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FACULTY OF JURIDICAL SCIENCES

E- CONTENT

COURSE: BALLB-Vth Sem

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Lecture-29





LECTURE-29

DISCRETIONARY NATURE OF THE REMEDY:

‘Indeed, the dominant principle has always been that equity will only grant specific performance if under all the circumstances, it is just and equitable so to do.’ Per Lord Parker of Waddington in **Stickney v. Keeble** (1915) A.C. 386 at 419. This brings out the discretionary nature of the remedy.

As stated by Rigby L.J. in **Scott v. Alvarez** (1895) 2 Ch. 603 at 615 C.A, from the very first, when specific performance was introduced it has been treated as a question of discretion whether it is better to interfere

and give a remedy which the common law knows nothing at all about, or to leave the parties to their rights in a court of law.

Unlike the common law remedies, specific performance cannot be claimed as of right; this is true of the early development of equity jurisdiction but, for a long time now, the correctness of the statement is no longer absolute. In many cases, the circumstances and the rules under which specific performance will be decreed are so well established that the court, exercising equitable jurisdiction, cannot afford to exercise any inconsistent judicial discretion. See **Behnke v. Bede Shipping Co.** (1927) 1 K.B. 649. In **Smith v. Colbourne** (1914) 2 Ch. 533 at 541, it was argued that specific performance should not be granted in respect of a contract for the sale of certain building because the title was too doubtful to be forced upon the

purchaser. Cozens-Hardy, M.R observed that the courts have in modern times not listened with favour to such a defence. 'It is the duty of the court, unless in very exceptional circumstances, to decide the rights between the vendor and the purchaser, even though a third person not a party to the action will not be bound by the decisions'. In general, the exercise of the jurisdiction is still subject to the overriding inherent discretion of the court which must be judiciously exercised.

Circumstances in which the remedy will be granted or refused:

The remedy is available in a variety of contractual relationships; whether or not it will be granted depends on the nature and character of the contract, its subject-matter and other numerous but varying factors which the Courts of Equity have established

purposely to ensure that the exercise of the jurisdiction meets with the requirements of rational justice and fair-play.

- (i) **Existence of Valid Contract:** The grant of the remedy presupposes a valid contract; where this is non-existent the remedy will not be granted.
- (ii) **Illegality:** Equity will not decree specific performance of a contract that is void for illegality. Here, equity follows the law.
- (iii) **Consideration:** Since equity will not assist a volunteer, want of consideration is a complete bar to a decree of specific performance. It is a settled rule of equity that inadequacy of consideration is not a bar action for specific performance although equity regards a gross inadequacy of consideration as an indication that the parties were not at arms'

length.

List the circumstances in which the remedy of specific performance will be granted or refused:

Doctrine of Part Performance:

At law, certain contracts are required to be in writing; non-compliance with this requirement renders such contracts unenforceable. However, equity takes a more flexible view and will enforce a contract within this class by an order of specific performance, if the contract is one to which the equitable doctrine of part-performance applies. The exercise of this jurisdiction provides an illustration for the maxim that 'equity looks

at the intent rather than the form.'

Transfer of Property Law provides that 'no action may be brought upon any contract for the sale or other disposition of land or any interest in land unless the agreement upon which such action is brought or some memorandum or note thereof is in writing and signed by the party to be charged or by some other person thereunto by him lawfully authorised.' Law recognises the existence of the doctrine of part-performance by providing that 'this section applies to contracts whether made before or after the commencement of this law and does not affect the law relating to part performance, or sales by the court.'

It is evident, from the above statutory requirements that a contract relating to sale of land or to the disposition of any interest in land is not enforceable at law by either party to the contract unless the contract is evidenced in writing.

The effect of non-compliance with the statutory requirement is not to avoid the contract. In 1883, Lord Blackburn in *Maddison v. Alderson* (1883) 8 App. Cas. 467 at 488 said: 'It is now finally settled that the true construction of the Statute of Frauds is not to render the contracts within it void, still less illegal but is to render the kind of evidence required indispensable when it is sought to enforce the contract.'

In the same case, Lord Selbourne observed as follows: 'it has been determined at law (and in this respect there can be no difference between law and equity) that the 4th section of the Statute of Frauds does not avoid parol contracts but only bars the legal remedies by which they might otherwise be enforced. The object of the statute is to prevent the fraudulent setting-up of pretended agreements, and then supporting them by perjury.' See *Story on Equity* (3rd ed.) p.317.

To this extent, equity follows the law, and regards itself as bound by the provisions of the statute. But at the same time equity will not allow the statute to be used as an engine for fraud; therefore, in certain cases equity would decree specific performance of a contract for the sale or other disposition of interest in land, even if the contract is not in writing as required by the statute provided there is sufficient act of part-performance. For, it is possible for two parties to have freely entered into an oral agreement for the sale of land, and for one of the parties to rely on the statute as a defence if and when called upon to perform his own part of the contract.

Application of the Doctrine:

A party relying on the doctrine of part performance must plead such facts and circumstances which will

bring his case within it and must show by oral testimony or otherwise that the acts alleged by him amount in law to part performance. Before the application of the doctrine the following well-established conditions must be satisfied.

- (i) The acts of part performance must be unequivocally and exclusively referable to, and denote the existence of, the alleged tract. See the following cases: **Maddison v. Alderson (1883) 8 App. Cas. 467 at 475;** **Rawlinson v. Ames (1925) Ch. 96.**
- (ii) The Acts must be such as to render it a fraud in the Defendant to take advantage of the contract not being in writing. Much as equity follows the law it will not allow a statute designed to prevent fraud to be used as an instrument for fraud. However, the act of part-performance relied upon

must show the equities arising from the relationship of the parties subsequent to the contract and that if specific performance of the oral contract is not granted, such equities will render it a fraud in the defendant to take advantage of the contract not being in writing. The equities arise not out of the contract itself but out of the altered position caused by the acts of the parties done in execution of the contract. See **Maddison v. Alderson** (supra) at 475; **Chaproniere v. Lambert** (1917) Ch. D. 356 at 359.

- (iii) **The contract to which the Acts of Part Performance denote must be capable of being enforced by a decree of specific Performance:** This condition exemplifies the limit of equitable remedy of specific

performance in general and that of the doctrine of part-performance in particular. The doctrine of part performance is confined to contracts relating to disposition of land or interest in land. It has no application either to contract of service or contract of guarantee; such contracts are not capable of being specifically performed and equity does not act in vain. See **Britain v. Rossiter** (1879) 11 Q.B.D. 123.

- (iv) **The parol evidence which is let in by the act of Part Performance must establish a finally concluded contract:** The equities resulting from the acts of part performance done in execution of the oral contract are the factors compelling the court to decree specific performance of the contract; therefore, such acts of part performance

upon which the equities are premised, must let in proper parole evidence of a concluded contract for which specific performance is sought. See *Maddison v. Alderson* (supra) at 475. The parole agreement need not set out the terms so long as the minds of the parties are at one upon matters which are essential and are cardinal to every agreement in relation to land.' However, the parties must have gone beyond the stage negotiation. See *Rossiter v. Miller* (1878) 3 App. cas. 1124; and *Marshall v. Berridge* (1881) L.R. 19 Ch.D. 233.

- (v) The Act of Part Performance relied upon must have been done by the plaintiff and not by the defendant. See *Caton v. Caton* (1865) L.R. 1 Ch. app. 137

Grounds for refusal of the Remedy:

There are certain contracts whose performance will not be compelled by a decree of specific performance. This is not because the court lacks jurisdiction to award the decree in these cases, but because the contracts by their nature are not enforceable by a decree of specific performance.

Contracts falling within this class are those whose performance or execution requires the court's constant and continuous supervision; thus, imposing too great a burden upon the court if the court is to ensure that compliance with its orders is not stultified. Therefore, the court will not ordinarily decree specific performance of a contract the prosecution of which it cannot supervise. See **Blackett v. Bates** (1865) L.R. 1 Ch. 124; **Powell Duffryn Steam Coal Co. v. TaffVale Railway**

Col. (1874) L.R. 9 Ch. 331.

Thus, specific performance will not be granted in contracts involving the construction of a railway, the management of a brewery, the management of a colliery or the construction of a waterway; or any contract of similar nature. See *Wheatley v. Westminster Brynibo Coal Co.* (1869) 9 Eq. Cas. 538 at 552. Generally, specific performance will not be granted in the following cases.

1. Contract to build
2. Contracts of personal service
3. Contracts determinable at will
4. Contracts to refer to arbitration
5. Contracts specifically enforceable only in part
6. Contracts relating to real and personal property
7. Contracts lacking in mutuality
8. Misrepresentation and mistake
9. Misdescription
10. Compensation and

condition of sale 11. Lapse of time 12. Unclean hands 13.
Hardship

The position in equity is that the court, in the exercise of its equitable jurisdiction, will in certain circumstances, compel parties to a contract freely entered into, to perform their obligations according to the terms of the contract and to respect the sanctity of the contractual relationship created by their acts. If equity had not interfered in this way, it would have been possible in many cases for parties to a contract to buy off their duties under the contract to the detriment of innocent parties.

MCQs

- 1. 'Indeed, the dominant principle has always been that equity will only grant specific performance if under all the circumstances, it is just and equitable**

so to do.'

- i. True**
- ii. False**
- iii. Cannot say**
- iv. None of these**

2. The court will not ordinarily decree specific performance of a contract the prosecution of which it cannot supervise.

- i. True**
- ii. False**
- iii. Cannot say**
- iv. None of these**

3. The parol agreement need not set out the terms so long as the minds of the parties are at one upon matters which are essential and are cardinal to every agreement in relation to land.'However, the parties must have gone beyond the stage negotiation.

- i. True
- ii. False
- iii. Cannot say
- iv. None of these

4. The equities arise not out of the contract itself but out of the altered position caused by the acts of the parties done in execution of the contract.

- i. True
- ii. False
- iii. Cannot say
- iv. None of these

5. 'it has been determined at law (and in this respect there can be no difference between law and equity) that the 4th section of the Statute of Frauds does not avoid parol contracts but only bars the legal remedies by which they might otherwise be enforced.

- i. True

- ii. False
- iii. Cannot say
- iv. None of these
