

The orthodox position principle law equity essay

Law



**ASSIGN
BUSTER**

Discuss this statement critically with reference to the cases in Singapore, the Commonwealth as well as any relevant secondary literature.

I. Introduction

1VK Rajah JA in *Lau Siew Kim v Yeo Guan Chye Terence*[1]outlined the historical development of equity and mapped out the guidelines for its future evolution. The development of equity although founded mainly to plug the weaknesses of the common law, has evolved to a body of " discrete rules, principles and remedies"[2]. Such a change was greatly motivated by " a need for certainty and consistency"[3]. He articulated that "[a]s society progresses and as lifestyles, attitudes and norms change, modern development of the law and of equitable principles becomes inexorable, and, indeed, necessary."[4]He then highlighted the four tenets that should guide courts in the development of equity: precedent, principle, policy and pragmatism. Therefore, any change in the law with respect to equity must develop in a way that is pragmatic and consistent with precedent, principle and policy. The problem here with regards to the remedies of specific performance and damages in the context of contracts for the sale of land is that given current developments in Singapore law, there is potential conflict between principle and precedent as well as (possibly) policy and pragmatism. As a result of this conflict, the certainty in the rights and remedies that purchasers and vendors are allowed have now been shaken. In order to safeguard certainty and also to allow the development into modern times, there is a need to review this movement towards awarding damages as a default remedy for the contract of sale of land.

II. The orthodox position / Principle

The orthodox position is that specific performance ought to be available to the purchaser as of right in a contract of sale of land. This is because such contracts are generally specifically enforceable due to the nature of the contract itself. Prima facie, land or property is perceived to be unique. Specific performance however has always been perceived to be a discretionary remedy and that the purchaser is always entitled to common law damages as of absolute right in the event of contractual breach. Despite that, it is usual for courts to award specific performance as a primary remedy in contracts for the sale of land because of the traditional notion that all parcels of land or pieces of property are inherently unique. In *Good Property Land Development Pte Ltd v Société Générale*[5], Chan Sek Keong J (as he then was) noted that:[i]t is settled principle that damages would not be an adequate remedy to a party who has been or will be deprived of his enjoyment of or interest in land. The same principle is applicable to the converse case of a claim for specific performance of a contract of sale of land. Damages are inadequate because no two parcels of land can be identical and a piece of land may have a peculiar and special value in the eyes of the purchaser.[6]Therefore, once land is deemed to be unique, specific performance will be granted unless there is the existence of an equitable defence, ie, hardship or if the plaintiff comes to court without 'clean hands'.

III. Developments in Singapore / Precedent

In the recent cases of *EC Investment Holding v Ridout Residence Pte Ltd*[7], both the High Court and Court of Appeal (partly affirming) have departed

from the orthodox position by refusing to award specific performance for a contract of sale of land. In doing so, the courts have challenged the orthodox position, although more so at first instance, which the Court of Appeal refused to fully affirm. At first instance, the judge there had largely relied on the Canadian and New Zealand cases of *Sinnadurai Paramadevan* and *Blossom Paramadevan v Bernard Semelhago*[8] and *Landco Albany v Fu Hao Construction Ltd*[9] in order to justify that purchasers of land no longer have specific performance as a remedy as of right. He doubted that the principles underlying the orthodox position held water in the modern context[10].

4 Locally, these Commonwealth cases have also been cited in obiter remarks in *Good Property Land Development Pte Ltd v Société*

Générale[11] 5 However, on the matter of specific performance, there seems to be two opposing views arising from the Singapore courts. Phang J (as he was then) in *Ho See Yueng Novel v V Development Pte Ltd*[12] was of the view that land being the subject matter is unique and hence the purchaser " may well consider a contractual remedy in damages to be inadequate - hence the possible remedy of ... specific performance".[13] The Court of

Appeal in *Ridout CoA*, too, had exhibited reticence on this matter. The orthodox position was deviated from at first instance and the Court of Appeal chose not to affirm specifically on this point but chose rather to affirm the decision of Loh J on a broader ground, ie, that it would not be just and equitable to award specific performance. Furthermore, in outlining what the orthodox position was, they described it as one where " specific performance will always be decreed for... land contracts", i. e. contracts relating to immovable property"[14](emphasis added). Precedent tells us that: " stare

decisis is the policy of the courts to stand by precedent and not to disturb a

<https://assignbuster.com/the-orthodox-position-principle-law-equity-essay/>

settled point. When a court has once laid down a principle of law as applicable to a certain state of facts, stare decisis requires that it adhere to that principle and apply it to all future cases, where the facts are substantially the same, regardless of whether the parties and property are the same"[15]As a result, it is yet uncertain whether the orthodox position still holds in Singapore. However, given Rajah JA's dictum in *Lau Siew Kim*, judges when presented with a legal problem, look to statutory law and precedent for a solution, in this case, he should look towards local precedent first before opting to go to foreign common law precedents. While local precedents are undivided, the judge should have looked towards English precedents which are still binding on us, i. e. pre 1993. Yet, Loh JA looked towards modern Canadian and NZ jurisprudence for guidance. Inasmuch as there is a need to bring the law into the modern century, it should not have been changed without due consideration of the English authorities, rather than English secondary authorities.

IV. Specific performance or damages: that is the question / Policy and Pragmatism

Whether a court awards specific performance or damages, it is worth noting that they: are simply two means of accomplishing the same result. Specific performance protects the [purchaser's] expectation interest in a contract by delivering the promised performance, [while] damages ... protects the same interest, forcing the defendant to pay the monetary equivalent of the promised performance.[16]Therefore, it is important to ensure that whichever remedy is awarded, the result should be the same and neither the purchaser nor vendor unduly benefits or loses as a result of the choice of the

remedy. Loh J was of the view that the law on contracts for the sale of land should follow that of Canada and New Zealand, as mentioned briefly in [3]. However, if the courts of Singapore were to follow Canadian and NZ jurisprudence as Loh J did, this may have adverse ramifications on the development of our law. The effect would be to adopt two premises into Singapore law. One, that specific performance will not be awarded if damages are adequate and two, that as long as the land is not unique, damages will be adequate. Furthermore, given Loh J's pronouncement that he: "doubt(ed) that ...(the) pronouncement ... that land is "deemed to have a special and peculiar value for the purchaser" and "no enquiry is made" as to the value of the land, ie, for damages, or the possibility of a substantially similar piece of land elsewhere, holds good today and in all circumstances", [17] as well as dictum in Semelhago: "... 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 most likely that the presumption of uniqueness would be removed. In fact, following the Canadian line of jurisprudence, it was the burden of the plaintiff-purchaser to prove that land was unique and that there was no other substitute before specific performance could be awarded. This means that the prima facie remedy would be damages rather than specific performance. A key problem with this (since the land presumed not to be unique and that damages would be adequate) is that the purchaser would have no claim on or equitable interest in the land, but only a contractual right against the vendor. As <https://assignbuster.com/the-orthodox-position-principle-law-equity-essay/>

mentioned in *Alberta Ltd v Walton International Group Inc*[18], "[o]nce it has been determined that damages are an adequate remedy, there is no "interest in land" capable of protection by caveat." [19] Because the purchaser is no longer the equitable owner of the land, he would not be able to file a caveat and therefore, he would not be able to register his interest pursuant to the Land Titles Act. [20] Registration of the caveat is of significant importance to the purchaser. The caveat affords the purchaser protection of his interest and claim in the property. Without it, the vendor will be able to transfer the property to another purchaser and in doing so, will deny the purchaser his right to specific performance. Furthermore, in the event of fraud, it is even harder for the purchaser to prove that the second purchaser had notice (actual or constructive) of the first purchaser's interest, i. e. the second purchaser is a bona fide purchaser. Another example would be the possibility of the insolvency of the vendor, where creditors may lay claim to the property without the protection of the caveat. Although 8C. Policy The potential unsavouriness of following *Semelhago* was itself mentioned in *Ridout CoA*, but was sadly not discussed. Counsel for ECI had pointed to the fact that the Alberta Law Reform Institute had created a report which considered overturning *Semelhago* via statutory provision. The decision in *Semelhago* had wide-reaching implications. D. Pragmatism

V. Conclusion

However, it is submitted that *Ridout* does not stand ultimately for the proposition that specific performance is no longer available as of right. The Court of Appeal denied specific performance for a number of reasons and even if specific performance were to be awarded as of right, it was denied

based on the equitable defence, i. e. that it would have caused hardship to a third party had the contract been performed. Moreover, the Court had also stated that in determining whether

Despite the fact that the property had been purchased for commercial reasons and hence damages can be adequate remedy, specific performance was arguably not granted on such a broad ground. To award specific performance on such a broad ground is tantamount to rebutting the orthodox position in Singapore and adopting what is largely the Canadian approach in *Semelhago v Paramadevan*, which again arguably has been **WRONGLY** interpreted by Canadian courts. Sopinka J highlighted in that case that it is not necessary for courts to be bound to award specific performance, since they similarly have the courts jurisdiction to substitute damages in lieu of specific performance. However, with regards to what was laid down in *E C Investments*, this is with regard to all the facts and circumstances of the case. Furthermore, what Sopinka J laid down was obiter and then re-interpreted and applied in other Canadian cases. Specific performance as of right

Hence it is submitted that specific performance should be available as of right to the purchaser of land via the presumption that land is ultimately unique. The Alberta Law Reform Institute came up with a list of objective factors that contribute to uniqueness: "[firstly,] no other land has the same boundaries and precisely the same physical characteristics, [secondly,] the parcel is immovable and indestructible [and] the land has been uniquely identified by the parties in a contracts." However, unlike their recommendation that land should be conclusively unique, the orthodox position takes into account not only objective factors but subjective notions of uniqueness. Therefore, it may be preferred such a presumption be rebuttable by the vendor. Given the factors, successfully rebutting the

<https://assignbuster.com/the-orthodox-position-principle-law-equity-essay/>

presumption may prove hard. In the event that it is the vendor who breaches the contract and pleads for damages, it may be preferred that the burden is placed on it, to argue on what basis the orthodox position should be departed from on the particular facts. The author humbly submits that the phrase "specific performance ought to be available to the purchaser as of right" has a separate interpretation. The right that is available to the purchaser is a qualified right, rather than an absolute right. Therefore, it represents a prima facie position rather than a default conclusion. Therefore, while the purchaser can plead for specific performance, he can lose this right either of his own action and volition as well as other circumstances. As such, the phrase "the court needs to look at all the facts and circumstances" is particularly important. In fact, it is to ensure that the situation is an appropriate one and that there is nothing to the contrary that can deprive the purchaser of his right. And most importantly, this right is premised on the threshold assumption/presumption that the land is unique. This position is also to ensure the fairness and justice of the case. If damages are to be awarded, this may result in supercompensation of the purchaser.

Furthermore, one of the reasons why specific performance is awarded instead of damages is due to the difficulty in assessing those damages. Note, there may a difference between common law damages awarded and damages awarded in lieu of specific performance, pursuant to s 18(2) of the Singapore Court of Judicature Act. Furthermore, the vendor on the other hand should not have specific performance as of right. In his case, his expectation from the contract was money, i. e. the amount he settled for in exchange for the land, hence any monetary difference between the price promised to the purchaser and current market value price would be

sufficient damages. There is no need for the vendor unlike the purchaser to have the remedy of specific performance, unless he can prove something to the contrary. This position would take into account the Canadian position and hence while moving the law forward would yet keep it in line with precedent. Unlike the Canadian cases where the burden is on the plaintiff to prove the uniqueness of land, the presumption of uniqueness should be upheld and the burden on the defendant to prove that the land is not sufficiently unique. Again referring to *Lau Siew Kim* and the four primary perspectives, even if *Loh JA's* decision in *Ridout HC* was made according to precedent, principle and policy, it can hardly be said to be pragmatic. The solution that is adopted has to work in practice, and from the above analysis, it neither works in that damages are only seemingly adequate, liable to under and over compensation. Furthermore, certainty has been shaken.