

SALE OF LAND - REMEDIES

The remedy most associated with Breach of Contract is an Action for Damages.

The remedy most associated with Breach of a Contract for the Sale of Land is an Action for Specific Performance.

Damages and Specific Performance are two of the remedies available to the parties to a Contract for the Sale of Land.

Other remedies are:-

- 1. Rescission
- 2. Rectification
- 3. Injunction
- 4. Declaration or Enforcement of lien
- 5. Forfeiture or Return of Deposit
- 6. Vendor and Purchaser Summons
- 7. Resale

See (a) Megarry & Wade 5th Edition - pp.617-627.

(b) Cheshire & Burns - Modern Law of Real Property (4th Edition) pp. 122-133.

The Plaintiff may in his writ claim inconsistent remedies in the alternative but he must elect before judgment which remedy he wants. The Court has no jurisdiction to grant two inconsistent remedies. He may for eg. claim Rescission as well as Specific Performance. The former involves a declaration that the contract has come to an end the latter that it still subsists.

Sir John Pennycuik put the matter thus:-

“The Vendor may elect between two remedies: (i) he may accept the purchaser’s default as a repudiation of the contract and claim damages at common law or (where available) under an express provision for liquidated damages contained in the contract: or (ii) he may refuse to accept the default as a repudiation and claim a decree of specific performance.”

See (Capital and Suburban Properties Ltd. v Swycher - 1976 1 All ER p.888.

And Buckley LJ echoed similar views in (Johnson v Agnew - 1978 3 All ER p.321).

“The time to make his (the plaintiff's) election is, generally, when he asks for his judgment or order. If, however, he asks to have the contract specifically performed, and the defendant (purchaser) does not pay within the time fixed by the Court, the plaintiff has on such default, a right to elect the remedy he will then pursue, and he need not elect until that time. He, however, is not bound to postpone his election until the defendant (purchaser) has made default. If, at the trial, he knows what remedy he will select in the event of the defendant making default in payment as directed, I see no good reason why he may not in the judgment, or order, have specified what result is to follow such default.”

An election once made with full knowledge of the facts is final. (See Di Castri - Law of Vendor and Purchaser 2nd Edition p.592.

DAMAGES

Subject to what is known as the rule in BAIN V FOTHERGILL the general principle as to Damages for breach of Contract applies. The party not in breach may recover as damages all loss which may be fairly and reasonably considered as arising in the natural course of things from the breach, or such as may be reasonably supposed to have been in the contemplation of both parties at the time of making the contract as the probable result of the breach.
(See HADLEY V BAXENDALE)

DAMAGES RECOVERABLE BY THE VENDOR

Where action is brought by the Vendor the loss caused by the Purchaser's failure to complete will usually be the difference between the purchase price, if any, and the market value of the land at the date of the breach of contract or some other date as the interest of justice may require.

Johnson v Agnew 1979 1 ALL ER P. 896 :-

(Lord Wilberforce)

“In cases where a breach of contract for sale has occurred, and the innocent party reasonably continues to try to have the contract completed, it would to me appear more logical and just rather than tie him to the date of the original breach, to assess damages as at the date when (otherwise than by his default) the contract is lost. Support for this approach is to be found in the cases.”

PURCHASER'S DAMAGES

In the event of breach by the Vendor the rule in BAIN V FOTHERGILL (1873-1874) I.R 7 HLC 158 is that the Purchaser cannot recover damages for loss of his bargain if the

The Purchaser's intention to develop the property was known to the Vendor at the time of the formation of the contract. The Court held that:-

“The plaintiff's damages for breach of contract should be assessed by reference to the profits which both parties contemplated that he would make and which the defendant's breach of contract had prevented him from making; accordingly, the market value of the property should be assessed on the footing that planning permission would be granted and the tree-preservation order would be modified within six months of the plaintiff's return on May 10, 1957, and that the building and alteration would have been completed within eighteen months of May 10, 1957 with the consequence that the damages would be the difference between the market value so estimated and the expenses of building together with the agreed price of the land.”

SPECIFIC PERFORMANCE

Specific Performance as its name implies is an order to secure the performance of the specific thing agreed between the parties as opposed to other remedies which are substitutes for the performance of whatever was agreed eg. damages.

It is an equitable remedy and is only granted in cases where the common law remedy of damages is deemed inadequate.

Land is considered a unique subject matter and specific performance will almost invariably be ordered in respect of the breach of contract concerning same. The remedy is available to the purchaser as well as the vendor although in the case of a breach by the purchaser the vendor would be adequately compensated by damages.

The remedy is discretionary. The exercise of the discretion is governed by settled principles.

In Snell's Principle of Equity (28th Ed.) p. 570 under the heading “Contracts relating to land the following passage appears:-

“The commonest case in which the court specifically enforces a contract is where the contract is for sale of land or for the granting of a lease. Contracts relating to land differ greatly from contracts respecting most goods, because the land may have a peculiar value to the purchaser or lessee. Where the necessary conditions are satisfied, the court will therefore almost invariably decree specific performance of a contract regarding land, even if the interest to be granted is no more than a licence of short duration; and where the contracting parties are within the jurisdiction this willingness to decree specific performance extends even to land out of the jurisdiction. Further, as the court will not interfere in favor of one party and not of the other, the vendor or lessor can maintain an action for specific performance as well as the purchaser or lessee, although in most cases payment of damages would give him a complete remedy.”

In the exercise of its discretion whether or not to grant specific performance the Court will

Fry on Specific Performance (5th Edition) deals with the matter of hardship in the following words:-

“It is a well established doctrine that the Court will not enforce the specific performance of a contract, the result of which would be to impose great hardship on either of the parties to it, and this although the party seeking specific performance may be from the least impropriety of conduct.

(paragraph 417)

The older view was that the question of hardship was generally to be determined at the time when the contract is entered into and that subsequent changes in a parties fortune would be immaterial. (See Fry op cit para. 418)

The modern view is more humane as illustrated by the case of PATEL V ALI (1984) 1 All ER p.978.

The Vendor and her husband were co-owners of a house. They entered into a contract to sell same in 1979. The Vendor was then 23 years old with one child. The husband's bankruptcy caused a long delay in completion for which neither the Vendor nor the Purchaser was to blame. In 1980 the Vendor contracted bone cancer. She subsequently had her second and third child. In the spring of 1981 the husband went to prison and remained there until mid-summer 1982. She became dependent on family and friends living in the neighbourhood of the house contracted to be sold - Removal to another house elsewhere was likely to deprive her of that assistance. An order for specific performance was obtained by the Purchaser.

On appeal it was held that on the facts it would inflict hardship on the Vendor to order specific performance of the contract since that would have the effect of asking her to do what she had never bargained for viz., to complete the sale after more than four years and after all the unforeseeable changes that had taken place during that period.

Before the Plaintiff can obtain Specific Performance he must show that he has performed all his obligations under the contract or has offered to perform them and is ready, willing and able to do so. Specific Performance will be refused where the Plaintiff is in breach of his obligations.

In Australian Hardwoods Pty. Ltd. v Commissioner For Railways (1961) 1 All ER p. 37.

The Privy Council refused specific performance because the appellant was in breach of its own obligations. In his speech Lord Radcliffe said at p.742:-

“The appellant's position is, to say the least, none the stronger if it is judged as an application for specific performance and its claim for this special relief is tested by the equitable principles that apply to such a claim. It might be a difficult task to enumerate all the separate aspects in which the claim is liable to be defeated on grounds of equity. It is sufficient for the decision of this case to identify two of them. A plaintiff who asks the court to enforce by mandatory order in his favour some stipulation of an agreement which itself consists of interdependent undertakings between the plaintiff and the defendant cannot succeed in obtaining such relief if he is at the time in breach of his own obligations. Measures Brothers, Ltd.

In *Steadman v Drinkle* (All ER Reprints - 1914-1918 p.298).

The Privy Council refused to grant Specific Performance because the plaintiff was in breach of a Time Stipulation and the parties had agreed that time was of the Essence.

(See *Burrows Remedies for Torts and Breach of Contract* - p.332 et seq.)

Fry op cit p.195

RESCISSION

1. The contract may provide for rescission on the happening of certain events in which case the parties may exercise their rights on the happening of the stipulated events.
2. In the absence of such a provision where one party's conduct amounts to repudiation of the contract the other party may accept the repudiation i.e. rescind the contract.

Atkin's Court Forms Vol. 34 (1988) paragraph 10 deals with rescission as follows:-

"Where either of the parties is guilty of conduct which amounts to a repudiation of the contract the other party may, as an alternative to affirming the contract and claiming specific performance and any damages arising from the breach or delay in performance, accept the repudiation and proceed to claim damages for breach of contract, both parties being discharged from further performance of the contract."

If the default is that of the purchaser the vendor will be entitled to forfeit the deposit and may sell at the purchaser's peril. If the sale is at a higher price the vendor keeps the profit. If it is at a lower price then the purchaser must make up the difference. (See *Farrand - Contract & Conveyance (3rd Edition)* p.202- 204 .

If it is that of the vendor the purchaser is entitled to recover the deposit and any other money paid thereunder.

(*Johnson v Agnew - 1979 All ER p.883*)

In *Johnson v Agnew* - The purchaser failed to complete. The vendor brought an action claiming specific performance and damages in addition to, or in lieu of specific performance, and alternatively a declaration that the vendors were no longer bound to perform the contract and further relief.

In his speech Lord Wilberforce stated five propositions which he regarded as uncontroversial - pp.889-890:-

1. In this situation it is possible to state at least some uncontroversial propositions of law.

3. Thirdly, if the vendor treats the purchaser as having repudiated the contract and accepts the repudiation, he cannot thereafter seek specific performance. This follows from the fact that the purchaser having repudiated the contract and his repudiation having been accepted, both parties are discharged from further performance.

4. Fourthly, if an order for specific performance is sought and is made, the contract remains in effect and is not merged in the judgment for specific performance. This is clear law, best illustrated by the judgment of Greene MR in *Austins of East Ham Ltd v Macey*, in a passage which deals both with this point and with that next following. I rephrases quotation in full:

“The contract is still there. Until it is got rid of, it remains as a blot on the title, and the position of the vendor, where the purchaser has made default, is that he is entitled, not to annul the contract by aid of the court, but to obtain the normal remedy of a party to a contract which the other party has repudiated. He cannot, in the circumstances, treat it as repudiated except by order of the court and the effect of obtaining such an order is that the contract, which until then existed, is brought to an end. The real position, in my judgment, is that, so far from proceeding to the enforcement of an order for specific performance, the vendor, in such circumstances is choosing a remedy which is alternative to the remedy of proceeding under the order for specific performance. He could attempt to enforce that order and could levy an execution which might prove completely fruitless. Instead of doing that, he elects to ask the court to put an end to the contract, and that is an alternative to an order for enforcing specific performance.”

5. Fifthly, if the order for specific performance is not complied with by the purchaser, the vendor may either apply to the court for enforcement of the order, or may apply to the court to dissolve the order and ask the court to put an end to the contract.

RECTIFICATION

This is an equitable remedy. Where the contention of a party is that the written document does not accurately record the agreement reached by the parties that party may bring an action for rectification.

It will be necessary to satisfy the court that by common mistake the writing failed to record the agreement or that the Defendant was aware of the mistake but failed to point it out and sought to take advantage of it.

The remedy will be lost by long delay or where the property has passed into the hands of a bona fide purchaser who had no notice of the mistake. The court may rectify and grant specific performance in the same action.

(See *Megarry & Wade* op cit p.625-627).

INJUNCTION

The vendor may be restrained from committing acts tending to depreciate the value of the

The vendor may be restrained from disposing of the property to a third person.

“Since the vendor becomes a trustee for the purchaser, he is not entitled to dispose of the property to any person other than the purchaser. Where there is a clear contract for sale, any such intended disposition entitles the purchaser to an injunction to prevent the disposition from being carried into effect, and if it has been validly carried into effect, the purchaser can forthwith sue the vendor for damages on the ground that the vendor has incapacitated himself from performing the contract.”

DECLARATION OR ENFORCEMENT OF LIEN

VENDOR'S LIEN:

As soon as a binding contract for sale has come into existence the beneficial interest in the property passes to the Purchaser but the Vendor has a lien on it for the amount of the unpaid purchase money. He can refuse to convey the property to the Purchaser unless the money is paid and if he does convey without receiving all the money he still has an equitable lien. The lien may be excluded by the express terms of the contract or impliedly. The lien gives no right of possession but enables him to apply to the court for a declaration and for an order for resale of the land in order to pay himself the outstanding balance money due to him.

(See Megarry & Wade 5th Ed. p.914)

(See Hals 4th Ed. Vol. 42 para 193.)

(See Atkins Crt. Forms Vol. 34 para 13).

(See Willaims - The Law of Sale of Land 3rd Ed. p. 244)

PURCHASER'S LIEN

A Purchaser who is not guilty of any misconduct or default has a lien on the property for so much of the purchase money which he has paid for interest and also for costs properly incurred by him in the event of the contract going off.

Forfeiture & Return of Deposit dealt with supra.

VENDOR & PURCHASER SUMMONS

THE VENDOR & PURCHASERS ACT

Section 7 of the said Act provides as follows:-

“A vendor or purchaser of real or leasehold estate in this Island, or their representatives respectively, may at any time or times and from time to time

An application may be made under this section

1. In a Summary manner
2. To a Judge in Chambers

The application is made by Originating Summons.

The existence or validity of the contract is expressly excluded from being dealt with under this section but the Court may deal with inter alia:

1. Validity of Notice
2. Right to Rescind
3. Whether or not a term is misleading.
4. Whether Purchaser entitled to a Right of Way.
5. Matters concerning Interest.
6. Matters concerning covenants.
7. Requisition

(See Hals Vol. 42 paras 230-235).

RESALE

The Contract may contain a term to the effect that upon the purchaser failing to comply with a notice to complete given to him by the vendor, the vendor will have the right to resell the property and recover from the purchaser any loss suffered by him on the resale.

(See Atkin's court Forms Vol 34 para 14).

In relation to the above condition the work makes the following point:-

“Difficult questions may arise on the construction of such conditions as to whether the power of resale has arisen.”