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Specific Performance in Arkansas

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Specific performance is an equitable remedy by which a court of equity compels the performance of a contract according to the precise terms of the contract. In effect, the court orders a contracting party in breach to do what he should have done.¹ The goal is to place the innocent party in the position he would have been in if the other party had fulfilled the terms of the contract.²

I. From the Plaintiff's Perspective

A. Prerequisite of a Valid Contract

In light of the equitable maxim that equity follows the law,³ the court must first determine whether a valid and definite contract between the parties exists,⁴ and whether all conditions of that contract have been fulfilled by the non-breaching party. Before equity will use its powers against a party, the court must ensure that the contract clearly spelled out the seller's responsibilities. The contract needs more certainty and definiteness than it would if only damages were sought.⁵ In the absence of a complete and finalized agreement that demonstrates a "meeting of the minds," the court has nothing to specifically enforce.⁶ A contract will be specifically performed only if the terms are sufficiently definite so that the court can determine what must be done to constitute performance.⁷ The necessary material terms may include the description of the property, the nature of the services, the names of the parties, the time of performance, and the manner of payment.

In order for a contract for the sale of land to be specifically performed, it must contain a definite description of the land.⁸ The Statute of Frauds requires a written agreement or memorandum for the sale of land,⁹ a writing that contains all the essential terms and is signed by the party to be charged.¹⁰ Property descriptions such as "120 acres more or less White County El Paso, Arkansas"¹¹ and "16 acres-67 Highway East at Fairfax Crossing"¹² lack the definiteness necessary for specific performance. However, the phrase "their plantation located on Carson Lake in the Osceola District of Mississippi County, Arkansas, containing 520 acres, more or less" was held sufficient because it referred to a definite tract owned by the defendants and clarified the location.¹³

Generally oral testimony is not permitted to identify the land,¹⁴ but occasionally oral testimony may be utilized to make certain the exact location, provided the written contract gives the key to identifying the property.¹⁵ Extrinsic evidence concerning the negotiations and other circumstances of the sale may be appropriate to decipher or make intelligible the terms of the contract. Therefore a writing describing "the real property and improvements belonging to Mrs. Lydia Boensch" was sufficient when the seller owned only one tract of land in the county.¹⁶

A common condition is presented by a "time is of the essence" provision. Such contractual language requires one party to perform within a specified period of time or forfeit his rights under the contract. In the absence of a specific clause in the con-

tract for the time of performance, the law imposes an obligation to comply within a reasonable time.¹⁷ The failure of a party to act in a timely fashion under the terms of the contract may bar that party from seeking specific performance.¹⁸ Similarly, when confronted with a contract that requires a party to carry on an activity for an indefinite period of time, the court will imply a reasonable time for continued operation in light of the surrounding circumstances and the negotiations leading up to the contract.¹⁹

If the contract is wholly executory, a "time is of the essence" provision will be strictly enforced. If the provision is not satisfied, specific performance will not be granted.

On the other hand, if the contract is partially executed, the court may be reluctant to take a strict approach. For example, suppose the buyer of land has made 15 of 50 required payments, and then misses a payment. Strict forfeiture would result in a loss of the equity of the buyer.

Forfeiture provisions in land sale contracts²⁰ are enforced when no substantial equitable circumstances demand the denial of forfeiture.²¹ However, equity will seize upon slight circumstances that indicate a waiver by the seller in order to prevent forfeiture against the buyer.²² For example, the acts of the seller may lull the buyer into a sense of assurance that late payments or other failures to comply with the terms of the contract will be tolerated; in that instance equity is reluctant to grant a forfeiture, particularly when the buyer has made substantial payments on the total purchase price.²³ In appropriate situations equity will even grant specific performance to a defaulting buyer, when a minor default might result in a major forfeiture.²⁴

B. Inadequacy of the Legal Remedy

Assuming that the elements of a valid contract are met and the conditions satisfied, the court's attention then focuses on the remedy. As with any equitable remedy, specific performance is available only if no legal remedy is adequate. To deprive equity of jurisdiction, the remedy at law must be clear, adequate, and complete.²⁵ The remedy at law must be a present remedy, not one that might be exercised in the future.²⁶ The basis for equity jurisdiction must be apparent in the pleadings.²⁷ Adequate legal remedies are not limited to damages. Specific remedies, administrative remedies, political action or out of court solutions may be suffi-

cient to bar equitable relief.

The most common examples of specific performance occur with real property. Each tract of land is presumed to be unique, and a buyer may seek specific performance of a contract without offering any evidence of the inadequacy of the legal remedy or the special nature of the land.²⁸ In contrast, the court will require a showing that personal property is unique before decreeing specific performance. The chattel may be unique, rare or one of a kind (a 16th century Flemish masterpiece), may have special significance to the plaintiff (a Civil War daguerreotype of relatives), or may not be generally available (a restored 1964 Mustang).

Apart from tangible property, the adequacy of the legal remedy is frequently less apparent. A worker discharged in violation of a contract has an adequate remedy in damages and cannot seek specific performance.²⁹ However, the mere availability of potential damages does not necessarily make the legal remedy adequate. Damages that are merely speculative³⁰ or hard to measure³¹ may not be adequate. The limited potential of recovering damages from an insolvent defendant is likely to make the remedy inadequate, as may multiple lawsuits for damages against several defendants.

Likewise, because the sale of a going business involves difficult issues of calculation of damages, equity may specifically enforce such a contract.³² Not only is good will present in the purchase price, the transaction may include the purchase or assignment of real property interests, the continued involvement of key personnel, covenants not to compete, and the continuation of a successful business. Such factors arguably make the calculation of damages speculative. Likewise, the difficulty of obtaining substitute equipment or personal property may make the legal remedy inadequate.³³

C. Part Performance Exception

The common law does not require that a contract be in writing. But the Statute of Frauds requires that some contracts be in writing to be enforceable in courts of law and courts of equity.³⁴ On the equitable side, an exception to the requirement of a writing for the land contract is the part performance doctrine. A buyer who pays part of a purchase price and takes possession of the land pursuant to an oral agreement for the purchase of the land may rely upon the doctrine.³⁵ The buyer must establish with clear and convincing evidence both the making of

the oral contract and its performance.³⁶ The doctrine is not applicable to a tenant who was already in possession or to another party who occupies the land on some basis other than vendee.³⁷

The partial performance must be substantial. Typically the party alleging the doctrine takes possession, clears the land, provides utility service, fences the property, or adds improvements.³⁸ Two weekends of cleaning up debris on land does not constitute part performance.³⁹ Minor repairs and improvements of the type typically made by a tenant in possession do not satisfy the requirement of part performance.⁴⁰ The improvements must be so substantial and valuable that the denial of specific performance would be inequitable.⁴¹ Part performance requires that possession be taken of the entire tract supposedly being purchased, not merely a portion.⁴² The part performance doctrine fulfills the evidentiary purpose of assuring the absence of fraud in the contractual relationship, even without a written contract.

D. Plaintiff's Responsibility

Implementing the maxim that "he who seeks equity must be willing to do equity,"⁴³ a party seeking specific performance must be ready, willing and able to perform its side of the contract.⁴⁴ Further, the party must have performed or offered to perform any acts that form part of the consideration for the contract.⁴⁵ For example, a tenant who has possession of land but fails to make the periodic payments may be denied specific performance of an option to purchase.⁴⁶ Similarly, a party who violates the terms of the contract will be denied specific performance. A tenant who had breached the contract by cutting trees, removing fences, and failing to cultivate land was denied enforcement of option to purchase land.⁴⁷

II. From the Defendant's Perspective

A. Defenses in General

Since equity follows the law, all the standard defenses to a breach of contract action are available to a specific performance claim: including the lack of an enforceable contract, the Statute of Frauds,⁴⁸ misrepresentation,⁴⁹ failure to disclose material information to a contractual partner in a confidential relationship, innocent misrepresentation,⁵⁰ and mistake.⁵¹ In addition to the general contractual defenses, equity will deny specific performance for those grounds that apply to any equitable claims:

unclean hands, estoppel,⁵² fraud,⁵³ and laches.

A party who seeks specific performance must act with reasonable diligence.⁵⁴ This implied obligation grows out of the equitable maxim of laches that "equity aids the vigilant, not those who slumber on their rights."⁵⁵ Unreasonable delay in seeking equitable relief and resulting prejudice to the defendant are the dual elements of laches.⁵⁶ The defense of laches may be particularly pertinent in the instance of property that fluctuates greatly in value. Accordingly, a party who waited four years to seek enforcement of a subscription contract for common stock was barred from the equitable remedy.⁵⁷ To permit such a party to sit idly by and act only when the financial rewards are certain is contrary to a sense of fairness.

B. Election of Remedies

Specific performance is almost always an alternative remedy. The election of remedies doctrine provides that if the substantive law provides two inconsistent remedies for one cause of action, the plaintiff must at some point and in some fashion elect between the two remedies.⁵⁸ The election can be made out of court or in court, intentionally or unintentionally. But the Arkansas case law is clear in stating that the election, however and whenever made, is irrevocable. Accordingly, a defendant will frequently respond that a plaintiff has elected the damages remedy and is thereby barred from the specific performance remedy.

To avoid the harshness of the Arkansas rule, the plaintiff may sue in the alternative, seeking both specific performance of a contract and damages for repudiation of a contract. The chancellor should not require an election before determining whether specific performance is an available remedy.⁵⁹ Accordingly a party is not required to mitigate damages until a judicial determination on the availability of specific performance.⁶⁰

C. Mutuality

Mutuality of remedies provides that a party cannot seek specific performance unless the contractual partner would also have been eligible for specific performance. For example, in a contract between an adult and a minor, since the adult could not obtain specific performance against the minor because of the infancy shield,⁶¹ the minor cannot seek it from the adult. Similarly, a party can seek specific performance if the

other contractual partner could have been awarded the remedy. For example, because the buyer under a land sale contract can obtain specific performance, the seller can likewise be granted the equitable remedy even though the only result is money.

Although mutuality of remedies certainly is the general rule,⁶² its scope has been narrowed. The mutuality of remedy is evaluated as of the time of enforcement, not at the time of formation of the contract.⁶³ For example, assume that a couple agreed to provide housekeeping and nursing services for an elderly person in return for title to property. If the purported grantor refused to execute a deed, a court of equity would not compel specific performance of the contract because if the status of the parties was reversed, the court would not compel the couple to specifically perform by providing the services.⁶⁴ Since a court would not compel them to perform, the mutuality of remedies doctrine bars the court from compelling the elderly individual to perform. But, if the elderly individual had died without signing a deed, the court would compel the executor to perform. Since mutuality is determined as of the time of enforcement, the couple had done all that they were required to do. In the absence of a written agreement, such a decree of specific performance is appropriate only when the couple establishes by clear, cogent and convincing evidence that the parties did have such an oral contract to make a will.⁶⁵ Some courts might describe this action against the executor as "quasi-specific performance" or decree a constructive trust against the property to prevent unjust enrichment,⁶⁶ but the result is the same: specific equitable relief transferring title.

Another limitation is presented by an option contract. For example, a contract that gives one party an option to purchase land or assert other provisions in the future is certainly not mutual. The seller cannot compel the buyer to purchase. However, case law clarifies that the option is binding on the seller and may be specifically enforced against him.⁶⁷ Further, since mutuality is determined as of the commencement of the action, a party's initiation of a suit for specific performance may be sufficient to establish the missing mutuality.⁶⁸

D. Adequacy of the Consideration and Unconscionability

Equity may refuse to specifically enforce a contract if the contract is unconscionable or if the con-

sideration is inadequate. For example, if a seller foolishly or unknowingly agrees to sell a valuable piece of land for a trivial amount, the court may deny specific performance and limit the buyer to damages in a court of law. Even if the buyer's conduct does not amount to fraud, too hard a bargain may bar equitable relief. Such a result is particularly easy to defend if the conduct of the buyer has elements of overreaching, unconscionability, or other questionable tactics. Similarly, the denial of the specific remedy is more easily justified if one party was mistaken or if one party was in a superior position.

Unconscionability is tested as of the time the contract was formed. Consider for example, a merchant who forgives a debt and advances funds to a prospector in return for a share of any mineral discovery. At the time the contract is made, it seems fair because the prospector may find nothing and the merchant accepted that risk. But if the prospector discovers the mother lode, the merchant would seek specific performance. Not only was the agreement fair at the time of contracting, but public policy and the free enterprise system suggest such a contract should be specifically enforceable.⁶⁹

Although unconscionability is specifically recognized as a defense to a specific performance action under the Uniform Commercial Code,⁷⁰ it has been little discussed in the Arkansas case law.⁷¹

E. Impossibility

Specific performance is not available when performance is impossible. If a party is legitimately unable to obtain suitable financing to purchase land under a contract, the court will not decree performance.⁷² Because a court cannot compel performance against a party who is not bound on the contract, the financial assets of a spouse who is not obligated on the contract are irrelevant in evaluating the financial ability of the buyer to consummate the agreement.⁷³ Specific performance may be impossible because the land that is the subject of the contract has been transferred to a third party for value without notice of the prior contract⁷⁴ or because a foreclosure action prevents the conveyance of clear title.⁷⁵

III. From the Chancellor's Perspective

A. Discretion

A party has no right to specific performance, for like all equitable remedies it rests in the discretion of

the chancellor. It is to be exercised "according to the settled principles of equity and not arbitrarily or capriciously, yet always with reference to the facts of the particular case."⁷⁶ Courts of equity have discretion in granting or withholding that relief, depending on the particular equities and inequities in a case.⁷⁷ The statement generally made is that courts deny specific performance when the case is not clear, the plaintiff is in the wrong, or considerable countervailing equities exist.⁷⁸ But the discretion is not absolute, as the courts speak of equity possessing "some latitude of discretion."⁷⁹

Appellate opinions also speak of specific performance as a question of fact for the chancellor.⁸⁰ If granted or denied, the issue on appeal is whether the chancellor's decision was clearly erroneous.⁸¹ In particular, the failure of a chancellor to grant specific performance of a land sale contract may be reversible error.⁸²

However, the Arkansas appellate opinions contain as well a second line of precedent. These opinions provide that just as a court of law awards damages for breach of a contract, the court of equity should usually and "as a matter of course" decree specific performance.⁸³ To be sure, these opinions require that the contract be certain in its terms, be supported by valuable consideration, be fair and just, be capable of enforcement without hardship to either side, and be controlled by the established principles of equity.⁸⁴ However, on further examination these opinions seem to turn on actions by the chancellor that fall more appropriately into the "arbitrary and capricious" category. For example, a court cannot refuse to decree specific performance simply because the buyer intends to resell land after initially acquiring it.⁸⁵

Specific performance is only available if enforcement is feasible. The determination of feasibility is an integral aspect of the equitable traditions of flexibility and discretion. If the court is unable to enforce the precise terms of the contract, it may decree the equivalent under the rubric of substantial performance or quasi-specific performance, in either case attempting to do justice between the parties.⁸⁶

Courts of equity are disinclined to grant specific performance when a judicial decree could not be easily enforced, would involve the court in on-going supervision, or would entail performance of a complicated contract. A court will not decree specific performance where the contract is one that could not be enforced by the ordinary processes of the court.⁸⁷ However, the ability to enforce a decree

with simple contempt authority may be sufficient to support enforcement. Accordingly, the court has been willing to consider enforcement of contracts requiring defendants to provide space in a plant lounge for plaintiff's vending machines.⁸⁸

As an exceptional and unique remedy, the decision to grant specific performance imposes a burden on the breaching partner. Equity may be reluctant to enforce a contract if the hardships weigh in favor of the defendant; that is, if the gain to the plaintiff from specific performance is less than the detriment suffered by the defendant if specific performance is granted. Accordingly, specific performance should be ordered "only where the importance of the remedy to one party outweighs the oppressiveness to the other."⁸⁹ In that vein a court refused to grant specific performance of the architectural covenants in a subdivision when construction of a home had begun. Although a technical breach of the covenants had occurred, to enforce the provisions at the request of the subdivision's Architectural Control Committee would have been financially oppressive to the homeowner.⁹⁰

In evaluating the feasibility of judicial supervision and enforcement of the contract, the court may conclude that although it has the requisite power to act and although action would be consistent with equity tradition and rules, such enforcement of performance is unwise. For example, the property, particularly real property, may be outside the control of the court. However, keep in mind that the chancellor's hands are not completely tied. With in personam power over the defendant and with the defendant actually present in the court room, the chancellor might be willing to use the contempt power to compel the party to execute a deed to the land in another state or in some other fashion to convey title.

Consider these variations

A) Assume the buyer seeks specific performance in an Arkansas chancery court.

1) The buyer and the seller are in Arkansas, as is the land. Specific performance is clearly available.

2) The seller and the land are in Arkansas. The court should have no reluctance to grant specific performance.

3) The buyer and the land are in Arkansas. The court has in personam power over the seller through the Arkansas long arm statute, but the court has no available contempt power over an absent

seller. However, the court may use Arkansas Rule of Civil Procedure 70 to appoint a commissioner to do what the defendant has refused to do.

4) The buyer and the seller are in Arkansas, but the land is in another jurisdiction. The court has no power to directly transfer title to land in another state.⁹¹ With in personam power over the defendant, the court may use coercive civil contempt and imprison the defendant until a deed is signed. The jurisdiction that is the situs of the land should have no hesitation in recognizing a deed signed under such circumstances.⁹² The "duress" of which the seller may complain is merely the result of the seller's stubborn refusal to obey the court order.

5) Both the land and the seller are outside Arkansas. The court cannot transfer title to the land and has no available contempt power. Even if the court has subject matter jurisdiction and somehow acquired personal jurisdiction over the seller, it probably has no power it can effectively use.

B) Assume the seller seeks specific performance in an Arkansas chancery court.

1) The buyer and the seller are in Arkansas, as is the land. As above, specific performance is available.

2) The seller and the land are in Arkansas. Given the court's lack of direct power over the buyer, it may be reluctant to order him to pay the purchase price. On the other hand, the buyer may have other assets in Arkansas. The Arkansas court may fear that the sister state will ignore a decree mandating purchase pursuant to the contract. It is injunctive, and such decrees are not necessarily enforceable and recognizable under full faith and credit.⁹³ But it is essentially a monetary judgment and thus may be recognized or at least accepted under principles of comity.

3) The buyer and the land are in Arkansas. Specific performance is available.

4) The buyer and the seller are in Arkansas, but the land is in another jurisdiction. The court can order the buyer to pay, and make the order significant with the veiled threat of the contempt power. The seller who has initiated the action is certainly ready, willing and able to execute a deed to the land in the sister state.

B. Damages Instead of Specific Performance

If, for any reason,⁹⁴ specific performance is denied, the clean-up doctrine⁹⁵ permits the court of

equity to award compensatory damages.⁹⁶ A denied buyer is entitled to receive, as general damages, the difference, if any, between the value of the property at the time of the breach and the contract price.⁹⁷ Similarly, upon the failure of the buyer to purchase, the seller is entitled to the difference between the contract price and the value of the property at the time of the breach.⁹⁸ Only if the property was sold above or below market value, or if the value of the property has fluctuated since the contract will general damages be available. The UCC permits a seller to resell the goods and recover damages or to recover damages for nonacceptance.⁹⁹ An aggrieved party is also permitted to seek other consequential damages that resulted from the failure to convey.¹⁰⁰

Contracts will frequently contain a liquidated damages provision, allowing the seller to keep a stipulated sum if the buyer fails to purchase.¹⁰¹ However, such a provision will not bar the seller from electing specific performance instead, unless the liquidated damages provision was intended by the parties to be the exclusive remedy.¹⁰²

C. Specific Performance and Damages

Typically specific performance is intended to be a complete remedy. However, the goal of putting the non-breaching party in the position she would have been if no breach had taken place may occasionally require the award of damages as well. The clean-up doctrine authorizes the chancery court to award such legal damages. However, damages that accompany an award of specific performance are computed differently than damages that are in lieu of specific performance.¹⁰³ Because the plaintiff has elected specific performance rather than disaffirmance of the contract, general damages are not appropriate. Rather, equitable principles are utilized to provide compensation for the party harmed by the delay in performance. Such awards are sometimes referred to as "equitable compensation" or an accounting rather than special damages.

Charges against both the buyer and the seller may be appropriate. By not conveying title as scheduled, the seller has deprived the buyer of possession and has perhaps caused other losses. By not timely paying the purchase price, the buyer has deprived the seller of the use of the funds.¹⁰⁴ Equity is to adjust and, if appropriate, to offset these charges.¹⁰⁵ For example, a seller of land whose breach delays execution of the contract may have caused the buyer to incur expenses for temporary housing and related

costs. Such incidental damages to the buyer resulting from the delay should be awarded to the buyer. Similarly, the delay in obtaining title to and possession of income property may entitle the buyer to compensation for lost rental income¹⁰⁶ or at least to damages based upon the fair rental value of the property.¹⁰⁷ Conversely, a buyer's default results in the seller's delay in receiving the purchase price. Such delay is easily, and justly, compensated by the award of interest.¹⁰⁸

D. Abatement and Reformation

Specific performance may not be available because the defendant-seller cannot comply with the contract because of a deficiency in the property. Deficiencies arise when the seller does not have good title to the property or the property is different, quantitatively or even qualitatively, from that described in the contract. In such a case, a delay in performance may be granted by the court to allow the deficiency to be cured. If a cure is not available and the deficiency is minor, the court may compel the seller to convey or the buyer to purchase, but give the buyer an abatement. That is, it will reduce the purchase price to compensate.

If the deficiency is substantial, the court will obviously not compel the buyer to perform because the buyer would be purchasing property different than that for which he had contracted. However, if the buyer still desires the property, the court may grant specific performance at the option of the buyer and order an adjustment of the purchase price. The general rule is that a purchaser may seek specific performance of a contract to the extent that the seller may perform the contract, and then seek an abatement to compensate for any deficiency in quantity, quality, title or other matters affecting the property.¹⁰⁹ A slight discrepancy in the amount of land is tolerable without an abatement,¹¹⁰ but where the acreage goes to the essence of the contract, the buyers are entitled to a reduction in the price because of the deficiency.¹¹¹ The court may give the sellers the option of accepting an abatement or rescinding the entire sale.¹¹²

Likewise, a discrepancy between the property that was the subject of the negotiations and the property as described in the written contract will not bar specific performance. The solution is another equitable remedy, namely reformation. Reformation permits a court to change the written terms of a contract to correspond to the actual intent of the parties. If the parties intended to convey "Greenacre for \$10,000,"

but the written contract says "Whiteacre for \$100,000," the chancellor, upon clear and convincing evidence of the actual intent, will reform the contract. Specific performance is then available. If a discrepancy is discovered after conveyance, the chancellor may employ abatement. For example, if the parties contracted for 100 acres, but the tract conveyed only included 80 acres, the chancellor may order an abatement, or refund, of 20% of the purchase price.

E. Defective Title

A seller who lacks good title is generally barred from seeking specific performance.¹¹³ Marketable title is one of sufficient quality that it "imports such ownership as enables and insures to the owner the peaceable control and use of the property as against every one else."¹¹⁴ Ultimate victory in potential litigation is not sufficient; rather, a marketable title is one free from reasonable doubt. Title is not clear if the grantee would be subject to a reasonable apprehension of litigation.¹¹⁵ The court will not compel a party to purchase a lawsuit.¹¹⁶ A mere statement by an attorney that title is not marketable will not justify a purchaser's failure to perform, for the court must decide whether the title is valid.¹¹⁷ If the seller cannot convey clear title, the vendee is permitted to rescind on grounds of a material mistake and seek restitution of any payments made.¹¹⁸ However, prior to seeking judicial rescission, the vendee must give the vendor notice of the defect and afford reasonable time for the vendor to correct the defect.¹¹⁹

On the other hand, a seller cannot refuse to convey because of defective title. A vendee who still desires the land has two options: take the entire tract in its defective condition or, if feasible, take the portion of the tract to which the vendor has good title. With either option, the buyer may seek an abatement of the purchase price.¹²⁰

F. Attorneys' Fees

A 1987 statute provides that in any civil action for breach of contract, the prevailing party may be awarded attorneys' fees.¹²¹ Unlike earlier statutory provisions, this does not require a prior contractual provision,¹²² is not limited to 10%,¹²³ and is applicable to any prevailing party.¹²⁴ The statute on attorneys' fees does not clarify whether fees are permitted in an action seeking specific performance for breach of contract.¹²⁵ But it does expressly state that fees

may be allowed "unless otherwise provided by law or the contract which is the subject matter of the action." Given the breadth with which courts have applied the statute,¹²⁶ its applicability in a specific performance action seems obvious. Accordingly, a provision in the contract waiving any fees would bind the parties. On the other hand, the absence of such a waiver would permit the court to award fees to the prevailing party.¹²⁷

The statute gives the trial court discretion in whether to award fees.¹²⁸ Such factors as the relative simplicity of the legal issues, the nature of the action,¹²⁹ the limited victory of the successful party,¹³⁰ the absence of specificity as to the fees incurred, or the presence of other compensation may support a denial of fees or an award of lessened fees. The burden is on the prevailing party to request fees from the trial court.¹³¹ The statute does not authorize appellate courts to award attorneys' fees.¹³²

IV. Other Variations of Specific Performance

A. Action by Seller

The buyer can seek specific performance because the land or chattel transferred under the contract is unique. A purchaser does not need to offer any evidence that a parcel of land is unique.¹³³ Indeed the Arkansas courts presume that damages will not constitute an adequate remedy when land or any interest in land is the subject matter of the agreement.¹³⁴

But under what circumstances can a seller seek specific performance? Several Arkansas opinions, without discussion of the underlying circumstances that made a legal remedy inadequate, have granted specific performance to the seller.¹³⁵ In one instance the buyers were ordered to pay money into the registry of the court and to assume an existing mortgage, following which a warranty deed would be executed.¹³⁶

B. Types of Contracts

The simplest type of contract to enforce is an action by a buyer to purchase items. Specific performance has been sought of contracts not only for the purchase of land, but also the purchase of common stock,¹³⁷ a soft drink bottling company,¹³⁸ and a Chinese restaurant.¹³⁹

Litigation has involved contracts to cut timber,¹⁴⁰ to refrain from seeking to adopt a foster child,¹⁴¹ to supply vending machines for soft drinks and food,¹⁴² to comply with architectural covenants in a subdivision,¹⁴³ to accept and incorporate a subdivision into a municipal water and sewer system,¹⁴⁴ to adhere to the terms of a settlement agreement in civil litigation,¹⁴⁵ or in divorce litigation,¹⁴⁶ and to make a will.¹⁴⁷

The issue with these types of contracts is not only whether the contract is sufficiently clear and precise to permit judicial involvement, but whether judicial discretion should grant a remedy that necessarily involves judicial supervision or enforcement. The Arkansas courts have not focused on this question. Without discussion of the discretionary factor, the Court of Appeals ordered performance of a contract that required a survey of disputed lands, the erection of a fence, the closure of a ditch, the lease of lands, and the conveyance of lands.¹⁴⁸ Certainly elements of that contract would require future judicial involvement.

C. Contracts for the Sale of Personality

Established case law held that equity would generally not compel specific performance of a contract for the sale of a chattel.¹⁴⁹ Such a rule is justified because, with the award of compensatory damages, comparable personality can usually be obtained. But an exception to that rule applies when the goods are unique or when other special factors make a remedy at law inadequate. For example, a cowboy was granted specific performance of a contract for a horse he had trained from a green and unbroken pony to a first class roping horse.¹⁵⁰ Similarly, equity enforced a contract for the purchase of the equipment of a Chinese restaurant.¹⁵¹ Property that has a peculiar or sentimental value to the buyer that cannot be measured in monetary terms may also qualify for specific performance.¹⁵²

That policy and that exception were continued in the Uniform Commercial Code, which provides that specific performance may be decreed where the goods are unique or "other proper circumstances" exist.¹⁵³ Accordingly, the appellate court refused to decree specific performance of a contract to purchase a mobile home in the absence of any allegations or proof of its unique nature.¹⁵⁴ However, the official comment to the Code says that the Code's emphasis on commercial feasibility and an expanded

view of unique goods is intended to permit the courts to take a more flexible attitude toward specific performance of sales contracts than under the prior law. The court is to consider the total circumstances, including the available market.¹⁵⁵ Further, the inability to cover, that is, to obtain replacement goods from another source, may be evidence of "other proper circumstances" supporting specific performance.¹⁵⁶

D. Personal Service Contracts

Equity has historically had an aversion to specific performance of contracts for personal services, whether it be the contractual obligation of an opera singer to perform, a butcher to work at the grocery store, or a contractor to build a home. Not only may damages be an adequate remedy in those cases,¹⁵⁷ but such a judicial order has elements of involuntary servitude and also involves the court in unique problems of enforcement and supervision of the judicial decree.¹⁵⁸ Accordingly, equity will not order a soprano to sing at the opera or a coach to lead a team into the playoffs.

Arguably equity might order a party to fulfill a contract to construct a building, for personal services of the same intimate nature as above are not involved. Note, however, that the court might refuse to order the company to perform because the construction might be substandard or deficient, the contract could not be supervised, the other party does not want performance from a reluctant contract breacher, the plaintiff has unclean hands, or similar discretionary factors. The Arkansas Supreme Court, citing the general rule that equity will not decree specific performance of a contract to do work, refused to order a canning company to continue operating a plant at Mount Ida.¹⁵⁹ On the other hand, the court could appoint a master¹⁶⁰ or use other available equitable techniques to ensure the contract was specifically performed.¹⁶¹

However, courts will issue negative injunctions. While a court will not order an opera singer to perform "Madame Butterfly" for the plaintiff opera company, it will bar the singer from performing "Madame Butterfly," or any other opera for that reason, for a competing company while the singer is still contractually bound to the plaintiff. Such a decree does not involve judicial supervision of the contract or have the aura of involuntary servitude. The inability of a court to decree specific performance of a contract does not necessarily bar the

court from forbidding conduct that is contrary to the contract. Accordingly the Arkansas Supreme Court, while not ordering the canning company to keep the plant open, did bar the canning company from dismantling and removing a canning plant in violation of the specific terms of a contract.¹⁶²

Similarly, if confronted with a plaintiff who alleges a valid restrictive covenant in an employment contract, the court will determine whether the restriction on the future job prospects of the former employee are reasonable in time, area and scope.¹⁶³ Similar issues are present in negative covenants in connection with the sale of a business¹⁶⁴ or with restrictions designed to prevent unfair competition or improper disclosure of trade secrets.¹⁶⁵ If the restrictive covenant is valid without "red-lining" or judicial re-writing, the court will enjoin the former employee from working for another and thus violating the contract.¹⁶⁶ In any instance the court might be reluctant to enforce the restriction in the contract without a showing that the employee was truly unique and that the loss of the employee would cause irreparable harm to the employer or contractual partner. Further, in balancing hardships, the court is unlikely to enforce a provision that would result in financial disaster to the employee.

E. Equitable Conversion

A corollary to the specific performance remedy is the doctrine of equitable conversion. When the buyer and the seller enter into a long term installment contract, under which the buyer will receive title only after making the final payment, equity, asserting the maxim that "equity regards as done that which ought to be done,"¹⁶⁷ creates a legal fiction to protect the buyer. From the time of the contract, the buyer is treated as having a real property interest, even though title has not yet been transferred to him, while the seller has only a personal property interest in the eventual proceeds.¹⁶⁸ Title is treated as being held in trust for the buyer by the seller merely as a means of security for the purchase price. In effect, equity converts the interests of the parties.¹⁶⁹ The doctrine is applicable only if the contract for the purchase of real or personal property is suitable for specific performance. The doctrine becomes applicable and relevant to explain the relations between the parties and the property in case of such situations as the loss or destruction of the property, the right to insurance proceeds, the death of one of the parties, and the claims of creditors.¹⁷⁰

F. Option Contract

An option to purchase is not a sale or a contract; rather the law treats it as an offer to sell within a set period of time and a corollary right to accept or reject the offer within that period of time. The seller agrees to sell if the buyer elects to purchase within the time period. Unlike other contracts, time is generally viewed as being essential to timely performance of an option contract. Accordingly, if the offer is accepted within the time period, then the option converts to a binding executory contract, subject to specific performance.¹⁷¹ A contract with an option to purchase is not necessarily unenforceable even though the actual consideration may be small or the length of the option extended.¹⁷²

Assume the seller violates the option contract and sells to a third party while the perspective buyer still has an option to purchase, admittedly unelected and unexercised. If the third party had no knowledge of the existing option, the perspective buyer's only option is to seek compensatory damages from the seller.¹⁷³ However, if the third party purchased with knowledge of the option, the buyer may seek specific performance from the seller (if title has not yet been conveyed)¹⁷⁴ or imposition of a constructive trust on the property in the hands of the third party.

Conclusion

Although long considered an extraordinary remedy¹⁷⁵ the purpose of specific performance remains the same: to give complete and perfect justice to the injured party, indeed to both parties, as to all judicial relations growing out of the contract between them, when the courts of law are unable to grant such relief.¹⁷⁶ Although this lofty aspiration is certainly not always accomplished, the availability of this flexible remedy has been and continues to be a hallmark of the courts of chancery and the unique justice they offer.

NOTES

1. *City of Crossett v. Pacific Buildings, Inc.*, 298 Ark. 520, 769 S.W.2d 730 (1989); *McCoy Farms, Inc. v. J & M McKee*, 263 Ark. 20, 563 S.W.2d 409 (1978); *Dossey v. Hanover, Inc.*, 48 Ark. App. 108, 891 S.W.2d 67 (1995).

2. *McCoy Farms, Inc. v. J & M McKee*, 263 Ark. 20, 563 S.W.2d 409 (1978).

3. See Howard W. Brill, *The Maxims of Equity*,

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4. *Lacey v. Bennett*, 210 Ark. 277, 195 S.W.2d 341 (1946).

5. WILLIAM Q. DEFUNIAK, *HANDBOOK OF MODERN EQUITY* (2nd ed. 1956) 158.

6. *Arkansas Beverage Company v. Dr. Pepper Bottling Company of Little Rock*, 249 Ark. 752, 461 S.W.2d 571 (1971).

7. *Lacey v. Bennett*, 210 Ark. 277, 195 S.W.2d 341 (1946).

8. *Sossamon v. Davis*, 271 Ark. 156, 607 S.W.2d 405 (Ark. App. 1980).

9. ARK. CODE ANN. § 4-59-101.

10. *Reynolds v. Havens*, 252 Ark. 408, 479 S.W.2d 528 (1972); *Boensch v. Cornett*, 267 Ark. 671, 590 S.W.2d 55 (Ark. App. 1979).

11. *James v. Medford*, 256 Ark. 1002, 512 S.W.2d 545 (1974).

12. *Routen v. Walthour-Flake Co.*, 221 Ark. 354, 253 S.W.2d 208 (1952).

13. *Miller v. Dargan*, 136 Ark. 237, 206 S.W. 319 (1918).

14. *James v. Medford*, 256 Ark. 1002, 512 S.W.2d 545 (1974).

15. *Dollar v. Knight*, 145 Ark. 522, 224 S.W. 983 (1920).

16. *Boensch v. Cornett*, 267 Ark. 671, 590 S.W.2d 55 (Ark. App. 1979).

17. *Smith v. Carter*, 213 Ark. 937, 214 S.W.2d 64 (1948); *Sossamon v. Davis*, 271 Ark. 156, 607 S.W.2d 405 (Ark. App. 1980).

18. *Loveless v. Diehl*, 236 Ark. 129, 364 S.W.2d 317 (1963) (dispute as to whether buyer had properly tendered purchase price).

19. *Montgomery County Canning Co. v. Bates*, 211 Ark. 930, 203 S.W.2d 195 (1947) (operation of a canning plant).

20. Arkansas has traditionally recognized two types of foreclosure: (1) judicial foreclosure and (2) power of sale foreclosure which allows the mortgagee to sell the property without court intervention. The traditional power of sale is now collected in the Statutory Foreclosure Act of 1987, codified as ARK. CODE ANN. § 18-50-101 *et seq.* The act does not "impair the right of any person or entity to assert his legal and equitable rights in a court of competent jurisdiction." ARK. CODE ANN. § 18-50-116(d). See Edward H. Schieffler, *Legislative Note, Nonjudicial Foreclosure in Arkansas with the Statutory Foreclosure Act of 1987*, 41 ARK. L. REV. 373 (1988).

21. *White v. Page*, 216 Ark. 632, 226 S.W.2d 973 (1950); *Hatfield v. Mixon Realty Co.*, 269 Ark. 803, 601 S.W.2d 894 (Ark. App. 1980).