

WHEN SPECIFIC PERFORMANCE FAILS: RECOURSE FOR THE INNOCENT PARTY

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In the event of a breach of contract, it is well-established in law that the innocent party has the option to either affirm the contract or terminate it. If the innocent party chooses to affirm the contract, one of the remedies available is specific performance. The conditions under which specific performance can be granted are provided in Chapter II of the Specific Relief Act 1950.

In essence, specific performance is a remedy that depends on the existence of a contractual obligation and serves to compensate the innocent party when the other party fails to fulfil that obligation. However, when court grants specific performance, an important question arises – does the granting of such an order mean that the contract is still in effect, or has it been discharged?

This question becomes particularly important when a party fails to comply with an order for specific performance.

This article delves into case law where such failures have occurred, focusing on the principles established in those cases that are relevant to the rights and entitlements of the innocent party. Specifically, it explores the recourse available to the innocent party when the other party does not comply with an order for specific performance.

The case of **Gee Boon Kee & Ors v Tan Pok Shyong**

In **Gee Boon Kee**, the appellants, as innocent parties, were plaintiffs in the High Court. They had entered into sale and purchase agreements with Tan Ah Tong ("**Tan**") in respect of 2 pieces of land and had paid the full purchase price. During the proceedings, Tan passed away, and the respondent, acting as Tan's personal representative, was substituted in his place.

Despite the sale of the lands, Tan charged the lands to a bank after the sale and purchase agreements were executed. This resulted in the filing of an originating summons by the appellants seeking (i) a declaration that Tan was a trustee of the lands and (ii) specific performance of the sale and purchase agreements. Following a full trial, the court granted an order for specific performance with the following terms:

"that there be specific performance of the contracts for the plaintiffs except 29th plaintiff against the first, second and third defendants."

Tan appealed against the order for specific performance, but the appeal was dismissed. Further, the Court of Appeal made the following incidental or ancillary order:

“DAN DIPERINTAHKAN bahawa Responden-Responden dibenarkan membuat permohonan kepada Mahkamah Tinggi untuk Perintah-Perintah tambahan berkenaan dengan Pelaksanaan Spesifik.”

Despite the existence of the order for specific performance, Tan once again charged one of the lands to another bank, resulting in the land being auctioned off by the bank. In effect, Tan failed to comply with the order for specific performance.

After the auction, only one piece of land remained, and the appellants filed an application in October 2015 to compel the respondent to transfer the 2nd piece of land to them. However, this application was met with an objection that it was filed too late to enforce the order for specific performance granted in March 2000. Section 6(3) of the Limitation Act 1953 (“**LA**”) provides that an action upon any judgment shall not be brought after the expiration of 12 years from the date on which the judgment became enforceable. Given that the application was filed more than 15 years after the order for specific performance was originally made, this objection was raised.

Suffice it to say that the High Court had allowed the application, but the Court of Appeal disallowed it.

The primary issue before the Federal Court was whether the limitation period applied when a party is seeking to enforce an order for specific performance after the other party’s failure to comply.

The Federal Court answered in the negative and held as follows:

- the application to enforce the order for specific performance was not a fresh action within the meaning of Section 2(1) of the LA, and, therefore, did not attract the application of Section 6(3) of the LA;
- the application was merely an effort to “carry the decree to completion”. The Federal Court cited the House of Lords’ decision in **Johnson v Agnew** (discussed below), which held that when an order for specific performance is made, the contract remains in effect and is not merged into the judgment. The court exercising its equitable jurisdiction, retains full control over the matter, and no issue of filing a “fresh action” arises once specific performance has been decreed;
- crucially, the Court of Appeal had issued an incidental order in October 2005, granting liberty to apply for the enforcement of the specific performance order made in March 2000. As the application was filed in October 2015, it was within the 12-year limitation period;
- ultimately, the Federal Court held that limitation was not a bar, as the appellants were not seeking specific performance anew, and they were simply seeking to complete the enforcement of an already granted decree, a process the court retained the authority to oversee.

The appellants succeeded in the Federal Court.

Takeaway

In essence, **Gee Boon Kee** reinforces the principle that an order for specific performance does not discharge the underlying contract but allows for further judicial intervention to ensure the contract is completed, even after significant time has passed, as long as the enforcement is within the scope of the court's continued jurisdiction.

However, a point of lingering uncertainty remains: while the Federal Court held that Section 6(3) of LA does not apply, the application for enforcement in **Gee Boon Kee** was filed within 12 years of the incidental/ancillary order granted by the Court of Appeal. This fortifies that Section 6(3) of LA was not violated in this case. Does this imply that the entitled party can delay seeking enforcement indefinitely, or should there still be a limitation period? Furthermore, when does the limitation period begin to run – does it start from the date of the order, or from the date a demand for enforcement is made?

The case of Johnson v Agnew

In **Gee Boon Kee**, the principles from **Johnson v Agnew** were cited twice to affirm the approach taken regarding the enforcement of specific performance orders.

The facts are commonplace, said Lord Wilberforce, summarising the facts as follows – an owner of land contracts to sell it to a purchaser; the purchaser fails to complete the contract; the vendor goes to the court and obtains an order that the contract be specifically performed ("**1st application**"); the purchaser still does not complete; the vendor goes back to the court and asks for the order for specific performance to be dissolved, for the contract to be terminated or 'rescinded', and for an order for the purchase to pay the balance purchase price ("**2nd application**").

There was also a charge created over part of the lands sold, where the mortgagee has subsequently obtained order for possession. This made specific performance impossible, even though the vendor had already obtained an order for specific performance. For this reason, the 2nd application was dismissed, as it would be unjust to award damages when the vendor had effectively made performance impossible.

The Court of Appeal also dismissed the 2nd application, denying the vendor's right to damages at common law, but holding that damages could still be awarded under the Chancery Amendment Act 1858 (Lord Cairns's Act), which enables the court to award damages in addition to or in substitution for specific performance.

The House of Lords laid down the following principles:

- first, in a contract for the sale of land, after time has been made, or has become, of the essence of the contract, if the purchaser fails to complete, the vendor can either treat the purchaser as having repudiated the contract, accept the repudiation, and proceed to claim damages for breach of the contract, both parties being discharged from further performance of the contract; or he may

seek from the court an order for specific performance with damages for any loss arising from delay in performance. Similar remedies are of course available to purchasers against vendors;

- second, the vendor may proceed by action for specific performance or damages in the alternative. At the trial he will however have to elect which remedy to pursue;
- third, if the vendor treats the purchaser as having repudiated the contract and accepts the repudiation, he cannot thereafter seek specific performance;
- fourth, 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;
- fifth, 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.

The House of Lords agreed that the 2nd application was a proper course of action when a party fails to comply with an order for specific performance. However, since the vendor's own actions, such as charging the land, had made performance impossible, the House of Lords limited the damages the vendor could claim. In this case, the damages were limited by taking into account the vendor's conduct of charging the land, which substantively reduced the amount claimable.

Ultimately, the House of Lords emphasized that since the court retains control after an order for specific performance is made, it must exercise its discretion based on equitable principles, which is the very nature of specific performance as a remedy.

Takeaway

The principles enunciated highlight the flexibility of remedies available in specific performance cases, the importance of the court's ongoing control, and the role of equitable considerations in determining damages and consequential orders.

The case of Sudagar Singh v Nazeer

In ***Sudagar Singh***, there was an anxious purchaser who had obtained order for specific performance for the vendor to perform the sale and purchase agreement. The vendor, who had previously resisted the action, later became willing and eager to proceed. This shift in attitude led to a threat of forfeiting the deposit paid by the purchaser or rescinding the sale and purchase agreement. As no satisfactory resolution was reached, the vendor issued a 28-day completion notice, as stipulated in the terms of the sale and purchase agreement. When the purchaser failed to complete the transaction, the vendor filed a motion seeking the forfeiture of the deposit, liberty to resell the property, and an order for the purchaser to pay the difference between the sale price and the resale price (if lower), along with resale expenses.

The issue raised was whether a completion notice, served under the contract after an order for specific performance had been made, is valid and effective.

It was held that while the contract continues to exist and is not merged into the order for specific performance, the court found the completion notice to be legally invalid. The rationale was that the provision for completion in the contract was superseded by the court's order. As a result, the party seeking enforcement needed to return to the court for the enforcement of the order, rather than attempting an extra-curial remedy such as issuing a completion notice. The court stated: "by applying to the court for an order of specific performance, and obtaining it, I think that the applicant has put it into the hands of the court how the contract is to be carried out. As the court has become seized of the matter, and has made an order, it seems to me that, subject to anything that the parties may then agree, the working out, variation, or cancellation of that order is essentially a matter for the court. The continued existence of the contract is one thing, its working out is another".

Sudagar Singh was also cited with approval in ***Gee Boon Kee***.

Takeaway

The key takeaway is that once an order for specific performance has been made, it is the terms of the order, rather than those of the original contract, dictate the future performance of the contractual obligations.

However, this raises an intriguing question: can a party rely on terms of the contract that are not the subject of the specific performance order? The answer appears to be affirmative, as it is well-established that the contract remains in effect even after an order for specific performance has been granted. If this is so, it is arguably the case that the applicable limitation period is 6 years for actions founded on a contract ("**Statutory Limitation Period**"). This would suggest that even after an order for specific performance, a party may still seek to enforce or claim breaches of other contractual terms within the Statutory Limitation Period, provided that they are not inconsistent with the specific performance order.

Commentary

What can be distilled from the aforementioned authorities is that a party who has obtained an order for specific performance is entitled to seek consequential orders for the enforcement of that order. This may include applications to fix a time and place for completion, or requests for an order rescinding the contract, either immediately if the other party refuses to complete, or within a limited time if there is a default in completing the contract.

Following these principles, it appears that a party entitled to specific performance must apply to the original court for either the enforcement or discharge of the said order. In ***Cheah Tjeng Siong v Lim Sin Oo & Ors, Edgar Joseph J*** set aside a bankruptcy notice issued based on an order for specific performance. The court held that "*it is clear law that if a defendant fails to comply with an order for completion,*

the plaintiff cannot immediately proceed to execution but must first apply for a further order directing the defendant to complete".

In relation to applications for consequential orders, **Gee Boon Kee** stands as an authority on the importance of an ancillary order. In **MIDF Amanah Ventures Sdn Bhd v Lim Thiam Chye**, the High Court allowed an application for a consequential order when the other party failed to perform, holding that the specific performance order included a clause granting the entitled party "liberty to apply" for further orders.

Finally, if an entitled party seeks to discharge an order for specific performance and opts for compensation in the form of damages, it is important to note that they can no longer return to seek specific performance. As held in **Johnson v Agnew**, once the order is discharged, "*the contract has gone, and what is dead is dead*". In line with this, the High Court in **Sia Her Yam Realty Sdn Bhd v Strata Century Sdn Bhd & Anor** dismissed the defaulting party's application for specific performance, noting that the application was made after the party's own failure to perform, and the parties had agreed to discharge the order for specific performance, with damages to be assessed instead.

In conclusion, to answer the question posed in the introduction, a contract remains valid and enforceable after an order for specific performance is granted. The proper approach for enforcement is to return to the original court to seek consequential orders, as the court retains supervisory jurisdiction over the matter to ensure compliance. Resorting to extra-curial methods is neither appropriate nor permissible in this context.