to the purchase money, a charge or lien on the estate for the security of that purchase-money, and a right to retain possession of the estate until the purchase money is paid, in the absence of express contract as to the time of delivering possession."

Unless the contract provides otherwise the risk of damage by fire passes to the purchaser on contract,<sup>91</sup> and the purchaser's equitable interest takes priority over the vendor's trustee in bankruptcy or liquidator and any third party claiming an interest in the property if the latter has notice of the purchaser's rights.<sup>92</sup> If specific performance is not at least *prima facie* available "then most purchasers do not acquire a beneficial interest in the land being sold, bear no risk of loss that needs to be insured, and have no property rights that can be protected by caveat or registration or enforced against third parties who might acquire competing

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<sup>88</sup> Robert Chambers, 'The Importance of Specific Performance' in Simone Degeling & James Edelman (eds), *Equity in Commercial Law* (Pyremont, Thomson Reuters Australia, 2005), 431.

<sup>89</sup> For discussion of this issue see Donald H. Clark, 'Will that be Performance ... or Cash?: *Semelhago v Paramadevan* and the Notion of Equivalence' (1999) 37 *Alta L. Rev.* 589. See also Orlando V. Da Silva, 'The Supreme Court of Canada's Lost Opportunity: *Semelhago v Paramadevan*' [1997-98] 23 *Queen's LJ* 475, where it is argued *inter alia* that difficulties in valuing the purchaser's 'consumer surplus' interest in purchasing the property support the case for specific performance. Mitigation was the issue before the Supreme Court in *Southcott Estates Inc v Toronto Catholic District School Board* 2012 SCC 51.

<sup>90</sup> (1876) 2 ChD 499, 506.

<sup>91</sup> *Rayner v Preston* (1881) 18 Ch D 1; Jones and Goodhart, *supra* n. 85, at 19-20.

<sup>92</sup> Jones and Goodhart, *ibid*, at 20.



interests in the land.”<sup>93</sup> The most fundamental flaw in the *Semelhago* principle is that it treats specific performance in the context of contracts for the sale of land simply as a remedy for breach of contract when it is much more than this, in truth an integral part of the conveyancing process. Recognition that significant change to the rights and duties of vendors and purchasers is a consequence of abolishing the presumption in favour of specific performance is not a feature of any of these decisions. Therefore it is submitted that there is considerable force in these criticisms.

### Mutuality

Specific performance has been the normal remedy for breach of a contract to sell an interest in land effectively since time immemorial. It is unnecessary in this article to explain in any detail why this is so, not at any rate so far as purchasers are concerned. In broad terms the perception has been that every parcel of land is unique so that damages could not adequately compensate the purchaser for not obtaining ‘her dream house’. Whatever the merits of this position it does not explain why specific performance should be the normal remedy for vendors. The vendor wants money and while the purchase price would exceed damages for breach of contract (calculated as the difference between market price and contract price) this does not explain why compensation for the financial loss of missing out on a sale would not be a sufficient remedy. The reason why the vendor would normally be awarded specific performance is the mutuality principle. If the purchaser can get specific performance against the vendor justice and equity demand that the vendor should be able to get it against the purchaser. ‘Equality is equity’, it is often said.

This ‘affirmative’ notion of mutuality substantially derives from the sixth edition of Sir Edward Fry’s treatise on *Specific Performance*<sup>94</sup> where it is expressed in the following terms:-

“A contract to be specifically enforced by the courts 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.”

There are at least two flaws in this notion of mutuality. First, it asks the question about mutuality at the wrong time, when the contract is entered into. Why should a contract that is not specifically enforceable when it is entered into not become specifically enforceable afterwards if something changes that would have made it specifically enforceable when it was entered into? Secondly, this apparently rigid requirement that a contract must be mutual otherwise it will not be specifically enforceable, is contrary to the way that equitable discretionary principles normally work. Generally one asks if there is some reason, such as an absence of mutuality, why the equitable remedy should not be granted? And this question would be asked at the time the court is asked to grant relief. Professor Ames attacked affirmative mutuality as having so many exceptions that it was almost meaningless.<sup>95</sup>

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<sup>93</sup> Chambers, *supra* n. 88, at 443.

<sup>94</sup> (1858, Philadelphia, T & JW Johnson & Co), at 222-223.

<sup>95</sup> JB Ames, *Lectures on Legal History* (Harvard University Press, 1913), 370.

Another theory of mutuality, negative mutuality, rests upon more rational foundations. Favoured by Spry<sup>96</sup> and Sharpe<sup>97</sup> this theory was judicially endorsed by the Court of Appeal in *Price v Strange*.<sup>98</sup> It is to the effect that mutuality is a discretionary defence to specific performance based on hardship to the defendant. Goff LJ<sup>99</sup> and Buckley LJ<sup>100</sup> both described Fry's statement of the law as unsupported by authority and wrong in principle. Buckley LJ opined that the true principle was that:-<sup>101</sup>

" ... 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 be an adequate remedy to the defendant for any default on the plaintiff's part."

Goff LJ expressed himself more widely as follows:-<sup>102</sup>

" ... want of mutuality raises a question of the court's discretion to be exercised according to everything that has happened up to the decree."

It will be noticed from each of these statements that mutuality is to be assessed at judgment as opposed to contract and that it is a discretionary principle as opposed to the rigid rule Fry propounded. Jones and Goodhart favour the more flexible approach of Goff LJ as more in keeping with the general principles of equitable discretion<sup>103</sup> and to this author that would seem to be correct. As applied to the facts of that case there was no potential hardship to the defendant in relation to the important repairing obligations because these had been carried out, some by the defendant herself.

It is not easy to see how the negative mutuality principle applied in *Price v Strange* would apply in the context of vendors' applications for specific performance of contracts for the sale of land. Therefore the value of this decision and the argument above lies in their undermining of the affirmative mutuality base for specific performance in these cases. In the context of purchasers who cannot pay the purchase price this would mean that case by case adjudication of whether the purchaser can or cannot pay or can only pay if severe hardship is experienced would be unnecessary. This would introduce some welcome certainty into the law and reduce unnecessary legal costs. There would be no injustice for vendors who would be entitled to an adequate damages remedy for the purchasers' breach.<sup>104</sup> Neither would there be any adverse consequences for the conveyancing system as there would be if specific performance ceased to be a purchaser's 'entitlement'. The vendor has a lien on the property for securing the purchase price but this means the vendor has a right to retain possession of the property until paid and where the property is conveyed to the purchaser the vendor's lien is equitable and allows an application to be made to the court for an order for sale of the land and

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<sup>96</sup> ICF Spry, *The Principles of Equitable Remedies* (7<sup>th</sup> ed, Sydney, 2007) , 91.

<sup>97</sup> RJ Sharpe, *Injunctions and Specific Performance*, looseleaf (Aurora, ON, Canada Law Book, 1998), **10.480**.

<sup>98</sup> [1978] Ch 337.

<sup>99</sup> *Ibid*, at 350.

<sup>100</sup> *Ibid*, at 363.

<sup>101</sup> *Ibid*, at 367-368.

<sup>102</sup> *Ibid*, at 354.

<sup>103</sup> Jones and Goodhart, *supra* n. 85, at 39.

<sup>104</sup> *Ibid*, at 33-34, expressing this view.

payment of the outstanding purchase price from the proceeds.<sup>105</sup> In the former the vendor simply terminates the contract and seeks damages for breach. In the latter the vendor's position is like a mortgagee's and so a secured creditor's action may be brought against the purchaser for payment of the price,<sup>106</sup> or alternatively the property is re-conveyed to the vendor.

So the recommendation of this article is that vendors of land should never get specific performance against the purchaser. In making this recommendation it is acknowledged that vendors often have good reason for preferring specific performance to damages. The vendor of a private house, as opposed to a developer constructing a large apartment building, may need to sell their current dwelling to finance the purchase of the house to which the vendor intends to move. If the purchaser capriciously withdrew from the sale damages or forfeiture of deposit might be a poor substitute for specific performance in this context. But it is unlikely that there would be many instances of purchasers exposing themselves to this sort of cost without reason. Inability to pay will be the reason for purchasers not completing in the vast majority of cases and in those cases specific performance for the vendor will be unworkable.

### Conclusion

This article has considered the 'impecuniosity' problem in contracts for the sale of an interest in land in the particular context of apartments sold 'off the plans' without a 'subject to finance' clause. Case law in England, both Irish jurisdictions, Australia and New Zealand, has been discussed and the view expressed that courts in these jurisdictions have hatched a pragmatic and realistic means of dealing with the problem. The approach of the courts in these jurisdictions is conservative and leaves untouched the fundamental principles of specific performance as applied in this area. Being first instance decisions this was all that courts could realistically do. It is not a panacea for the problem of purchasers' inability to pay as they will still be left with a liability to pay damages many of them will be unable to meet. It also comes with some costs in terms of legal uncertainty and legal costs occasioned by the case by case adjudications courts must engage in to decide if payment is 'impossible' or gives rise to excessive hardship. These costs prompted consideration of the question whether there might be a better way of dealing with this problem and two other approaches were then considered.

The first of these, the Canadian *Semelhago* principle, is by far the more radical of the two. This would effectively abolish the presumption in favour of specific performance in all sales of an interest in land, whether the applicant was purchaser or vendor. For the reasons stated by Professor Chambers considerable reservation has to be expressed about the wisdom of this approach. Like 'impecuniosity' it is likely to introduce much uncertainty into this area of the law as courts make case by case decisions on whether a particular property passes the 'uniqueness' test and thus qualifies for specific performance. It ignores the important institutional significance of specific performance in land contracts and the rights and duties of contracting parties that depend on them. To this may be added the objection that this

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<sup>105</sup> See *Irish Conveyancing Law* (3<sup>rd</sup> ed, 2005) by JCW Wylie and Una Woods (Tottel Publishing), at **12.15**.

<sup>106</sup> See Ames, *supra* n. 95, at 379-380.

remedy is established law and that contracting parties will be advised by their lawyers that if the other party does not perform the court will probably make them perform. It could well put purchasers in a difficult position, unsure whether to seek specific performance because of the risk that the court will decide that they should have mitigated loss and settled for damages at the breach stage. In any event *Semelhago* is not necessarily a solution to the inability to pay problem because the vendor may be able to demonstrate a degree of uniqueness in a case where the purchaser still cannot pay. The principle has not been received in any of the other common law jurisdictions covered in this article and there seems no reason to believe that it will catch on any time soon.

Finally the article considered how the mutuality principle might be reformed to provide a solution to inability to pay cases. This would involve preserving the purchaser's right to obtain specific performance against the vendor but abolishing the vendor's right to get specific performance against the purchaser. This can be supported on the basis that specific performance for the vendor rests on a discredited affirmative mutuality principle and that the vendor's interest would be adequately compensated by damages. There would also be no interference with the conveyancing process like those that would follow from *Semelhago* where the purchaser was seeking the remedy. The principal benefit of this approach would lie in the replacement of the case by case adjudication of the purchaser's impecuniosity or hardship with the clear and certain rule that the vendor never gets specific performance. The only arguments against abolishing specific performance for vendors are those from sanctity of contract and reasonable expectation explained above, as well as an intuitive sense that if the purchaser can get it then so should the vendor. But these are weak bases for continuing with a principle that otherwise rests on flawed assumptions and leaves the potentially very uncertain 'impecuniosity' defence as the only escape route for problems spawned by the recession of the first part of the third millennium.

The closing thought of this article is prompted by that 'Great Recession'. The objection is commonly enough made that people purchasing apartments as investments were gamblers who brought all the "melancholy consequences of debt and improvidence"<sup>107</sup> upon themselves, and hence should be shown no sympathy. Whatever truth there may be in this the fact remains that developers and vendors were just as guilty of gambling as were the purchasers. Fashioning a solution to this problem and assessing its implications for the law of specific performance requires taking a balanced approach to the respective positions of both parties to the contract.

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<sup>107</sup> *Re Citro* [1991] Ch 142, at 157 (Nourse LJ).