BLUNDELL LECTURES

TOPICAL ISSUES IN PROPERTY LAW

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When contracts for the sale of land go wrong

Pull the ripcord or push on through?

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SPEAKERS

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Lord Justice Newey practised at the Chancery Bar between 1983 and his appointment as a High Court Judge (Chancery Division) at the beginning of 2010. Before taking silk in 2001, he was one of the Junior Counsel to the Crown (Chancery/A Panel) (from 1990) and Junior Counsel to the Charity Commissioners (from 1991). In 2003 he became an (Acting) Deemster of the Isle of Man, and in 2006 he was appointed as a Deputy High Court Judge. He also served as a DTI inspector, inquiring into the affairs of MG Rover and associated companies. As a judge, he was the Chancery Supervising Judge for Wales and the Midland and Western Circuits between 2014 and 2017. He has been a Lord Justice of Appeal since October 2017.

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Nat Duckworth is a barrister at Falcon Chambers whose practice encompasses all aspects of real estate and landlord and tenant work. He was real estate barrister of the year in 2023 and was ranked in Band 1 in both Chambers & Partners and Legal 500 before taking silk in 2025. He is a co-author of *Residential and Commercial Service Charges.*

Like all of us who practice in this field, he has good days and bad days: in *Donovan v Prescott Place Freehold Ltd* [2024] EWCA Civ 298, he persuaded the Court of Appeal that a party found to have committed fraud was entitled to keep hold of the fruits of his fraud; in *AHGR Ltd v Kane* [2023] EWCA Civ 428, he somehow failed to persuade the Court of Appeal that a “live/work” use covenant in a lease required the tenant to carry on at least some form of business activity from the unit.

Although happy to turn his hand to anything property related, he has a particular penchant for cases with an NHS angle to them, mind-twisting rent review provisions, and cases in other jurisdictions, especially in the Caribbean and other warm places.

WHEN CONTRACTS FOR THE SALE OF LAND GO WRONG: PULL THE RIPCORD OR PUSH ON THROUGH?

Guy Newey

1. This lecture is concerned with the ability of a party to a contract for the sale of land to bring it to an end. The principal focus is on the right to serve a notice to complete and the issues (and dangers) which can arise in relation to that.

2. What I am going to do is, first, say something about the origins of the present law; secondly, refer to the key provisions of the Standard Conditions of Sale; thirdly, focus on seven particular areas; fourthly, make a few more general observations; and, finally, comment briefly on a point relating to the quantification of damages.

Origins

3. First, then, origins.

4. Prior to the Judicature Acts of the late nineteenth century, time was "of the essence of the contract" at common law. That meant that, so far as the common law Courts were concerned, any failure to complete on time allowed the innocent party to treat the contract as terminated.

5. Equity adopted a different approach. Time could be of the essence in particular circumstances: if the parties so agreed, because of the nature of the subject matter or if the context showed that the parties intended the contract to be completed within a limited time. The default position, though, was that time was not of the essence in the eyes of equity.

6. With the Judicature Acts, equity prevailed. A provision to that effect was included in the Supreme Court of Judicature Act 1873 and is nowadays to be found in the Law of Property Act 1925. Section 41 of that Act states:

> "Stipulations in a contract, as to time or otherwise, which according to rules of equity are not deemed to be or to have become of the essence of the contract, are also construed and have effect at law in accordance with the same rules."

7. The result in the case of a contract for the sale of land is, of course, that you cannot normally terminate the contract just because your counterparty has failed to complete on the date specified in the contract. One situation in which time may be of the essence even without a notice to complete having been served is where the subject matter of the contract is a wasting asset. That was held to be the

position in *Pips (Leisure Productions) Ltd v Walton*[1], a 1980 decision which involved the sale of a lease with some 15 and a half years to run. Typically, though, the contract will allow for the service of a notice to complete making time of the essence.

The Standard Conditions of Sale

8. That takes me to the Standard Conditions of Sale (5th edition – 2018 revision), which supply the benchmark. They provide for completion to take place by the date specified on the front page, but they state in terms that "time is not of the essence unless a notice to complete has been served". Then, under the heading "Notice to Complete" at condition 6.8, are to be found the clauses central to this lecture. Condition 6.8.1 says:

> "*At any time after the time applicable under condition 6.1.2 on [the] completion date, a party who is ready, able and willing to complete may give the other a notice to complete.*"

Condition 6.8.2 continues:

> "*The parties are to complete the contract within ten working days of giving a notice to complete, excluding the day on which the notice is given. For this purpose, time is of the essence of the contract.*"

9. So you can give a notice to complete provided that you are yourself "ready, able and willing to complete" and, if you do, time will be of the essence. Conditions 7.4 and 7.5 deal with the implications. Essentially, a seller faced with a buyer's failure can rescind the contract, forfeit the deposit and accrued interest, re-sell the property and claim damages while a buyer faced with a seller's failure can rescind the contract and recover his deposit. Further, conditions 7.4.3 and 7.5.3 provide for the rescinding party to retain all his other rights and remedies.

Topics

How far do variations in wording matter?

10. Let me turn to the first of my seven specific topics: variations in the wording of the relevant contractual provisions.

11. The Standard Conditions speak of a party being "ready, able and willing" to complete. In contrast, a good number of the decided cases concerned a provision in the National Conditions of Sale, which used to be used a good deal, allowing a party to serve a notice to complete if "ready and willing" to fulfil outstanding obligations, without the word "able".

[1] (1982) 43 P&CR 415

12. There is no indication that the omission was of any significance. In that connection, the *Pips (Leisure Productions)* case is noteworthy. In that case, vendors had claimed to be "ready and willing" to complete a contract. Sir Robert Megarry V-C noted that "the customary word 'able'" did not appear in the assertion, but he thought that unimportant: he could "not see how anyone could honestly assert that he is 'ready and willing' to do something which he knows that he is unable to do".

Mutuality

13. My second topic is mutuality.

14. What is sauce for the goose is sauce for the gander. If a party makes time of the essence by serving a notice to complete, the counterparty is not the only one affected. Time is of the essence for the server of the notice, too. In *Quadrangle Development and Construction Co Ltd v Jenner*[2], a 1973 case, Russell LJ thought it "really ludicrous to think of an obligation on the one party to complete the contract, time being of the essence without there being necessarily as the other side of the coin a similar obligation upon the party giving the notice" and Buckley LJ said that "when notice is given to complete in this form it has the effect of making time of the essence of the contract as a whole and in respect of both parties to the contract".

"Remaining poised"

15. My third topic can be termed "remaining poised".

16. In the *Quadrangle Development and Construction* case, Russell LJ inferred that a party serving a notice to complete "must continue to be ready and willing at any time during the period to fulfil his part of the contract" and, in the same vein, Buckley LJ said that the relevant contractual condition "clearly proceeds upon the footing that the giver of the notice will be ready and willing to perform his obligations at any time within the 28 days limit within which the other party is bound to complete the contract".

17. However, in *Aero Properties Ltd v Citycrest Properties Ltd*[3] in 2002, Blackburne J, after quoting from the *Quadrangle Development and Construction* case, said:

> "These observations cannot mean that, although valid at the time it was served—assuming the server was then ready and willing to fulfil his outstanding obligations under the contract—the notice ceases to be valid because at some later time the server ceases for some reason to be ready and willing. The validity of the notice must be determined by reference to the position at the time of its

[2] [1974] 1 WLR 68
[3] [2002] 2 P&CR 21

> service. Nor can they mean that the vendor (where it is the vendor who has served the notice) must be and throughout the period of the notice must remain poised to complete at a moment's notice in case the purchaser should suddenly turn up armed with the completion money and calling for completion."

18. Barling J followed the *Aero Properties* decision in 2018 in *Cantt Pak Ltd v Pak Southern China Property Investment Ltd*[4]. He considered that "*validity* of a notice to complete (as distinct from a question whether there is a later breach by the giver of the requirements of a valid notice) falls to be judged at the time the notice is given".

19. *Emmet & Farrand on Title* comments that "[t]he better view has appeared to be that the party who has given notice must remain 'poised', i.e. ready and willing, to complete so far as matters of substance are concerned and also ready and willing to carry out, at a moment's notice any necessary administrative arrangements". However, that understanding of the law does not appear to accord with Blackburne J's analysis in *Aero Properties* and would be liable to give rise to practical difficulties.

Conveyancing matters

20. My fourth topic can be termed "conveyancing matters". The cases have drawn a distinction between, on the one hand, matters of title and, on the other, mere "conveyancing matters" (or "administrative matters") which have to be sorted out by completion but which do not preclude service of a notice to complete.

21. In *Edwards v Marshall-Lee*[5], a 1975 case, a purchaser disputed the validity of a notice to complete on the basis that the vendors had yet to obtain a receipt confirming that Barclays Bank Trust Company had become entitled to receive mortgage money in place of Barclays Bank. Brightman J said that that did not matter. It was enough, he said, that it was "clear that the vendors would be able to produce [the document] on completion".

22. That case can be contrasted with *Cole v Rose*[6], from 1978, where a notice to complete served by vendors was held to be ineffective because the vendors' solicitor had not at the time felt able to give an undertaking that all the charges disclosed by a search would be discharged on completion. However, the judge, Mervyn Davies QC, then sitting as a Deputy High Court Judge but later to become Mervyn Davies J, agreed with the vendors' counsel that a vendor does not have to be literally ready to complete when serving a notice to complete because "a completion statement may have to be prepared

[4] [2018] EWHC 2564 (Ch). See too e.g. *Northstar Land Ltd v Brooks & Brooks* [2005] EWHC 1919.
[5] [1975] 2 EGLR 149
[6] [1978] 3 All ER 1121

and agreed, or arrangements made for the discharge of mortgages, or the time and place of completion agreed".

23. *Naz v Raja*[7], a 1987 decision, reflects that thinking. The fact that a vendor had not yet provided the purchaser with authority to inspect the register was held not to invalidate a notice to complete. Dillon LJ observed that, when serving such a notice, a vendor "[p]lainly … does not need to have fulfilled all the obligations which would have to be fulfilled when completion takes place", explaining:

> "He is not bound to have tendered a transfer of the property or to have evicted persons in occupation who have arranged to leave before completion takes place. He is not bound to have discharged outstanding mortgages which are intended to be discharged in the usual way out of the purchase money on completion."

In a similar way, Dillon LJ saw authority to inspect the register as "something which is required for completion", not as a matter of title.

24. Likewise, David Vaughan QC, sitting as a Deputy High Court Judge in *Herkanaidu v Lambeth*[8] in 1999, regarded discharge of a local land charge as "a conveyancing matter which would be dealt with on completion" rather than a matter going to title and, hence, as consistent with service of a notice to complete. Again, in the *Aero Properties* case Blackburne J rejected a submission that notices to complete served by vendors were invalid because the vendors did not at the time have in their possession charge certificates relating to the head leasehold interest. After citing *Edwards v Marshall-Lee* and *Cole v Rose*, Blackburne J said that these cases "show that a vendor serving notice to complete is entitled to a sufficient period within which to set up what the judge in *Cole v. Rose* later referred to as 'the necessary administrative arrangements respecting completion'". Blackburne J went on:

> "If therefore a purchaser served with a notice to complete under Condition 22 of the National Conditions of Sale wishes to contend that, at the time of service, the vendor was not ready to fulfil his outstanding obligations and therefore that the notice was invalid, he must adduce evidence to show either that the vendor was in breach of some obligation under the contract—for example, a failure to show title or answer a requisition—or that the vendor would not have been able within the time reasonably required to do so to set up the necessary administrative arrangements to enable completion to take place."

[7] The Times, 11 April 1987
[8] The Times, 28 February 2000

25. In the *Cantt Pak* case, Barling J evidently treated a vendor's obligation to give vacant possession on completion as part of the "administrative arrangements to enable completion to take place". On that footing, he asked himself whether, at the time it served a notice to complete, the vendor could have ensured that the occupiers, boilers, containers and scrap metal which were then at the property were removed before the notice expired.

26. Very recently, in *Amaal Ventures Ltd v Eros Ltd*[9], Stephen Jourdan KC, sitting as a Deputy High Court Judge, expressed doubt on that point, observing that it may be difficult or impossible for a buyer to ascertain whether the vendor will be ready and able to achieve vacant possession within the currency of a notice to complete. However, Mr Jourdan considered that he should follow Barling J's decision unless *convinced* that it was wrong, which he was not.

Pending claims

27. My fifth topic is pending claims.

28. My first case relating to that is *Horton v Kurzke*[10], from 1970. There, a vendor served a notice to complete even though a third party was claiming to have a grazing tenancy over part of the land and that claim was being submitted to arbitration under the Agricultural Holdings Act 1948. In due course, the arbitrator found that there was no tenancy, but Goff J nevertheless concluded that the notice to complete was invalid. The vendor was not entitled to say to the purchaser, "You must buy a lawsuit".

29. The next case is *Eagleview Ltd v Worthgate Ltd*[11], a 1998 case where several people had moved into the property and to outward appearances had started to occupy it as squatters. The vendor nonetheless served a notice to complete. Park J ruled against its validity, explaining:

> "If at the relevant date there is an adverse claim to possession of the property, the court will consider that the vendor cannot give vacant possession even if the vendor is disputing the adverse claim. The court does not wait and see whether the adverse claim succeeds or fails and say that, if it fails, the vendor was able to give vacant possession after all."

30. The third case is *Herkanaidu v Lambeth*, the decision of Mr Vaughan which I have already mentioned. There, a vendor was held to have been entitled to serve a notice to complete even if there had been

[9] [2026] EWHC 870 (Ch)
[10] [1971] 1 WLR 769
[11] [1998] EGCS 119

squatters at the property. The vendor was obliged to evict any squatter before completion, but it was still able to serve a notice to complete.

31. The last case on this topic is another involving a sale by Lambeth Council: *Lambeth v Vincent*[12], a decision of Kim Lewison QC, sitting as a Deputy High Court Judge, in 2000. There, Lambeth contracted to sell a leasehold property and served a notice to complete despite the fact that the freeholder had issued proceedings claiming possession on the basis of forfeiture for non-repair. Mr Lewison said that the buyer would have been entitled to object to the notice if the lease had been validly forfeit but that the section 146 notice on which the writ was based was defective, that the writ was therefore bound to fail and that the notice to complete had been validly served. "If", Mr Lewison said, "a claim is obviously unsustainable in law, … a seller is still entitled to make title, notwithstanding the existence of the claim". "It must in each case be a question of degree", Mr Lewison said.

Completion statements

32. My sixth topic is completion statements.

33. In *Schindler v Pigault*[13], from 1975, a vendor had served a notice to complete but completion did not take place. Megarry J concluded that the fact that the vendor had claimed too much in a completion statement did not matter. The purchaser's answer, Megarry J said, was "to attend for completion … and tender whatever he accepted as being the correct sum".

34. The Court of Appeal endorsed that view in 1988 in *Carne v Debono*[14]. Sir Nicolas Browne-Wilkinson V-C regarded the provision of completion statements as "merely a matter of practice and not of law" and so considered that "it is not a repudiation by the vendor if in the completion statement he asks for more than that to which he is entitled". Sir Nicolas left open the possibility that a vendor might be deprived of his ability to rely on a purchaser's failure to tender if the purchaser had been unable to calculate the amount due without information from the vendor.

35. *Clarke Investments Ltd v Pacific Technologies Ltd*[15], a 2013 decision, is to the same effect. There, Floyd LJ noted that, "[a]lthough it is the practice of conveyancing solicitors to prepare and debate the accuracy of completion statements, a failure by the vendor to provide an accurate completion statement is not a basis on which a party is discharged from its obligation to complete".

[12] [2000] 2 EGLR 73
[13] (1975) 30 P&CR 328
[14] [1988] 1 WLR 1107
[15] [2013] EWCA Civ 750, [2013] 2 P&CR 20

Misdescription

36. My seventh topic is misdescription.

37. Four of the cases I am going to mention in this connection involved the future Lord Browne-Wilkinson, variously as counsel, as Browne-Wilkinson J, as Browne-Wilkinson LJ and as Sir Nicolas Browne-Wilkinson V-C. The earliest of them is *Pagebar Properties Ltd v Derby Investment Holdings Ltd*[16], from 1972. In that case, the contract of sale referred to a flat forming part of the property being the subject of a seven-year lease at a rent of £275 per annum. The flat was in fact let to a different tenant for three years at a rent of £350 per annum. Goulding J held that the vendor had not been entitled to serve a notice to complete because it "itself was in breach of an obligation that ought to have been performed by that date: namely, the obligation to disclose all existing tenancies". A provision in the contract stating that "no error, mis-statement or omission in … the special conditions, shall annul the sale" made no difference. In Goulding J's words, "The fact that, at the end of the day, condition 17 might prevent the purchaser from obtaining any relief in respect of the non-disclosure does not … affect that point".

38. That was a case in which Lord Browne-Wilkinson was one of the counsel. In *Prosper Homes Ltd v Hambros Bank Executor and Trustee Co Ltd*[17], a 1979 decision, Browne-Wilkinson J was the judge. A purchaser argued that a notice to complete served by the vendor was invalid on the basis that the vendor had, post-contract, permitted a change in the lessee and user of a shop comprised in the property. The purchaser having accepted the vendor's title, it was not suggested that there was inability to make title. The purchaser instead contended that the vendor had been in a position akin to that of a trustee and was in breach of its obligations as such when the notice to complete was served. Browne-Wilkinson J disagreed. He said:

> "the fact that a vendor may have failed in some respect to carry out his duty between contract and completion in looking after the property does not mean that he is unable or unwilling or unready to complete. He is able, ready and willing to complete …. If any damage has occurred in the interim the vendor would have to make it good in damages. It does not prevent a completion of the contract."

39. Moving on five and a half years, we have *Johns v Deacon*[18], where Browne-Wilkinson LJ gave the leading judgment in the Court of Appeal. In that case, the sale under the terms of the contract was to include a dismountable stable block which had formerly been on the property.

[16] [1972] 1 WLR 1500
[17] (1980) 39 P&CR 395
[18] [1985] 1 WLUK 937

The vendor served a notice to complete, but it was held to be invalid. Browne-Wilkinson LJ said:

> "The question is: Could the vendor serve a valid notice to complete … at a time when he was unable to transfer the stable block which he had contracted to sell? On the face of it, of course, he was not. He could not complete the contract he had entered into."

40. Nor, once again, did a condition stipulating that a misdescription would not annul the sale make any difference. Browne-Wilkinson LJ said:

> "A valid notice to complete could not be served under general condition 19, since the vendor at that stage was not able and willing to complete. He could not complete on the terms that he was to receive the full £100,000, because, by reason of the misdescription provisions, that no longer was the full purchase price payable. The purchase price payable was £100,000 less the compensation. Unless and until that reduction in the purchase price had been agreed, he could neither make title to the whole of the property contracted to be sold nor make title to the lesser amount, being the property less the stable block. Accordingly, he was in no position to say at that stage that he was able and willing to complete either the literal terms of the contract or the contract as affected by general condition 13. It follows that in my judgment his notice to complete was a bad notice and that the purported attempt to rescind on failure to comply with the notice to complete was itself a repudiation of the contract by the vendor."

41. Three and a half years later, Sir Nicolas Browne-Wilkinson V-C heard *Bechal v Kitsford Holdings Ltd*[19]. In that case, the property at issue had been said to be a shop investment with a ground floor area of 385 square feet but the purchaser alleged that the true area was only 240 square feet, some 40% or so smaller. Distinguishing the *Pagebar* case and without any reference to *Johns v Deacon*, Sir Nicolas Browne-Wilkinson held a notice to complete served by the vendor to be valid. He said:

> "On the facts of this case, on 30 November 1987 when they served the notice to complete, could the vendors fulfil the contract they had entered into? In my judgment they plainly could. The area sold is merely part of the description of the property and not a matter which would have featured in any way in the conveyance."

[19] [1989] 1 WLR 105

"If", Sir Nicolas said, "somebody had raised the question that there was a misdescription of its area, [the vendors] might have been required to accept an abatement in the purchase price referable to the reduction in the area stated", "[b]ut in any event they were able and willing to fulfil that contract".

42. Carnwath J attempted to reconcile *Johns v Deacon* and *Bechal v Kitsford Holdings Ltd* in 1997 in *Clowes Developments (UK) Ltd v Mulchinock*[20]. He said of the former decision:

> "The language of that judgment could perhaps be taken as implying that, whenever there is a potential compensation claim, there cannot be a valid notice to complete until that compensation has been settled. I doubt, however, if it was intended to express the matter so widely. On the facts of that case, it was not simply a matter of misdescription of the subject matter of the sale. The vendor was unable to convey that which he had contracted to sell, which included the stable block. Thus, if one asks the question posed by Sir Nicolas Browne-Wilkinson V.-C. in *Bechal v. Kitsford Holdings Ltd.* [1989] 1 W.L.R. 105, 108, 'Could the vendors carry out their contract?' the answer was 'No, they could not.'"

That being so, Carnwath J did not see the two decisions as "necessarily inconsistent".

43. *Emmet & Farrand on Title* criticises the supposed reconciliation in characteristically strident terms. It suggests that the passage I have quoted from Carnwath J's judgment "simply shows that his Lordship failed to appreciate the meaning of 'misdescription'" and that it is "oxymoronic".

44. After referring to *Emmet & Farrand*'s comments on *Johns v Deacon*, *Bechal v Kitsford Holdings Ltd* and *Clowes Developments (UK) Ltd v Mulchinock*, Ramsey J said in *Donnelly v Weybridge Construction Ltd*[21] in 2006:

> "In principle, it seems to me that where there is a misdescription which would reduce the purchase price, the claim for an abatement does affect the ability of a vendor to be ready and willing to complete. It therefore impeaches the notice to complete."

On that basis, Ramsey J considered the notice to complete with which he was concerned to be invalid. There had been substantial misdescriptions and, even if the misdescriptions had justified only abatement, the abatements had not been agreed.

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[20] [1998] 1 WLR 42
[21] [2006] EWHC 2678 (TCC)

45. Mr Jourdan entered this fray in the recent *Amaal* case. He took the view that *Bechal v Kitsford Holdings Ltd* was to be understood as a case about the effect of a *misrepresentation* on a notice to complete. He went on, though, to say this:

> "But if that is wrong, and it is to be understood as deciding that a seller can serve a notice to complete when he cannot convey the physical property he has promised to convey, I regard it as inconsistent with *Johns*, which is a decision of the Court of Appeal and binding on me."

46. Mr Jourdan added that he agreed with the remarks of Ramsey J in the *Donnelly* case and to say that he found the distinction which Carnwath J sought to draw between *Johns v Deacon* and *Bechal v Kitsford Holdings Ltd* in the *Clowes Developments* case "difficult … to understand".

47. I am not aware of any appeal against Mr Jourdan's decision, but, lest there be one, I will not express any views on the issue myself.

More general observations

48. A few more general observations.

49. It will sometimes – though rarely – be the case that time is of the essence of a contract for the sale of land even without a notice to complete. Where, though, that is not the case, the ability to serve such a notice, and so either to achieve completion or to bring the contract to an end, is obviously of great importance.

50. However, the power to serve a notice to complete should be exercised with great caution. You would be very unwise to give such a notice without considering carefully whether you *are* "ready, able and willing" to complete and also whether you *will be* when the notice expires. Extreme care should be taken if there is ongoing litigation relating to the property.

51. As can be seen from the case law, working out whether a party to a contract is "ready, able and willing" to complete is not always easy. It does not help that some quite fine distinctions are drawn and that there are question marks over the interpretation and correctness of certain decisions.

52. One area of risk relates to the period between service of a notice to complete and its expiry. The server has to be "ready, able and willing" to complete at both points, but there may be only so much that can be done to exclude the possibility of, say, squatters arriving, the landlord claiming to forfeit or an occupier deciding not to leave after all. It might be prudent to think about whether anything can be done to reduce the

dangers. In an appropriate case, it could, for example, be sensible to employ a security guard to safeguard the property.

53. A client who finds that his counterparty who is unable or unwilling to proceed to completion may be keen for a notice to complete to be served as a matter of urgency, and the very familiarity of the phrase "ready, able and willing" may lead you to assume that that is the right course of action. You should, though, be alive to the risk of acting in haste and repenting at leisure.

An aspect of quantification of damages

54. Lastly, a very brief word on an aspect of the quantification of damages touched on last year in *Olam Global Agri Pte Ltd v Holbud Ltd*[22] and going back to the decision of Teare J in *Flame SA v Glory Wealth Shipping Pte Ltd*[23]. The *Flame* case did not involve a sale of land but a "contract of affreightment" under which 18 cargoes of coal were to be carried over a three-year period. The first four shipments took place, but the charterers then repudiated the contract. The owners accepted the repudiation and claimed damages, but the charterers contended that the owners would be entitled to substantial damages only if they could prove that they would have been able to perform their side of the contract. Teare J agreed. He said:

> "The assessment of loss necessarily requires a hypothetical exercise to be undertaken, namely, an assessment of what would have happened had there been no repudiation. That enables the true value of the rights which have been lost to be assessed. The innocent party is claiming damages and therefore the burden lies on that party to prove its loss. That requires it to show that, had there been no repudiation, the innocent party would have been able to perform his obligations under the contract. If the court were to assume that the innocent party would have been able to perform, rather than to consider what was likely to have happened in the event that there had been no repudiation, the court might well put the innocent party in a better position than he would have been in had the contract been performed."

55. That decision has its detractors[24], but, for what it is worth, there seems to me to be a good deal to be said for it and, if it is correct, it has implications for contract law generally, including contracts for the sale of land.

[22] [2025] EWHC 3187 (Comm)
[23] [2013] EWHC 3153 (Comm), [2014] QB 1080
[24] See e.g. (2015) 131 LQR 29 (Peel); contrast [2015] JBL 530 (McLauchlan).

When contracts for the sale of land go wrong: Pull the ripcord or push on through? Part II: Specific Performance

1. In Part II of this lecture, I will focus on issues that arise when parties to property contracts do *not* wish to extricate themselves from the contract and instead wish to compel the other party to complete it.

Specific performance – the general rule in relation to property contracts

2. The common law does not provide a mechanism to compel reluctant parties to perform their outstanding obligations, so equity fills that void through the remedy of specific performance. Unlike common law remedies, specific performance is a discretionary remedy, albeit one that falls to be exercised by reference to certain well-established principles. In the law of contract, the general rule is that specific performance is an exceptional remedy: parties should be left to vindicate their common law right to damages unless they can show that damages would be an inadequate remedy for the breach.[1]

3. But by longstanding tradition, land is treated differently. Damages for breach of contracts for the sale or grant of an interest in land have traditionally not been regarded as an adequate remedy on the basis that "*each piece of land is unique*"[2] and because the recoverable damages for breach of a contract for the sale of land at its full market value will usually be "*negligible*".[3] Property contracts will therefore "*normally be specifically enforced*".[4]

4. Although most of the cases from which this general principle is derived involve claims brought by a disgruntled purchaser against a defaulting vendor, it also applies where it is the vendor who seeks to enforce the contract.[5] It is often said,

[1] See *Cooperative Insurance Society Ltd v Argyll (Holdings) Ltd* [1998] AC 1, at 11F (per Lord Hoffmann).
[2] See *Mugalsingh v Juman* [2015] UKPC 38 at [33] per Lord Neuberger. See also *Cavendish Square Holding BV v Makdessi* [2015] UKSC 67 at [30] per Lord Neuberger and Lord Sumption.
[3] See *Sudbrook v Eggleton* [1983] 1 AC 444, at 478 per Lord Diplock.
[4] See *AMEC Properties v. Planning Research and Systems* [1992] 1 E.G.L.R 70, at 72L-M (per Mann LJ), in a passage approved by the Privy Council in *Mugalsingh* at [33]. The general rule applies even where the purchaser does not intend to occupy the property itself and instead intends to sell it on at a profit: see *Pianta v National Finance & Trustees Ltd* (1964) 34 ALJR 232.
[5] See *Lewis v Lechmere* (1721) 10 Mod 503, at 505; *Cogent v Gibson* (1864) 33 Beav 557, 55 ER 485 and *Nives v Nives* (1880) 15 Ch. D. 649.

somewhat graphically, that the remedy of specific performance enables a vendor to "*thrust the property down the throat of a purchaser*".[6]

5. Judges and textbook writers alike have thus repeatedly told us that, irrespective of the identity of the enforcing party, if the subject matter of the contract is land, the remedy of specific performance is available "*as a matter of course".*[7]

6. So, is that all there is to it – could this be the shortest lecture given in the fifty-one-year history of the Blundell Memorial Lectures?

7. Sadly, not. Beneath that beguilingly simple statement of principle hides a more complicated reality which needs to be confronted by those advising on and litigating about property contracts. The thesis of this lecture is that the oft-repeated statement that specific performance is available as a matter of course has tended to lead practitioners, and occasionally even judges, to be a little too quick to conclude that a given property contract is specifically enforceable, and has fostered a tendency to gloss over the analysis that must be undertaken before that conclusion can properly be reached on the facts. But there is, I suggest, no need for us to 'throw the baby out with the bathwater' and follow other jurisdictions, such as Canada, in recasting time-honoured equitable principles in search of a better fit with property contracts: properly understood and scrupulously applied, our existing principles offer adequate flexibility to enable practitioners, working with suitable facts, to persuade the Court to decline to grant specific performance of a property contract and award damages instead.

Are damages really an inadequate remedy for breach of a property contract?

8. The general rule that damages are not normally regarded as an adequate remedy for breach of a property contract is not without its critics, and it has attracted particular scrutiny in the context of claims for specific performance brought by the vendor of a property interest.

9. The unique qualities of a given property will no doubt loom large in the mind of a purchaser who has just contracted to buy it, but they will be rather less significant to a vendor who has just sold it and is now only interested in the money that it will fetch. Money is fungible – there is nothing unique about the money sitting in the purchaser's bank account pending completion of the contract. Given that the

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[6] See para 14-113 of *Megarry & Wade* and para 17-011 of *Snell*, where the editors both refer to the judgment of Lindley LJ in *Hope v Walter* [1900] 1 Ch 257 CA.

[7] See, for example, *Patel v Ali* [1984] Ch 283, at 286H per Goulding J ("*…in the ordinary case of a sale of land or buildings, the court normally grants it as of course and withholds it only on proof of special facts*"). See also *Megarry & Wade*, para 14-113.

vendor's interest is purely financial, it is not immediately obvious why damages should be regarded as an inadequate remedy, or why specific performance of the obligation to pay over the completion monies should be regarded as the only adequate form of redress for the vendor.

10. As Trower J recently noted in *Southgate v Graham* [2024] EWHC 1692 (Ch), a case concerning specific performance of a contract to repay cryptocurrency tokens, where the Claimant's interest in the contract is purely financial, the real difference between an order for specific performance and an award of damages is that breach of the former exposes the defendant to the risk of contempt proceedings.[8] No doubt that is an appealing extra turn of the thumbscrew from the enforcing party's point of view. But if the ability to bring contempt proceedings against the paying party is not treated as an essential ingredient of full redress for other forms of contract, why should the position be any different where the contract relates to real property?

11. It was no doubt considerations of this kind which prompted Goulding J to describe the principle that property contracts will normally be specifically enforced as an "*awkward exception*" to the rule that specific performance will not be ordered where damages at law would be an adequate remedy: see *Anders Utkilens Rederi A/S v O/Y Lovisa Stevedoring Co A/B* [1985] 2 All E.R. 669 at 673. The somewhat dubious rationale for treating damages as an inadequate remedy where it is the vendor who seeks specific performance has also been noted by a number of the leading textbook writers.[9]

12. Various attempts have been made to resolve this apparent anomaly (none of them particularly compelling to my mind):

    (i) The extension of the general rule to vendors has sometimes been justified by reference to the doctrine of 'affirmative mutuality':[10] if specific performance is generally available to purchasers, it must likewise be available to vendors. But it is no longer the case that specific performance is only available if it could be ordered for and against each of the parties to the contract.[11] Under the modern, much diminished, principle of mutuality, the fact that a defendant against whom a decree of specific performance is made might find that they could not obtain an equivalent order to compel

[8] At [35].
[9] See *Chitty*, at para 31-19, *Treitel* at para 21-020 and *Snell* at para 17-011.
[10] See p64 of *Spry* and para 21-021 of *Treitel*.
[11] See *Price v Stange* [1978] Ch. 337.

the claimant to perform their remaining obligations under the contract is a factor (a form of 'hardship') to be taken into account by the Court in the exercise of its discretion. Given that mutuality is no longer a jurisdictional requirement, it is difficult to see what real relevance it has to the question of whether damages are generally an adequate remedy for vendors of property interests.

(ii) The extension of the rule has also been supported on the basis that vendors will often prefer to avoid the hassle and risk of selling the property again and would rather not run the risk of a sudden fall in its value.[12] But these are not problems peculiar to vendors of property – the same would be true of vendors of shares, commodities and just about anything else. A vendor of shares in a company runs an even greater risk of sudden fluctuations in value than the vendor of property, yet specific performance of contracts for the sale of shares which are readily available in the market is generally not ordered, in favour of either party, on the basis that damages are an adequate remedy.[13]

(iii) A still further basis for supporting the rule as it applies to vendors is that it upholds the efficiency and integrity of the property transaction system because it gives vendors who are in a chain of property contracts the means to ensure that their own purchaser's default does not cause the chain to collapse.[14] However, even accepting the starting premise that a claim for specific performance could be prosecuted to completion before the chain collapses,[15] the fact that in *some* cases the vendor is also a purchaser within a chain does not seem to me to provide a sound basis for treating damages as an inadequate remedy for vendors in property contracts across the board.

13. The general rule about specific performance of property contracts has also been criticised in its application to claims brought by purchasers. In *Semelhago v Paramadevan* [1996] 2 S.C.R. 415, the Supreme Court of Canada effected a notable shift away from the principles which apply in this jurisdiction. On the question of adequacy of damages, Sopinka J, speaking for six of the seven members of the Court, said this (at [21-22]):

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[12] See para 21-021 of *Treitel*, para 31-019 of *Chitty* and para14-113 of *Megarry & Wade.*
[13] See, for example, *Cud v Rutter* (1720) 5 Vin Abr. 538 and *Re Shwabacher* (1908) LT 127.
[14] See Paul S. Davies "*Being Specific About Specific Performance"*, Conv. 2018, 4, 324-338.
[15] A claim for specific performance can be brought as part of a 'vendor and purchaser summons' under section 49(1) of the Law of Property Act 1925 and might therefore be determined in relatively short order: see, for example, *CBRS Estates Ltd v Foreman Homes Ltd* [2025] EWHC 3038 (Ch).

"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."

14. The alternative approach promoted in *Semelhago* is to treat property contracts in the same way as other contracts; damages are taken to be an adequate remedy unless the claimant dislodges that starting position by adducing evidence that the property in question is special, not interchangeable. Although the dicta in *Semelhago* were strictly speaking *obiter*,[16] it was reaffirmed and applied in *Southcott v Toronto Catholic School Board* [2012] 2 S.C.R. 675 and the *Semelhago* approach remains good law in Canada, albeit that it has been subject to criticism on both sides of the Atlantic.[17] Reading between the lines of *Southcott* decision, the Supreme Court's adoption of the *Semelhago* approach was in part based on Justice Sopinka's views about the uniqueness or otherwise of real property and in part on the desire to ensure that parties to property contracts cannot sidestep the common law duty to mitigate losses by the simple expedient of applying for specific performance.[18]

15. A rebellion against the general rule applicable in this jurisdiction has also been mounted in New Zealand,[19] and Singapore has flirted with the same idea.[20]

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[16] In *Semelhago*, both parties had indicated that they were content to proceed on the basis that the purchaser under the property contract in question was entitled to specific performance

[17] See "*Contracts for the Sale and Purchase of Land: Purchasers' Remedies*" (Alberta Law Reform Institute, Final Report No 97, October 2009) ("Final Report No 97"); R. Chambers "*The Importance of Specific Performance"*, in S. Degeling and J. Edelman (eds), Equity in Commercial Law (NSW: Lawbook Co, 2004), 437–441 and Paul S Davies "*Being Specific About Specific Performance"*, Conv. 2018, 4, 324-338.

[18] In *Southcott*, it was held that an investment company could and should have acquired an alternative property following the vendor's failure to complete and that it would be wrong to grant specific performance and allow the purchaser to share in the significant increase in value of the property which had occurred between the date of the contract and the trial.

[19] See *Landco Albany Ltd v Fu Hao Construction Ltd* [2006] 2 N.Z.L.R. 174 in which the Court of Appeal concluded, at [43-44], that a purchaser had no prospect of obtaining specific performance because "…the respondent's interest in the land is plainly commercial rather than private or sentimental. It must have entered into the transaction in order to make a profit and in those circumstances damages would be an adequate remedy."

[20] In *Singapore EC Investment Holding Pte Ltd v Ridout Residence Pte Ltd* [2011] SGCA 50, [2012] 1 S.L.R. 32, the judge at first instance had followed the examples set in *Semelhago* and *Landco Albany* by declining to award specific performance on grounds that included the fact that general rule should not be applied in favour of a purchaser acquiring the property "for investment/financial gain". The Court of Appeal said (at [121]) that they did not find it necessary to decide whether Singapore should adopt the new approach favoured in Canada and New Zealand because specific performance had in any event been correctly refused on discretionary grounds.

Some of the leading textbook writers have invited debate about whether we should make the same adjustment in this jurisdiction.[21]

16. My own view is that there is no need to invite our own Supreme Court[22] to take the leap suggested by the *Semelhago* decision. There is, I suggest, already sufficient flexibility in our existing equitable principles to enable the Court, on the right facts, to depart from the general rule that damages are not an adequate remedy in property contract cases.

17. The statements in the authorities that damages are "*normally*" or "*traditionally*" regarded as an inadequate remedy for parties to property contracts should not be elevated from a useful rule of thumb to an inflexible rule. Mann LJ's statement of the general rule in *AMEC* is qualified, in the very next sentence, by his recognition that it is subject to exceptions. The decision in *Hope v Walter* [1900] 1 Ch 257 CA, which spawned the vivid image of a vendor thrusting a property down the purchaser's throat, was a case in which the Court *declined* to order specific performance in favour of the vendor. In *Adderley v Dixon* (1824) 1 Sim & St 607; 57 ER 239, a case cited in all the leading textbooks as authority for the general rule, the Vice Chancellor (Sir John Leach), explained the general rule in this way:

> "*Courts of Equity decree the specific performance of contracts, not upon any distinction between realty and personalty, but because damages at law may not, in the particular case, afford a complete remedy. Thus a Court of Equity decrees performance of a contract for land, not because of the real nature of the land, but because damages at law, which must be calculated upon the general money value of land, may not be a complete remedy to the purchaser, to whom the land may have a peculiar and special value*" (all my emphasis).

18. That language seems to me to recognise that whether damages are an adequate remedy for a party to a property contract is a fact-sensitive question that will not always fall to be answered in the negative.

19. True it is that the example of an exception to the general rule given by Mann LJ in *AMEC* is a case where *discretionary* factors militate against a decree of specific performance, and it was similarly on 'hardship' grounds that specific

[21] See para 17-008 of *Snell* and para 31-019 of *Chitty*.
[22] Given that the general rule in relation to property contracts is settled at Court of Appeal level, it would take a decision from the Supreme Court to effect a *Semelhago*-type shift.

performance was refused in *Hope v Walter*. But it seems to me that none of the authoritative statements of the general rule exclude the possibility that, in a given case, damages may be shown to be an adequate remedy for the purchaser or the vendor, as the case may be.

20. One would not expect the position to be otherwise. Equity is a branch of the law that abjures rigid rules and exists to ensure that a fair result can be achieved in any given case. In *Coventry v Lawrence* [2014] UKSC 13, the Supreme Court notably chastised the lower courts for applying the *Shelfer* principles on the closely related question of when damages should be awarded in lieu of an injunction "slavishly" and in a "mechanical" way,[23] pointing out that in an equitable jurisdiction, principles identified in the authorities must not become a fetter on the exercise of the Court's discretion.[24] Recognition of the possibility of exceptions to the general principle about the adequacy of damages in claims for specific performance of property contracts is therefore necessary if we are to pay proper respect to its equitable origin and avoid falling into the same trap.

21. The true position is, I suggest, well put in *Hayton, Macfarlane & Mitchell on Equity and Trusts* (at para 19-059):

> *"Ultimately, however, it is important to bear in mind that the adequacy of damages, not the categorisation of the contract or subject property, is what matters. Contracts that are usually not specifically enforceable such as for the sale of shares in which there is a ready market, i.e. those of a quoted public company, may exceptionally be specifically enforced if it can be shown on the specific facts that damages are inadequate.*"

22. Vendors' claims for specific performance are likely to offer the most fertile ground for those seeking a departure from the general rule about the adequacy of damages in property contract cases.

23. I do not, however, suggest that damages will always, or even usually, be an adequate remedy for vendors. On the facts of a given case, the vendor may be able to show that damages would not be an adequate remedy because retaining the property pending resale would be onerous (e.g. where the property requires significant management time) or risky (e.g. where litigation with a disgruntled

[23] See [119] per Lord Neuberger, [161] per Lord Sumption and [171] per Lord Clark.
[24] See Lord Neuberger at [123].

neighbour is in prospect) or both (e.g. where there are Building Safety Act 2022 issues); or because it would disrupt other transactions in the same chain or cause a loss of amenity or some other prejudice which is not easily measured in damages. If the contract is for the grant of a lease where the identity and covenant strength of the tenant are important matters, the vendor/landlord may be able to satisfy the Court that it should not have to accept damages and look for a different tenant.

24. It may therefore be that many vendors will ultimately be able to show that damages are not an adequate remedy for the breach. But purchasers seeking to resist an order for specific performance should, I suggest, still lay down the gauntlet to the vendor in the first instance, rather than meekly submitting to the general rule and, if the vendor's response is not compelling, they should be brave and contest the adequacy of damages at trial.

25. I accept that the task faced by a vendor seeking to displace the general rule that a purchaser should be granted specific performance is an imposing one. But equally, the possibility of successfully doing so should not be dismissed out of hand. Consider this: an investor enters into an 'off plan' contract or sub-contract to purchase a flat in a block, or a house on a housing estate, with a view to taking advantage of the early purchaser discount and then selling the property on at a profit when the works are completed. Suppose that by the time of the trial of the purchaser's claim for specific performance there are still flats for sale in the block (on the same floor), or houses on the estate (in the same vicinity), on the market which could be acquired by the purchaser in substitution for the properties specified in the contract. On these facts, the proposition that the flat (or the house) for which the purchaser had contracted is "unique" has an air of unreality about it.

26. In *Cavendish Square Holding BV v Makdessi* [2015] UKSC 67, Lord Neuberger and Lord Sumption said that, in the context of adequacy of damages, "*the minimum condition for an order of specific performance is that the innocent party should have a legitimate interest extending beyond pecuniary compensation for the breach*".[25] In adopting that language (now familiar in the context of contractual penalties), the Supreme Court were not purposing to alter the test applicable in specific performance cases; this is just (at least as it seems to me) another way of expressing the same basic idea. But it is a helpful formulation in the context of my earlier example: can a purchaser of a property who intends to

[25] At [30].

flip it for profit and who could buy a materially identical substitute property at any time credibly contend that it has a *legitimate interest* in insisting on performance of the contract? On these facts, a vendor could surely maintain with some conviction that the purchaser has no such interest and that equity should not intercede in favour of a pedantic purchaser.

27. Although the suggestion in *Semelhago* that properties should generally be treated as interchangeable is surely a step too far, the possibility that it might be true of certain properties should not be overlooked.

28. The difficulty faced by a party seeking to elude specific performance of a property contract is, I suggest, not so much that the applicable equitable principles represent an insuperable obstacle, but rather that there is an element of judicial muscle-memory linked to the general rule about adequacy of damages. The challenge for such parties will be to ensure that the judge fully stress-tests the proposition that adherence to the general rule is appropriate on the facts of the particular case.

Discretionary factors

29. If the defendant fails to dislodge the general rule about the adequacy of damages, all is not necessarily lost; they may be able to retrieve the position by relying on one or more of the recognised discretionary factors which may defeat a claim for performance. In the textbooks, these factors tend to be grouped into broad categories ('hardship', 'impossibility', and so on). In practice, however, the grounds put forward by parties seeking to resist a decree of specific performance of property contracts often straddle two or more of those broad categories, and I have therefore chosen to examine certain commonly encountered grounds in the analysis below.

30. The grounds discussed below do not, either individually or collectively, represent a defendant's panacea. But here again, my essential thesis is that the general rule that property contracts are normally specifically enforced may lead practitioners to overlook or discount these grounds and that, with the right facts, they may repay a closer look.

(1) Don't order specific performance – I don't have the money!

31. The argument that equity ought not to specifically enforce a contract because the purchaser lacks the funds that they promised to pay over to the vendor when entering into the contract is, at first blush, a distinctly unpromising one: why

should equity intervene to rescue a purchaser from the consequences of being unable to do the very thing promised at the outset?

32. It is now settled that defendants will only avoid specific performance on the grounds of 'hardship' if they can point to "*extraordinary and persuasive circumstances*",[26] and, perhaps unsurprisingly, the argument that specific performance should not be ordered because the defendant would have difficulty raising the funds needed to complete has generally been found not to meet that high threshold.[27]

33. But the decided cases show that a plea of impecuniosity may gain greater traction with the Court if the argument is reframed as one based on 'impossibility' or 'futility'. *Matila Ltd v Lisheen Properties Ltd* [2010] EWHC 1832 is a case in point. In that case, a purchaser had entered into contracts for the purchase of all 25 apartments and all three commercial units on a development which was in the process of construction. By the time the works were finished and the purchaser was required to complete the contracts, the Credit Crunch had intervened and the purchaser's funding had fallen through. When the vendors sued for specific performance, the purchaser relied, amongst other things, on its inability to raise the required funds to complete the purchase and argued that specific performance should be refused on the grounds of 'hardship' or 'impossibility'.

34. The argument based on 'hardship' got nowhere. But the argument based on 'impossibility' very nearly carried the day. HHJ Stephen Davies said that it was well established that the Court would decline to order specific performance if it was clear that the defendant would not be able to comply with the order, not least because the defendant ran the risk of committal for contempt in the event of non-compliance.[28] The judge also said that the decision in *North East Lincolnshire BC v Millennium Park (Grimsby) Ltd* [2002] EWCA Civ 1719 was authority for the proposition that specific performance would not be decreed where the defendant's financial position meant that it would be impossible (as distinct from difficult or unpalatable) to comply.[29] Although that was a case about specific performance of an obligation to carry out works, the judge treated this principle as being applicable to contracts for the purchase of real property.

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[26] See *Patel v Ali* [1984] Ch. 283.
[27] See *Patel v Ali*, supra, per Goulding J ("Certainly, mere pecuniary difficulties, whether of purchaser or of vendor, afford no excuse from performance of a contract"); see further *Francis v Cowcliffe Ltd* (1976) 33 P&CR 368, *RVB Investments Ltd v Bibby* [2013] EWHC 65 (Ch) and the New Zealand case: *Nicholas v Ingram* [1958] NZLR 972.
[28] At [248] citing *Locobail International Finance v Agroexport* [1986] 1 WLR 657.
[29] See [246].

35. However, although satisfied that lack of funds could, in principle, justify a refusal, HHJ Davies nonetheless ordered specific performance because the defendant had failed to properly evidence that payment of the completion monies was impossible. As to that, the judge said this (at [251]):

> *"… It seems to me that there is a real difference between my concluding, as I do, that as at the end of September 2008 the [defendant's directors and guarantors] themselves saw no way of completing without funds from the [defendant's lender], and my concluding that on the evidence before me that as at the present date the combined finances of the Defendants, coupled with their access to third party funds, whether on a commercial or non-commercial basis, and whether on a secured or unsecured basis, is such that it is simply impossible for them to complete. Whilst given the fall in property values and the credit crunch I can see that this may well be the case, in my judgment it is incumbent on a defendant who wishes to advance such an argument to give the fullest possible disclosure of his financial position so that the other party and the court can be satisfied that this is so, and in this case the Defendants have failed to surmount that high hurdle*."

36. There have been a number of decisions in other jurisdictions in which specific performance has been refused on the grounds that the defendant's lack of funds would make the order futile or impossible to comply with,[30] and several other judges have echoed HHJ Davies' view that, to get this argument off the ground, the defendant must give full disclosure of its financial means.[31] Interestingly, in the Irish case of *Aranbel Ltd v Darcy & Crampton* [2010] IEHC 272, Clarke J suggested that a defence based on impossibility should even succeed where the purchaser's inability to pay the completion monies has been brought about by the purchaser's own acts or omissions. Whereas the purchaser's conduct might disqualify him from succeeding when his case is viewed through a 'hardship' lens, the focus of the Court's attention when considering 'impossibility' and 'futility' was on whether the order would be complied with, not on the validity of the reasons why it might not be.

37. Clarke J also discussed, but did not need to determine, whether specific performance should be ordered if the only means by which the defendant would be able to make the payment was by selling the family home and making himself

[30] See *Aranbel Ltd v Darcy & Crampton* [2010] IEHC 272; *Titanic Quarter Ltd v Rowe* [2010] NICh 14 and *Boyarsky v Taylor* [2008] NSWSC 1415.
[31] See *Fairborne Pty Ltd v Strata Store Noosa Pty Ltd* [2009] QSC 250 at [24] per Daubney J; see also *Millbrook Country Club Ltd v SFM Investments Ltd* [2009] NZHC 2502.

or herself homeless. The judge expressed the provisional view that the Court might be reluctant to order specific performance in such circumstances. However, I suggest that an English court would be likely to harden its heart in these circumstances because, on the assumed facts, payment is not impossible, and, we have seen, in this jurisdiction, the fact that taking the steps needed to make the payment would give rise to hardship is unlikely to be enough to avoid a decree of specific performance.

38. So, in summary, the defendant's inability to secure the required completion funds may properly form the basis for a refusal to grant specific performance, perhaps even when the defendant bears some responsibility for his or her predicament. But it is not enough for defendants to show that they do not have the money themselves; defendants will need to evidence that they could not raise the money from other sources – banks, family and friends (in the case of individuals) and shareholders, directors and companies in the same group (in the case of companies) – or by selling other assets, and the defendant's own home is likely to be regarded as an available asset for this purpose.

(2) Don't order specific performance – completing the contract would be illegal or unlawful!

39. Naturally, equity will not enforce a contract that is contrary to the law[32] or public policy.[33] So, how far will this principle assist a party who is hoping to avoid an order for specific performance of a property contract?

40. Let's start with the easy bit: equity will not enforce a contract to commit a crime or a contract which could not be performed without committing a crime;[34] nor will equity do so where the contract involves a fraud on a third party.[35] A defendant will have no difficulty avoiding specific performance if the contract can be shown to fall into either of those categories.

41. But it is not just criminal offences and fraud that will spook a court of equity; other forms of unlawfulness may impinge on the availability of specific performance:

    (i) A contract to commit a breach of trust will not be specifically enforced. So, if a vendor, selling as trustee, has acted in excess of his or her powers when selling a property[36] or an executor has done so in the erroneous belief that

[32] See *Sutton v Sutton* [1984] Ch 184.
[33] See *Ewing v Osbaldiston* (1837) 40 ER 561.
[34] See *Mirza v Patel* [2016] UKSC 42 per Lord Neuberger at [159-160].
[35] See *Zimmerman v Letkeman* (1977) 79 DLR (3d) 508.
[36] See *Phillips v. Edwards* (1864) 33 Beav. 440 and *Gas Light and Coke Co. v. Towse* (1887) 35 Ch.D. 519.

he or she had the authority of his co-executor,[37] specific performance would not be ordered.

(ii) The same is true where completion of the contract would give rise to a breach of a superior lease or a prior contract.[38] The Court will not therefore specifically enforce a contract to assign a lease[39] or grant a sub-lease[40] where completion of the contract would give rise to a breach of the alienation covenant in the lease or the headlease. (But the position may be different in the case of a qualified alienation covenant where the landlord has unreasonably refused consent or where the court is satisfied that the landlord would have no reasonable grounds to do so[41]).

(iii) A contract for the sale or grant of a property interest entered into by a company which is contrary to the terms of its articles of association will seemingly not be specifically enforced.[42]

42. A reluctant purchaser may therefore wish to investigate the scope of its vendor's powers of disposition and any contractual constraints on those powers because if the vendor would be acting in breach of a legal duty in completing the contract, that may very well provide the purchaser with a 'get out of jail free' card in this context.

43. Would it matter if the purchaser knew or ought to have known that the vendor would be acting unlawfully in completing the contract? In the context of an equitable jurisdiction, one would instinctively think that it would. But in most cases the result would, I suggest, be the same because the Court will be concerned not to make an order that leads to the infringement of the legal rights of third parties; the degree of guilty knowledge of the two contracting parties is not, therefore, the only consideration.

44. Sometimes, even the risk that performance of the contract will result in commission of a criminal offence will be enough to deter the Court from ordering specific performance. In *Hope v Walter* [1900] 1 Ch 257, the Court declined to

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[37] See *Sneesby v Thorne* (1855) 7 De G.M. & G. 399.
[38] See *Harvela Investments Ltd v Royal Trust Co of Canada Ltd* [1985] Ch. 103 at 122.
[39] See *Willmott v Barber* (1880) 15 Ch D 96.
[40] See *Warmington v Miller* [1973] QB 877.
[41] See the authorities reviewed by Master Brightwell's recent decision in *Valbonne Estates Limited v United Homes Limited* [2024] EWHC 876 (Ch) at [21-26]. But cf HHJ Hodge KC's decision in *Mulberry Homes (Hazel Grove) Ltd v Scoto Ltd* [2026] EWHC 1339 (Ch) at [38].
[42] See, by analogy, *McKillen v Misland (Cyprus) Investments Ltd* [2013] EWCA Civ 781 (contract for sale of a company's shares contrary to its articles of association not capable of specific performance). In the case of local authorities or statutory corporations, if the contract was entered into *ultra vires*, it will be simply void and, self-evidently, specific performance will not then be ordered: see *Corbett v South Eastern and Chatham Railway* [1906] 2 Ch 12.

enforce a contract for sale where the current tenant of the property was using it as a brothel and the purchaser would be at risk of prosecution if he failed to carry out effective steps to prevent that from happening upon becoming the landlord.

45. But the mere fact that there is a whiff of unlawfulness about the contract that the Court is being asked to specifically enforce, does not, necessarily, mean that the defendant will be off the hook:

    (1) *Planning and other statutory consents*: The fact that the purchaser is intending to use the land for purposes which are inconsistent with the current planning permission or which could not lawfully be carried on without some other statutory licence or consent not yet in place is unlikely to provide a basis for avoiding a decree of specific performance. The Court would not shy away from specifically enforcing such a contract because the purchaser can apply for the necessary consents and, if those consents are not then forthcoming, they can change their plans for the land or sell it on to someone who is content to operate within the existing consents. The position would be different, however, if both parties knew that the purchaser proposed to use the land for its intended purpose without applying for the necessary consents.[43]

    (2) *Breaches of statutory duties.* Where completion of the contract would constitute a breach of statutory duty, much is likely to turn on the nature of the statutory scheme in question. A contract for the grant of a lease of a property which does not hold the minimum EPC rating would, if completed, constitute a breach of statutory duty under the Energy Efficiency (Private Rented Property) (England and Wales) Regulations 2015. So, too, would a long lease granted in contravention of the ban on long residential leases in section 1 of the Leasehold and Freehold Reform Act 2024 (when it comes in). However, in both cases, the legislation expressly declares that a lease granted in breach of the statutory prohibition is still valid and enforceable and creates its own enforcement code which notably does not make a landlord's breach of the prohibition a criminal offence. Although the point is yet to be tested, I suspect that when the Court is invited to exercise its equitable jurisdiction to specifically enforce such a contract, it would take its lead from the statute, and that, by itself, the breach of one of those statutory duties would not be a reason for declining the remedy. But in cases where the statutory scheme does not suggest that interests created

[43] See *Best v Glanville* [1960] 3 All ER 478, at 481H per Ormerod LJ.

in breach of its terms should nonetheless survive and be enforceable, a claim to specifically enforce a contract which contravenes the statute would likely fail.

(3) *Defendant's fault*: Just as parties claiming equitable relief must have clean hands, defendants seeking to avoid it on discretionary grounds must themselves have respectably clean hands. A purchaser who is intending to use the land for unlawful purposes would not be able to use his own unlawful intent as a basis for avoiding specific performance against a vendor who was unaware of the purchaser's intentions.[44] Similarly, a purchaser of a lease will not be able to rely on the fact that the lease being acquired is now at risk of forfeiture if the purchaser has brought about that risk by their own actions since the contract was entered into.[45]

(4) *Avoiding the problem by conditionality, conditions or severance:* The Court has certain tools at its disposal which may enable it to overcome potential unlawfulness problems. One such tool is the power to order conditional specific performance[46] or specific performance subject to conditions.[47] So, for example, if completion of a contract for the grant of a lease would be unlawful absent the superior landlord's consent, it would be open to the Court to grant specific performance conditional upon the consent being granted and it could impose conditions designed to ensure that consent is later secured. Another tool is the ability of the Court, in an appropriate case, to sever the legal and illegal parts of a contract and order specific performance of the obligations which can lawfully be performed.[48] For example, in *Ailion v Spiekermann* [1976] Ch 158, a contract for the assignment of a lease in consideration of a premium which was illegal under the Rent Act 1968 was specifically enforced on terms that the illegal premium would not be paid.

(3) Don't order specific performance – there's been a mistake!

46. In some circumstances, a contract which is the product of a mistake may be void for mistake at common law, voidable on the grounds of misrepresentation or

[44] See, by analogy, *Doe d Roberts v Roberts* (1819) 2 B & Ald 367.
[45] *Helling v Lumley* (1858) 3 De G & J 493.
[46] In *Mean Machines Limited v Blackheath Leisure (Carousel) Limited*, the Court of Appeal acknowledged that it would be open to the court to order specific performance conditional upon the vendor securing vacant possession of the property, but ultimately decided that the outcome and timeframe for conclusion of the proceedings that the vendor would have to bring were too uncertain and ordered damages instead.
[47] See *Brady v Brady* [1989] AC 755 where the Court recognised that conditions may be imposed to an order for specific performance to ensure that performance of the contract is lawful.
[48] See *Carney v Herbert* [1985] A.C. 301. Severance is not available in all cases; serious illegality may be found to taint the whole agreement and prevent severance: *Taylor v Bhail* [1996] C.L.C. 377 CA.

susceptible to rectification. Where that is so, there will be a straightforward answer to a claim for specific performance, and the defendant will not need to have recourse to discretionary factors to avoid a decree being made. But even where simpler solutions of that sort are not available, the Court has a discretion to refuse specific performance on the grounds of mistake.

47. The decided cases show that the Court's willingness to refuse specific performance will to some extent turn on the category of mistake into which the case falls:

(1) *Mutual mistake:* The Court may decline to order specific performance of a property contract where both parties have been labouring under a common misapprehension, either as to the facts or their relative rights, provided that the misapprehension is fundamental and the party seeking to resist enforcement is not blameworthy. The cases cited in *Snell*[49] as authority for that proposition are all cases where the Court set aside the contract itself on the grounds of mutual mistake exercising an equitable jurisdiction.[50] Following the Court of Appeal's decision in *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd* [2003] Q.B. 679, it is now apparent that there is, in fact, no equitable jurisdiction for the Court to set aside a contract for mutual mistake. But if the earlier decisions had been decided now, it would seem likely that specific performance would instead have been refused on discretionary grounds related to the mistake.[51]

(2) *Unilateral mistake – claimant at fault:* If the claimant is at fault for the defendant's misapprehension, specific performance may be refused on the grounds of unilateral mistake. A deliberate misrepresentation or concealment of relevant facts would plainly provide grounds for specific performance to be refused.[52] Even if the defendant has committed an innocent misrepresentation[53] or has by some other means unintentionally contributed to the Claimant's mistake,[54] that is likely to be sufficient grounds. Standard conditions of sale in property contracts often include terms which might, at first blush, seem to suggest that even a claimant who

[49] See para 17-30.
[50] Solle v Butcher [1950] 1 K.B. 671; Grist v Bailey [1967] Ch. 532; Taylor v Johnson (1983) 151 C.L.R. 422.
[51] For a more recent example of specific performance being refused, as a matter of discretion, on the grounds of mutual mistake, see *Heath v Heath* [2009] EWHC 1908 (Ch) (specific performance refused on the basis of the contracting parties' shared misapprehension about the identity of a beneficiary under a will).
[52] See *London Holeproof Hosiery Co v Padmore* (1928) 44 T.L.R. 499; *Ellard v Llandaff (Lord)* (1810) 1 Ball & b. 241; *Baskcomb v Phillips* (1859) 29 L.H.Ch. 380; see also *Becker v Partridge* [1966] 2 Q.B. 155.
[53] See *Barnes v Cadogan Developments Ltd* [1930] 1 Ch. 479 at 485 per Farwell J.
[54] See *Wilding v Sanderson* [1897] 2 Ch. 534 and *Neild v Davidson* (1890) 11 LR (NSW) Eq 209.

has caused or contributed to the defendant's mistake should still be granted specific performance.[55] But when exercising an *equitable* jurisdiction, the Court is unlikely to feel constrained by terms of that sort, and specific performance may still be refused even where standard conditions in the contract point the other way.[56]

(3) *Unilateral mistake – claimant **not** at fault*: Where the defendant has made a mistake about the property being conveyed or the legal effect of the contract for which the claimant bears no responsibility, the mistake is unlikely to justify a refusal to grant specific performance of a property contract.[57] As James LJ put it in *Tamplin v James* (1880) 15 Ch. D. 215, at 219: "*If a man will not take reasonable care to ascertain what he is buying he must take the consequences*". Specific performance will even be ordered where the defendant would not have made the mistake had the claimant not kept quiet about some relevant information provided that there was no positive duty on the latter to disclose the information.[58] But even in 'no fault' mistake cases, there is no inflexible rule that specific performance will be ordered. As James LJ recognised in *Tamplin*, a mistake not caused or contributed to by the other party may still justify declining specific performance "*where a hardship amounting to injustice would have been inflicted upon him by holding him to his bargain, and it was unreasonable to hold him to it*".[59]

48. So, if there has been a mistake about something important, and either both parties made it or one of them contributed to the other making it, specific performance may be avoided. But if the claimant neither shared nor caused the mistake, the defendant will need to show hardship amounting to injustice, which is a high bar to get over.

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[55] Standard conditions commonly provide, for example, that rescission is only available for fraudulent misrepresentations or that the purchaser has not relied on any representations beyond those contained in responses to enquiries before contract and formal solicitors' correspondence.
[56] See *Faruqi v English Real Estates Ltd.* [1979] 1 W.L.R. 963 and *Walker v Boyle* [1982] 1 WLR 495. See also, by analogy, the two decisions to which Newey LJ refers in Part I of this lecture: *Pagebar Properties Ltd v Derby Investment Holdings Ltd* [1972]1 WLR 1500 and *Johns v Deacon* [1985] 1 WLUK 937.
[57] See *Van Praagh v Everidge* [1902] 2 Ch. 266 (specific performance ordered against a purchaser who mistakenly believed he was buying a different property) and *Bashir v Ali* [2011] EWCA Civ 707 (specific performance ordered against vendors who did not realise that the property included a studio flat which would have justified a higher price). See also the Australian case, *Slee v Warke* (1949) 86 C.L.R. 271 (specific performance of an agreement for lease of a hotel ordered against a landlord who had been mistaken about the terms of an option in the lease).
[58] See *Turner v Green* [1895] 2 Ch. 205; *Greenhalgh v Brindley* [1901] 2 Ch. 324 and *Fox v Mackreth* (1788) 2 Cox Eq. 320; affirmed (1791) 4 Bro. P.C. 258.
[59] See page 221.

(4) Don't order specific performance – the Claimant isn't 'ready, willing and able' to complete

49. In Part I of this lecture, Newey LJ explained the slippery concept of 'ready, willing and able' in the context of parties who are seeking to extricate themselves from a property contract. The concept, and the cases to which Newey LJ has referred, are important in this context, too, because a party seeking specific performance of a property contract needs to show that (i) it has performed its own obligations under the contract or that it had been 'ready, willing and able' to do so and would have done so but for the other party's default[60] and (ii) it is 'ready, willing and able' to perform the obligations still to be performed.[61]

50. Given that this topic has been covered in detail by Newey LJ, I need only note that this represents another reef upon which an otherwise seaworthy claim for specific performance may founder, and remind those acting for parties reluctant to complete a property contract to investigate this issue. I will, however, say something about the related topic of defects in the vendor's title, which often rears its head in specific performance claims.

(5) Don't order specific performance – there's a problem with the vendor's title!

51. It sometimes happens that by the time the Court is asked to specifically enforce a property contract, the vendor is not in a position to convey the property specified in the contract. That might occur because the vendor turns out not to own the entirety of the property sold or because there is a defect in the quality of its title (e.g. an incumbrance). So, does the fact that the contract cannot be precisely performed offer a reluctant party a shield against a claim for specific performance?

52. If it is the purchaser who seeks specific performance in spite of the title defect, the answer will in most cases be: No. If the vendor cannot give good title to the land they contracted to convey, the purchaser will nonetheless be entitled to waive the defect and claim specific performance of the obligation to convey such interest as the vendor has with an appropriate abatement of the purchase price[62] or the rent reserved by the lease,[63] as the case may be, even where the contract

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[60] See *Australian Hardwoods Pty Ltd v Commissioner for Railways* [1961] 1 W.L.R. 425, at 433 and *Grant v Cigman* [1996] 2 B.C.L.C. 24.
[61] See *Measures Bros v Measures* [1910] 2 Ch 248, at 254. For a recent discussion of the burden of proof in this context, see *Amal Ventures Ltd v Eros Ltd* [2026] EWHC 870 (Ch).
[62] See, for example, *Hill v Buckley* (1810) 17 Ves. Jun. 394.
[63] See *Jeffreys v Fairs* (1876) 4 Ch.D. 448.

does not contain an express term to that effect. The rationale is that equity will not allow vendors to set up their own failure to make out the title they contracted to convey as a ground for refusing to complete the contract.[64]

53. As ever, there are exceptions to that general rule. If the purchaser knew about the defect at the time of contracting[65] or if completing the contract at the abated price would cause significant hardship to the vendor, specific performance would not be ordered.[66] If the vendor has already conveyed the land away to a third party (e.g. where the land has been acquired by compulsory purchase in the period after the contract was entered into[67]), specific performance would likewise not be ordered, for equity does not make orders in vain or orders requiring parties to do the impossible. But equally, the Court will ensure that this principle is not abused by vendors. If the property in question has been transferred to a company controlled by the vendor,[68] specific performance will then be ordered against the vendor even though it no longer holds title to the property in question. In those circumstances, the decree of specific performance does not offend the 'futility' and 'impossibility' principles because it is within the vendor's powers to ensure that the order is performed.

54. A defect in title will not, necessarily, derail a vendor's claim for specific performance, but the circumstances in which such a claim may succeed are more limited. The position here, as explained by Viscount Haldane in *Rutherford v Acton-Adams* [1915] AC 866, at 869, is that: "*If a vendor sues and is in a position to convey substantially what the purchaser has contracted to get, the court will decree specific performance with compensation for any small and immaterial deficiency, provided that the vendor has not, by misrepresentation or otherwise, disentitled himself to his remedy*."

55. A vendor will usually only succeed in obtaining specific performance where there is some modest and relatively inconsequential deficiency in the *quantity* of land being conveyed. If the defect relates to the *quality* of title,[69] the purchaser will generally be off the hook because equity will not force an unwilling purchaser to take a different kind of interest to the one for which they had contracted to

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[64] *Mortlock v Buller* (1804) 10 Ves. Jun. 292 at 315, 316
[65] See *Castle v Wilkinson* (1870) L.R. 5 Ch. 534.
[66] See *Rudd v Lascelles* [1900] 1 Ch. 815.
[67] That was the basis upon which specific performance was refused in *E Johnson & Co (Barbados) Ltd v NSR Ltd* [1997] A.C. 400 (PC).
[68] *Elliott and H. Elliott (Builders) Ltd. v Pierson* [1948] Ch. 452. See also *Jones v Lipman* [1962] 1 All ER 442 in which Russell J held that the specific performance would be ordered against both the vendor and his "creature".
[69] Cases in this class include *M'Queen v Farquhar* (1805) 11 Ves. Jun. 467 and *Scott v Hanson* (1829) 1 Russ. & M. 128; 39 E.R. 49.

receive.[70] Even where the defect relates to the quantity of land being acquired, a vendor will not surmount the 'substantial performance' hurdle if the difference is such that the purchaser would not have proceeded with the contract had the discrepancy been pointed out at that time.[71]

56. As has already been noted, these days, standard conditions for sale often provide that if the property has been misdescribed in the contract, the buyer's remedy, where no fraud is involved, is compensation or damages.[72] A provision of that kind is primarily directed at the choice between the two common law remedies, rescission and damages, but it may also be relevant in the context of the Court's equitable jurisdiction because it shows that the parties specifically contemplated that compensation might be an appropriate form of redress for certain kinds of defects in title.[73] But contractual provisions of this kind do not relieve the vendor of the requirement to satisfy Viscount Haldane's 'substantial performance' requirement and will therefore only take vendors with a title difficulty so far.[74]

57. So in summary, a defect in the title being sold will rarely provide a reluctant vendor with an effective escape route; but, save in cases where the defect merely removes a comparatively insubstantial portion of the land from the sale, a defect in title may well be just the ticket for a regretful purchaser.

Conclusion

58. The grounds discussed above do not represent an exhaustive list: there may be other features of the facts that could provide a platform for a reluctant party to resist specific performance of a property contract on discretionary grounds. Those advising such parties will also wish to consider whether either of the two recognised defences to a claim for specific performance – laches and acquiescence – could have a role to play. But as I have endeavoured to demonstrate, the availability of specific performance of property contracts should not be taken for granted; both the adequacy of damages and the applicability of discretionary factors to the case merit careful consideration before a decision is taken to bring or defend a claim for specific performance.

Nat Duckworth KC

19 June 2026

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[70] See *Madeley v Booth* (1845) 2 De G. & Sm. 718; 64 E.R. 321.
[71] See *Flight v Booth* (1834) 1 Bing NC 370, at 377 per Tindall CJ.
[72] See for example clause 10 of the Standard Commercial Property Conditions (Third Edition – 2018 Revision).
[73] See *Rudd v Lascelles* [1900] 1 Ch 815 at 818 per Farwell J.
[74] See again *Flight v Booth* per Tindall CJ. Here again, see also, by analogy, the two decisions to which Newey LJ refers in Part I of this lecture: *Pagebar Properties Ltd v Derby Investment Holdings Ltd* [1972]1 WLR 1500 and *Johns v Deacon* [1985] 1 WLUK 937.