SPECIFIC PERFORMANCE AS A LEGAL ALTERNATIVE TO AWARD OF DAMAGES: SOME LEGAL CONSIDERATIONS

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Abstract

The topic of this research is "Specific performance as a legal alternative to Award of damages: Some Legal Consideration". The court of equity developed the remedy of specific performance as damages often could not adequately compensate someone for the inability to own a particular piece of real property, land being regarded as unique. The research examined specific performance as a legal alternative to Award of damages under property Law with a view of pointing out the adequacy or otherwise of the remedy. Efforts were made to rely on doctrinal method based on primary and secondary sources. It was discovered that specific performance is an alternative to awarding damages and is classed as an equitable remedy commonly used in the form of injunctive relief concerning confidential information or real property. It was found further that as alternative remedy, the plaintiff may at times, unreasonable seek for the remedy when it is practically impossible to do so, particularly, when damages could be an adequate remedy. The research recommended that the availability of this remedy should depend on whether it is appropriate in the circumstances of the case to grant same and not on the mere erroneous believe that it is alternative to damages. The conclusions reached shed light on the choices made between damages and specific performance to the extent that orders of specific performance should be granted when damages are not an adequate remedy and in some specific cases, such as land sale.

1. Introduction

Under the various Rules of Courts in Nigeria, and of course under the case laws, litigants are permitted to bring relevant as well as necessary applications before the courts. This could be done before, during and after the substantive suit. These applications are designed to remedy certain defects in the substantive suit. Some applications are aimed at seeking some temporary reliefs in addition to the main claims as may be contained in the judgment of the court. Some applications have the effect of nipping the substantive action in the bud.

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Generally, the court is bound to decide every application before it, one way or the other before the substantive matter is finally decided, as the ruling or the outcome of such applications may assist in doing justice in a matter before the Honorable Court as seen in *Nalsa&Team Associate Ltd v NNPC.*[2] More importantly, the applications are usually required by the Rules of various courts to be in writing, always by way of motion, except there is an enabling law or rule of procedure to the contrary. As decided in *Coker v Coker*[3] some oral applications can be made in some interim and interlocutory reliefs being sought before the court.

Specific performance is one of the equitable remedies. Under common law, specific performance was not a remedy. The right of a litigant is limited to the collection of damages. However, the court of equity developed the remedy of specific performance as damages often could not adequately compensate someone for the inability to own a particular piece of real property, land being regarded as unique. The commonest case in which the court of equity specifically enforces a contract is in cases where the contract is for sale of land or for the granting of a lease.[4] In this regard, it is sometimes possible to find the land in issue having a peculiar value to the purchaser or leasee. In a case of breach of contract for sale of land, the appropriate order is that of specific performance and not the award of damages which cannot be an adequate remedy.[5] Usually where the court is satisfied with the necessary conditions, it would invariably decree specific performance of a contract affecting the land. This decree would be made where the parties are both within the jurisdiction and even out of the jurisdiction.

2. Specific Performance

Black's Law dictionary defined specific performance as follows:

> The rendering, as nearly as practicable, of a promised performance through a judgment or decree; a court ordered remedy that requires precise fulfilment of a legal or contractual obligation when monetary damages are inappropriate or inadequate, as when the sale of real estate or a rare article is involved.[6]

[2](1991) 11 SCNJ
[3](1956)1FSC16
[4]*Verral v Great Yarmouth BC* (1981) QB 202 (used of meeting hall for two days)
[5]See *Universal Vulcanising (Nig) Ltd v Ijecha United Trading Transport Compant Ltd* (1992) 9 NWLR (PT.266) 388; *Anaeze v Anuaso* (1993) 5 NWLR (Pt.291) 1
[6]Bryan A.G., Black's Law Dictionary, 9th Ed., Dallas, Texas, Thomson Reuters Business, 2009, p.1529

Specific performance is the remedy of requiring exact performance of a contract in the specific form in which it was made or according to the precise terms agreed upon. It is the actual accomplishment of a contract by a party bound to fulfill. The doctrine of specific performance is that where monetary damages would be an inadequate compensation for the breach of an agreement, the contractor or vendor will be compelled to perform specifically what he has agreed to do. He can, for example, be ordered to execute a specific conveyance of land.[7] Such obligations may be contractual in nature or other consensual obligation.[8]

Specific performance is an order of a court which requires a party to perform a specific act, usually what is stated in a contract. It is an alternative to awarding damages and is classed as an equitable remedy commonly used in the form of injunctive relief concerning confidential information or real property. While specific performance can be in the form of any type of forced action, it is usually to complete a previously established transaction, thus being the most effective remedy in protecting the expectation interest of the innocent party to a contract. It is usually the opposite of a prohibitory injunction, but there are mandatory injunctions that have a similar effect to specific performance.[9]

It is an equitable relief, given by the court to enforce against a defendant, the duty of doing what he agreed by contract to do. The remedy is in contrast with the remedy by way of damages for breach of contract, which gives pecuniary compensation for failure to carry out the terms of the contract. Damages and specific performance are both, remedies available upon breach of obligations by a party to the contract; the former is a 'substitutional 'remedy, and the latter a 'specific' remedy.[10] The plaintiff seeking this remedy must first satisfy the court that the normal remedy of damages is inadequate; the presumption being that in cases of contract for transfer of immovable property, damages will not be adequate. Even in these cases, specific performance is not always granted, as it is a discretionary remedy.

2.1 Where Specific Performance cannot be granted

[7] *Ibekwe v Nwosu* 2011 Legalpedia SC Q5WT
[8] Peter, C and Joanne. C, The New Oxford Companion to Law, New York, Oxford University Press 2008, p.1107.
[9] "Specific Performance" <https://en.wikipedia.org/wiki/Specific_performance> Accessed 30/11/17.
[10] "Specific Performance of a Contract" <http://www.legalservicesindia.com/article/article/specific-performance-of-contracts-942-1.html>, Accessed on 1/12/2017.

There are certain contracts, which equity will not specifically enforce due to their nature and these include:

1. Where the party seeking to enforce a contract or agreement was, himself, in breach of the fundamental terms of the contract. A party can only seek that equitable remedy, if he has put his house in order and shown compliance with his own side of the agreement. This justifies the equitable maxim that he who comes to equity must do so with clean hands.[11]
2. Illegal or immoral contracts.[12]
3. Agreements without consideration because equity would not aid a volunteer,[13]
4. Contracts for transient interest,[14] because equity like nature does nothing in vain,
5. A contract for partnership[15] except there has been some part performance,[16]
6. Contracts that involve personal skill, reason being that the court cannot compel the complete performance of a contract personally.[17] This is in line with the idea that courts will usually not order specific performance of contracts involving personal service, like most employment contracts, on the ground that they do not want to force people into a kind of involuntary servitude.
7. Contracts requiring constant supervision; example, a contract to carry on a business. This is because of the difficulty of defining with precision what has to be done,[18]
8. Contracts to transfer goodwill alone will also not be specifically enforced as the uncertainty of the subjects matter and the consequent incapacity of the court to give specific directions as to what is to be done to transfer it will be a bar.[19]
9. Divisible contracts by their nature are also not specifically enforced[20]
10. Contracts for arbitration because equity will not directly enforce an agreement to appoint an arbitrator.[21]

[11]*Asaka v Raminkura*, 2014 legalpedia CA JJX5.
[12]*Ewing v Osbaldiston* (1837) 2 my &Cr. 53
[13]*Jefferys v Jeffery's* (*Supra*)
[14]*Hercy v Birch* (1804) 9 Ves 357
[15]*Scott v Rayment* (1868) LR 7 Eq 112
[16]*England v Curleng* (1844) 8 Veav 129
[17]*Lumley v Wagner* (1852) 1 De G.m& G 604
[18]*Ryan v Mutual Ton tine Westminister Chambers Association* (1893) Ch. 116
[19]*Baxter v Conolly* (1802) Ij& W 576
[20]*Ogden v Fossic* (1862) 4 De G. F. &J 426
[21]*Odessa v Tramways* C (1878) 8 Ch& J235

Furthermore, in some cases, specific performance is not possible. This would be the cases if the defendant has already sold the house to another party who was unaware of the first sale.

3. Specific Performance as an Alternative to Award of Damages

It is an equitable remedy that lies within the court's discretion to award whenever the common law remedy is insufficient, either because damages would be inadequate or because the damages could not possibly be established. In essence, the remedy of specific performance enforces the execution of a contract according to its terms and it may therefore be contrasted with the remedy of damages which is compensation for non-execution. In specific performance, the execution of the contract is enforced by the power of the court to treat disobedience of its decree as contempt for which the offender may be imprisoned until he is prepared to comply with the decree. It is not strictly accurate to say that the court enforces the execution of the contract according to its terms for the court will not usually intervene until default upon the contract has occurred, so that enforcement by the court is later in time than performance carried out by the person bound, without the intervention of the court.[22]

Specific performance is often guaranteed through the remedy of a right of possession, giving the plaintiff the right to take possession of the property in dispute.[23] However, in the case of personal performance contracts, it may also be ensured through the threat of proceedings for contempt of court.

Orders of specific performance are granted when damages are not an adequate remedy and in some specific cases, such as land sale. Such orders are discretionary, as with all equitable remedies, so the availability of this remedy depends on whether it is appropriate in the circumstances of the case. The doctrine of specific performance like all other equitable remedies is discretionary in nature and therefore in many cases, the court will not grant specific performance even where remedy in damages is insufficient.[24]

Specific performance is usually pleaded in the statement of claim as follows:

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[22]See Keeton, G.W, An Introduction to Equity, 5thedn., !961, cited in Bryan A.G., Black's Law Dictionary, 9th Ed., Dallas, Texas, Thomson Reuters Business, 2009, p.1529.
[23]"Specific Performance" <https://en.wikipedia.org/wiki/Specific_performance> Accessed on 30/11/17.
[24]*Abdeen v Thaheer* (1958) A.C. 116

> An Order of specific performance of the agreement made in 1982 between the 2nd Plaintiff and 1st and 2nd Defendants for the assignment of the unexpired residue of the leasehold interest in the property known as Plot 1164 SakaTinubu Street, Victoria Island Lagos covered by Certificate of Occupancy issued on the 10th of February 1983 and registered as No.84 page 84 in volume 1982 at the Lagos State of Nigeria Land Registry…[25]

Or in the following:

> An order of specific performance of the contract of sale between the plaintiff and the 1st Defendant.[26]

The gist of specific performance rests squarely on the agreement of the parties. In *Minilodge Ltd. v Ngei*[27] where the Supreme Court held:

> A contract of sale exists where there is final and complete agreement of the parties on essential terms of the contract, namely, the parties to the contract, the property to be sold, the consideration for sale and the nature of the interest to be granted. Once there is agreement on these essential terms, a contract of sale of land or property is made and concluded. In contract for sale of property where part payment was paid, the law is that the contract for purchase has been concluded and is final, leaving the payment of the balance outstanding to be paid. The contract for the sale and purchase is absolute and complete for which each party can be in breach for non-performance and for which an action can be maintain for specific performance...

In principle, establishing the basis of specific performance, Brett, J.S.C in *Fakoya v St. Paul's Church, Shagamu,*[28]held as follows:

> The basis of the remedy of specific performance is not the conversion of an equitable interest into a legal interest, but the enforcement of a contract where damages would not afford a complete remedy, and although specific performance is more frequently granted where the contract is for the sale of land than in other cases, this is not because of any distinction between the jural nature of a right to purchase land and other contractual rights but because damages are

[25]See relief ii in *Ohiaeri v Yussuf&Ors case (supra)*
[26]See relief (d) in *Asaka v Raminkura* 2014 Legalpedia CA JJX5
[27](2009) 7 NWLR (Pt. 1173) 254 at 284 - 285,
[28](1966)1 SCNLR 189

> less often a complete remedy for the breach of a contract for the sale of land than for the breach of other contracts.

An action for specific performance arises once there exists a contract coupled with circumstances which make it equitable to grant a decree of same.[29] F.F. Tabai, JSC held as follows:

> … This being a contact for the sale of land attracts a greater justification for a decree of specific performance because as opposed to other types of contract, the land may have a special and peculiar value to the purchaser. The Plaintiffs/Respondents have therefore every justification to claim for specific performance.[30]

The law is that where parties have entered into a contract voluntarily and there is nothing to show that same was obtained by fraud, mistake, deception or misrepresentation; they are bound by the provisions or terms of the contract or agreement.[31] A contract is always construed strictly in the light of the essential and material terms agreed upon by the parties. The court would not allow a party to dribble the other party by doing any act inconsistent with the terms of the contract and later come up to place reliance on those inconsistent acts to enforce the contract. The order of specific performance must relate to the exact agreement of the parties otherwise there would be nothing to rest an order of specific performance upon.[32] A party who seeks specific performance of a contract must depict evidence of compliance with the terms of the contract.[33]

Moreso, a party who seeks an equitable remedy of specific performance, must show that he has performed all the conditions precedent to the grant, that is, that he has fully performed his side of the contract.[34] Thus, where the Appellant failed, woefully, to keep the terms of the contract agreement, for instance, to pay the balance as stipulated, he gives liberty to the other party to treat the contract as repudiated, as the breach discharged

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[29]*Ohiaeri v Yussuf&Ors*, 2009 Legalpedia SC WNDF
[30]*Supra*
[31]See the case of *A.G. Rivers v A.G. AkwaIbom* (2011) 8 NWLR (Pt. 1248) 31; *Ebla Const. Ltd. V Costan (WA) Plc*. (2011) 6 NWLR (Pt. 1242) 110; *AgrovetSincho Pharm. Ltd. v Estate Of Engr. Dahiru* (supra) at 33 – 34.
[32]*Ibekwe v Nwosu* 2011 Legalpedia SC Q5WT
[33]*Best Nigeria Ltd. v Blackwood Hodge Nig. Ltd. &Ors* (2011) ALL FWLR [Pt. 573] 1955 at 1968; *Coker v Ajewole* [1976] 98 10 SC 17 at 29.
[34]*Gaji v Paye* (2003) FWLR (Pt. 163) 1 at 19; *Asaka v Raminkura*(*Supra*)

the other party in the contract. In that case, an order of specific performance will be refused by the court.[35]

Where an unregistered document affecting land is pleaded and produced in support of a claim for specific performance of a contract for the sale of land, such a document will be admissible for the purpose of claiming specific performance of the contract. The position would have been different if the unregistered document is pleaded and produced as affecting the land for the purpose of claiming damages as held in *Elkali v Fawaz*[36] or *Yaya v Mogoga*[37] and these cases are no authority on the point when the agreement is produced for the purpose of specific performance. In specific performance, the purpose of producing the agreement is not to show that a party has an equitable interest in the land, but to show that such party has contractual rights of a kind which the court will enforce by specific performance. Thus, such a document will be admissible for the purpose for which it was produced, that is to say, for the enforcement of a personal obligation which it imposed on the appellant, and not produced as affecting the land.

A mistake by a party through his own fault entirely is not necessarily a valid defence to a suit for specific performance.[38] Also as a general rule, reinstatement is not ordinarily the remedy for breach of contract of service. It is only in special circumstance that the remedy of specific performance will be granted and what constitutes special circumstances depends upon the particular facts of each case. This follows from the general law that the court will not grant specific performance of a contract of service. Therefore, a declaration that a contract of service still subsists will rarely be made as special circumstance will be required before such a declaration is made and its making will normally be in the discretion of the court.[39] This follows from the nature of contract of employment (except the ones with statutory flavour) that no servant can be imposed on an unwilling master even where the master's behaviour or motive for getting rid of the worker is wrongful, unfounded or unjustifiable. In a purely master and servant relationship in which the relationship is purely contractual, termination of employment by the employer cannot be wrongful unless it is in breach of contract, notwithstanding that

[35] *Mustapha v Abubukar* (2012) ALL FWLR [Pt. 651] 1519 at 1538.
[36] (1940) 6 WA.C.A. 212
[37] (1947)12 W.A.C.A. 132
[38] *Ikomi v Bank of West Africa Ltd*
[39] *Gateway Bank of Nigeria Plc* v *Abosede*2001 Legalpedia CA WSUG

the employer gave a totally untenable reason for the termination.[40] Thus, wrongful termination of contract of employment cannot entitle the employee to an order of declaration that he is still in the employment of the employer until his appointment is properly terminated. Also, order for payment of salaries and other entitlements until such employer's employment is properly determined in cases of wrongful termination of employment cannot be made in respect of employment contracts lacking statutory flavor. Even if the employment was wrongly terminated, the remedies open to the employee are damages for breach. It is only in exceptional circumstances that the court will decree a specific performance of employment contract. Thus, to do otherwise will amount to imposing an employee on an unwilling employer.[41] Where the master has taken a valid decision to fire a servant - the court will not order specific performance of the contract of employment.[42]

Contracts for the sale of an interest in land are usually specifically enforceable. The reason for this is that the law views land as a unique asset for which damages would not adequately compensate the buyer. However, the law goes further and allows for specific performance even for a seller of land. In some cases a seller may have good reasons for wanting to transfer the disadvantages, burdens and obligations attached to a specific plot of land, but nonetheless the rule applies even to readily saleable plots. Specific performance for land is a major exception to the court's restrictive approach.[43]

4. Conclusion

Specific performance is an equitable remedy. When the court orders specific performance, they are ordering one party to perform a contractual obligation. Specific performance is distinct from damages and from actions on debts as a remedy for breach of contract. Specific performance is more often employed for contracts to convey property than for contracts to produce things or to provide services. A partial explanation for the scarcity of cases on specific performance may be that our courts generally frown on attempts to employ specific performance where contract law would not sanction the remedy. The familiar rule is that courts will not award specific performance when damages provide adequate relief.

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40 (*Supra)*

41 *U.B.N v Ugo* (1995) 2 NWLR (Pt. 380) pg. 67*; NNPC v IdomiboyeOdu* (1996) 1 (Pt. 427) 655 at 677; *Patti.vMesimone* (1995) 6 NWLR (Pt. 402) pg 488.

42 *Gateway Bank of Nigeria Plc v Abosede* (*Supra).*

43 *Drukker "Specific Performance"* <https://drukker.co.uk/portfolio/specific-performance/> Accessed on 22/7/2018.

The advantage of an order for specific performance is that the innocent party gets exactly what it contracted for and there is no need to mitigate loss. Consequently, there is the potential for the innocent party to act quite unreasonably in refusing to accept compensation for the breach of contract. For this reason the courts limit the availability of specific performance as a remedy. The test is whether damages would be an adequate remedy. If so, then specific performance will not be granted.