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Specific Performance of Contracts for the Sale of Land Purchased for Resale or Investment

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I. Introduction

In two recent decisions, Canadian courts have refused to order specific performance of contracts for the sale of land. The basis for these decisions appears to be that the property in question was not being purchased for personal use, but for investment or resale. The first instance occurred in *Heron Bay Investments Ltd* v. *Peel-Elder Developments Ltd*[1] where leave to appeal from an order vacating registration of a certificate of *lis pendens* was refused on the ground that the plaintiffs' action was appropriately characterized as one involving a monetary claim rather than an interest in land.[2] In addition, it seems that section 42(3) of *The Judicature Act*[3] was relied upon; the Court decided that any loss sustained by the plaintiffs could be satisfactorily compensated by an award of damages, despite the probable loss of the land.[4] Aside from its

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1 (1976) 2 C.P.C. 338 (Ont. H.C.) *per* Weatherston J. (as he then was).

2 See *The Judicature Act*, R.S.O. 1970, c. 228, s. 42(2).

3 *Ibid.*

4 Weatherston J. held that the balance of convenience therefore favoured the defendants, since they would lose an apparently profitable pending sale: *supra*, note 1, 339.

refusal to follow *Galinski* v. *Jurashek*,[5] the decision by Weatherston J. is remarkable for its views on purchasers' rights under contracts for the sale of realty:

> The remedy of specific performance is one that is peculiar to real estate transactions and is based on the fact that real estate is regarded as unique and of particular importance to the purchaser. Obviously, the purchase of a new house is much different than the buying of a new car.... *That reasoning does not apply when land is purchased merely as an investment*.... True it may be a uniquely good investment, but it was not being purchased by the plaintiffs for their own use but only to develop and resell at a profit. *Obviously, any loss of profits can be compensated for in damages.*[6]

Similar views were expressed by the Newfoundland Court of Appeal in *Chaulk* v. *Fairview Construction Ltd.*[7] The vendor had agreed to construct and convey five duplexes to the plaintiff purchaser. Two of the duplexes were in fact conveyed to the purchaser and subsequently resold at a substantial profit, but the vendor refused to build and convey the remaining duplexes on the ground that the purchaser had failed to notify the vendor that necessary financing had been obtained.[8] Gushue J.A., delivering judgment on behalf of the Court,[9] held that formal notification that suitable financing had been arranged was not required, and that in any event, financing had actually been procured. Thus he found it unnecessary to consider the vendor's second argument that the financing condition was a condition precedent to the completion of the contract, the nonfulfilment of which precluded specific performance.[10] Yet the purchaser was ultimately unsuccessful in his attempt to obtain specific enforcement of the contract:

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[5] (1976) 1 C.P.C. 68 (Ont. H.C.). Lerner J. decided that a certificate of *lis pendens* could be vacated only when the claim was frivolous or vexatious or when it was an abuse of process and must fail at trial.

[6] *Supra*, note 1, 339 [emphasis added].

[7] (1977) 14 N. & P.E.I.R. 13.

[8] The financing clause provided as follows: "Subject to financing as offered by agent that is $1,200 downpayment per unit with monthly payments of $305.00 which includes principal, interest, furnace financing and municipal taxes up to $55.00 per mo."

[9] Morgan J.A. and Mahoney J. concurring.

[10] Gushue J.A. doubted whether the clause was a condition precedent within the meaning given to that term in *Turney* v. *Zhilka* [1959] S.C.R. 578, and also stated that as the vendor was not himself ready, willing and able to perform his own obligations, he could not rely on any default by the purchaser. For an extensive analysis of conditions precedent in contracts for the sale of land, see Davies, *Conditional Contracts for the Sale of Land in Canada* (1977) 55 Can. Bar Rev. 289.

> The question here is whether damages would have afforded Chaulk an adequate remedy, and I have no doubt that they could, and would, have. There was nothing whatever unique or irreplaceable about the houses and lots bargained for. They were merely subdivision lots with houses, all of the same general design... *which the respondent was purchasing for investment or resale purposes only .... It is therefore obvious that damages do afford an adequate remedy* to Chaulk, and that these damages should be capable of assessment, with very little difficulty.[11]

This essay seeks to examine the principles governing specific performance in cases of acquisition of realty for the purposes of investment or resale. It is contended that the decisions in *Heron Bay Investments Ltd* and *Chaulk* are not warranted by the state of authorities and are incorrect as a matter of principle. Part II of the article describes the reasons normally articulated in support of the equitable remedy for contracts for the sale or lease of interests in land. An examination of the relevant case law is presented in Part III, while differences between the concepts of "resale" and "investment" in the context of dealings with land are considered in Part IV. The final section is concerned with the question whether damages are an adequate remedy where the purchaser seeking specific performance has already resold the property by the time specific performance is sought.

II. Factors giving rise to specific performance of agreements for the sale of land

Contracts for the sale of land may be specifically enforced by either the vendor or the purchaser. The right to specifically enforce a contract for the transfer of an interest in land is so well known that there is perhaps a tendency to overlook the reasons for this right in any particular case. Thus Maitland concluded that "specific performance applies to agreements for the sale or the lease of lands as a matter of course".[12] The inadequacy of the legal remedy is the traditional reason ascribed to the enforcement of contractual obligations *in specie* by courts exercising equitable jurisdiction.[13]

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[11] *Supra*, note 7, 21 [emphasis added].

[12] Maitland, *Equity* rev. ed. (1936), 304. See also *Kloepfer Wholesale Hardware & Automotive Co.* v. *Roy* [1952] 2 S.C.R. 465, 472 *per* Kerwin J.

[13] Spry, *Equitable Remedies* (1971), 57. There has been some attempt to argue that specific performance should be liberated from the "adequacy of legal remedy" test, so as to expand its availability. See Dawson, *Specific Performance in France and Germany* (1959) 57 Mich. L. Rev. 495; Farnsworth, *Legal Remedies for Breach of Contract* (1970) 70 Colum. L. Rev. 1145;

Damages at law for contracts for the sale of land were viewed as inadequate because land was seen as unique, peculiar, or of special significance[14] to the purchaser.[15] Whether or not the property possessed any intrinsic value due to its fertility or mineral wealth, damages for failure to convey legal title were always considered inadequate, without regard to the size, value, or location of the land, or to the possibility of obtaining other land substantially equivalent.[16]

A related justification, more appropriate to the times when land was relatively difficult to obtain, was that "there is no open market. . . . The number of instances where the buyer could get land substantially as satisfactory or where the vendor could make a ready sale

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Van Hecke, *Changing Emphases in Specific Performance* (1961) 40 N.C.L. Rev. 1, cited by Brun, Comment on *Centex Homes Corp.* v. *Boag* (1974) 43 U. of Cin. L. Rev. 935, 944, n. 36.

[14] *Cud* v. *Rutter* (1719) 1 P. Wms. 570, 571, 24 E.R. 521, 522 (Ch.); *Buxton* v. *Lister* (1746) 3 Atk. 383, 26 E.R. 1020, 1021 (Ch.); *Adderley* v. *Dixon* (1824) 1 Sim. & St. 606, 610, 57 E.R. 239, 240 (Ch.); *Scott* v. *Alvarez* [1895] 2 Ch. 603, 615 (C.A.); *Restatement of the Law of Contracts*, §360, comment (a).

[15] Since the purchaser may obtain specific performance, the vendor has a similar right, based on the concept of mutuality of remedy. See *Lewis* v. *Lord Lechmere* (1722) 10 Mod. 503, 88 E.R. 828 (Ch.); *Regents' Canal Co.* v. *Ware* (1857) 23 Beav. 575, 53 E.R. 226 (R.C.); *Cogent* v. *Gibson* (1864) 33 Beav. 557, 55 E.R. 485 (R.C.). Spry, *supra*, note 13, 59 cites *Eastern Counties Ry* v. *Hawkes* (1855) 5 H.L.C. 331, 10 E.R. 928, and *Dougan* v. *Ley* (1946) 71 C.L.R. 142 (H.C. Austl.) for the view that the vendor's remedy is inadequate in any event, but *cf.* Hanbury & Maudsley, *Modern Equity* 10th ed. (1976), 40; Megarry & Baker (eds.), *Snell's Principles of Equity* 27th ed. (1973), 574; Waddams, *The Law of Contracts* (1977), 424.

There is some evidence that the doctrine of mutuality is gradually being modified: see *Price* v. *Strange* [1977] 3 W.L.R. 943 (C.A.). In the United States the operation of the mutuality concept has been considerably weakened, if not annihilated: see Cook, *The Present Status of the "Lack of Mutuality" Rule* (1927) 36 Yale L.J. 897; Durfee, *Mutuality in Specific Performance* (1922) 20 Mich. L. Rev. 289; *Epstein* v. *Gluckin* 233 N.Y. 490, 135 N.E. 861 (1922) (*per* Cardozo J.), cited by Brun, *supra*, note 13, 939-40, n. 20.

Those who argue that damages alone should be the vendor's sole remedy overlook the particular difficulties vendors may face in actually disposing of the land in question, whatever its theoretical market value: see Brun, *supra*, note 13, 942-44. That author also notes the possible existence of a proprietary right justifying the vendor's claim for specific performance, *i.e.*, "equitable conversion", where a purchaser in breach is deemed to be the [constructive] trustee of the purchase price for the vendor. See Hynes, *Remedies of the Vendor and Purchaser Under a Contract for the Sale of Realty in Pennsylvania* (1965) 10 Vill. L. Rev. 557, 569, cited by Brun, *supra*, note 13, 938, n. 14.

[16] Clark, *Equity* (1919), §42, citing *Gartrell* v. *Stafford* 12 Neb. 545, 11 N.W. 732 (1882); Corbin, *Corbin on Contracts* (1964), vol. 5A, §1143.

to another purchaser is so small as to be negligible".[17] It has also been said that in the case of a contract for the sale of land, the "real meaning between the parties ... was not that there should be a contract with legal remedies only, [but] that the purchaser should get the land, and should not be put off in an ordinary case by offering him damages".[18] Of course the fact that this is "the real meaning" of the contract is not of itself sufficient to compel specific performance of contracts for the sale of substitutable goods.[19] These justifications for compelling the specific transfer of interests in realty appear to stem from the importance of land as a "favorite and favoured subject",[20] and are based on rationalizations concerning the inadequacy of damages. Where the foundation for the rule is not present, does the rule nonetheless operate, or are damages always to be deemed inadequate as a matter of law, thereby precluding inquiry in any particular case?[21]

In the United States there are considerable differences of opinion regarding the approach to be taken toward this question. Inadequacy of damages may be presumed or assumed without any onus upon the plaintiff to affirmatively demonstrate that this is so.[22] On the other hand it has been said that the remedy is discretionary; thus the plaintiff must show the inadequacy of legal relief before specific performance will be decreed.[23] A third line of authorities supports

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[17] See Clark, *supra,* note 16.

[18] *Scott* v. *Alvarez, supra,* note 14, 615, *per* Rigby L.J.

[19] See, *e.g., Mennonite Land Sales Co.* v. *Friesan* (1921) 62 D.L.R. 344, [1921] 3 W.W.R. 341 (Sask. K.B.).

[20] *Kitchen* v. *Herring* 42 N.C. 137, 138, 7 Ired. Eq. 190, 191 (1851).

[21] See Waddams, *supra,* note 15, 423; Megarry & Wade, *The Law of Real Property* 4th ed. (1975), 593.

[22] See, *e.g., Rowan* v. *Harburney Oil Co.* 91 F. 2d 122 (10th Cir. 1937); *Sinclair Ref. Co.* v. *Miller* 106 F. Supp. 881 (D. Neb. 1952); *Lee Builders, Inc.* v. *Wells* 33 Del. Ch. 439, 95 A. 2d 692 (1953); *Dee* v. *Collins* 235 Iowa 22, 15 N.W. 2d 883 (1944); *Farrington* v. *Hays* 353 Mo. 194, 182 S.W. 2d 186 (1944); *Wasserman* v. *Manson* 225 App. Div. 342, 233 N.Y.S. 80 (1929). See also cases cited in 81 C.J.S. §76, nn. 26-31, §77, nn. 73, 74; 81A C.J.S. §167, nn. 88, 89; and cases cited in 49 Am.Jur. §92, n. 15; 71 Am.Jur. 2d §112, nn. 72, 74.

Accordingly it has been said that in the case of contracts for the sale of land, " 'it is as much the duty of the court to decree specific performance of the contract as it is to give damages for its breach' ": see de Funiak, *Contracts Enforceable in Equity* (1948) 34 Va L. Rev. 637, 643, cited by Brun, *supra,* note 13, 938, n. 12.

[23] See, *e.g., Shields* v. *Trammell* 19 Ark. 51 (1857); *Porter* v. *Frenchman's Bay* 84 Me 195, 24 A. 814 (1892); *McCall* v. *Atchley* 256 Mo. 39, 164 S.W. 593 (1914); *Peeler* v. *Levy* 26 N.J. Eq. 330 (1875); *Schwartz* v. *Church & Commerce Corp.* 184 Misc. 200, 53 N.Y.S. 2d 666 (1945).

the proposition that specific performance of a contract for the sale (or lease) of land will be ordered whether or not the legal remedy of damages is adequate, or because as a matter of law, damages will be deemed an inadequate remedy.[24] Finally, there is the issue whether contracts for the sale of land will be specifically enforced as a "matter of course",[25] or subject to the general discretion of courts exercising equitable jurisdiction.[26]

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[24] See, *e.g.*, *McCargo* v. *Steele* 160 F. Supp. 7 (D. Ark. 1958); *Dickinson* v. *McKenzie* 197 Ark. 746, 126 S.W. 2d 95 (1939); *Dollar* v. *Knight* 145 Ark. 527, 224 S.W. 983 (1920); *Dean* v. *Brower* 119 Cal. App. 412, 6 P. 2d 580 (1931); *White* v. *Greenamyre* 77 Colo. 33, 234 P. 164 (1925); *Hotel Candler* v. *Candler* 198 Ga 339, 31 S.E. 2d 693 (1944); *Spoden* v. *Krause* 117 Ind. App. 14, 68 N.E. 2d 654 (1946); *Battista* v. *Moreau* 366 Mass. 247, 316 N.E. 2d 626 (1974); *Janiszewski* v. *Shank* 230 Mich. 189, 202 N.W. 949 (1921); *Bria* v. *Michalski* 188 Mich. 400, 154 N.W. 110 (1915); *Wilkinson* v. *Vaughn* 419 S.W. 2d 1 (Mo. 1967); *McCullough* v. *Newton* 348 S.W. 2d 138 (Mo. 1961); *Cummins* v. *Dixon* 265 S.W. 2d 386 (Mo. 1954); *Rice* v. *Griffith* 349 Mo. 373, 161 S.W. 2d 220 (1942); *Jesseman* v. *Aurelio* 106 N.H. 529, 214 A. 2d 743 (1965); *Gulf Oil Corp.* v. *Rybicki* 102 N.H. 51, 149 A. 2d 877 (1959); *Kann* v. *Wausau Abrasives Co.* 81 N.H. 535, 129 A. 374 (1925); *McVoy* v. *Baumann* 93 N.J. Eq. 638, 117 A. 725, *aff'g* 93 N.J. Eq. 360, 117 A. 717 (1922); *Guokas* v. *Bishara* 57 N.Y.S. 2d 588 (1945); *Montano* v. *Kimmel* 185 Misc. 165, 57 N.Y.S. 2d 281 (1945); *Belanewsky* v. *Gallaher* 55 Misc. 150, 105 N.Y.S. 77 (1907); *Belin* v. *Stikeleather* 232 S.C. 116, 101 S.E. 2d 185 (1957); *Adams* v. *Willis* 83 S.E. 2d 171 (S.C. 1954); *Singleton* v. *Cuttino* 107 S.C. 465, 92 S.E. 1046 (1917); *Hammond* v. *Foreman* 48 S.C. 175, 26 S.E. 212 (1897); *Payne* v. *Still* 10 Wash. 433, 38 P. 994 (1894).

[25] *I.e.*, in the absence of any vitiating factor, *e.g.*, uncertainty, incompleteness, unconscionability. See, *e.g.*, *General Am. Life Ins. Co.* v. *Natchitoches Oil Mill* 160 F. 2d 140 (5th Cir. 1947); *Sabin* v. *Rauch* 75 Ariz. 275, 255 P. 2d 206, *aff'd* 76 Ariz. 71, 258 P. 2d 991 (1953); *Kimball* v. *Slatter* 20 Ariz. 81, 176 P. 843 (1918); *Vincent* v. *Grayson* 30 Cal. App. 3d 899, 106 Cal. Rptr 733 (1973); *Lee* v. *Peck* 228 Ga 448, 186 S.E. 2d 94 (1971); *Baron* v. *Anderson* 204 Ga 7, 48 S.E. 2d 846 (1948); *Lewis* v. *Trimble* 151 Ga 97, 106 S.E. 101 (1921); *Tolbert* v. *Short* 150 Ga 413, 104 S.E. 245 (1920); *Funk* v. *Browne & Leary* 145 Ga 828, 90 S.E. 64 (1916); *Miedema* v. *Wormhoudt* 288 Ill. 537, 123 N.E. 596 (1919); *Excell Co.* v. *Freeman* 252 Md 242, 250 A. 2d 103 (1969); *Manning* v. *Potomac Elec. Power Co.* 230 Md 415, 187 A. 2d 468 (1963); *Sims* v. *Nidiffer* 203 Va 749, 127 S.E. 2d 85 (1962); *Ballard* v. *Ballard* 25 W. Va 470 (1885). See also cases cited in 81 C.J.S. §10b, nn. 41-44; §77, nn. 45, 55.

[26] See, *e.g.*, *Willard* v. *Tayloe* 75 U.S. (8 Wall.) 557 (1869); *Williams* v. *Neeld Gordon Co.* 86 Fla 59, 97 So. 315 (1923); *Murphy* v. *Hohne* 73 Fla 803, 74 So. 973 (1917); *Zempel* v. *Hughes* 235 Ill. 424, 85 N.E. 641 (1908); *Clifton Land Co.* v. *Reister* 186 Ky 114, 216 S.W. 345 (1919); *McNeil* v. *McNeil* 61 Utah 141, 211 P. 988 (1922); *Merill* v. *Rocky Mtn Cattle Co.* 26 Wyo. 219, 181 P. 964 (1919). See also Annotation — *Specific performance of a contract as a matter of right* 65 A.L.R. 7, 39-45.

The Canadian courts recognize that the remedy is discretionary. See, *e.g.*, *Harris* v. *Robinson* (1892) 21 S.C.R. 390, 397 *per* Strong J.; *Webb* v.

In England there is some indication that the decree of specific performance, rather than being dependent on an answer to the "adequacy of damages" test (which itself tends to depend on the classification of the contract under consideration), is being reinterpreted[27] and applied on a case by case basis. Although the equitable remedy there sought was an interlocutory injunction rather than specific performance, Sachs L.J. in *Evans Marshall & Co.* v. *Bertola S. A.*[28] stated that "the standard question ... 'Are damages an adequate remedy?', might perhaps, in the light of the authorities of recent years, be rewritten: 'Is it just, in all the circumstances, that a plaintiff should be confined to his remedy in damages?' "[29] Whether this reformulation alters judicial attitudes towards the specific enforcement of contracts for the sale of interests in land remains to be seen.

Whatever the relationship between specific performance and contracts for the sale of land, it is apparent that where the purchaser by conduct demonstrates that to him or her the realty is not unique, special, or peculiar, a conflict beween the reasons for the remedy and the application of the remedy has been created.[30] Whatever the

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Dipenta [1925] S.C.R. 565, 571 *per* Rinfret J. But see *Roberto* v. *Bumb* [1943] O.R. 299, 310 (C.A.) *per* Laidlaw J.A.

This is perhaps an arid debate, since the assertion that such contracts are being specifically enforced "as a matter of course" will not be made in the presence of a factor affecting the court's discretion, unless the court intends to ignore that factor. The exercise of discretion will necessarily be present even where a court refuses to recognize its existence.

[27] *Beswick* v. *Beswick* [1968] A.C. 58 (H.L.). See also *Coulls* v. *Bagot's Ex'r & Trustee Co.* (1967) 119 C.L.R. 460, 503 (H.C. Austl.) *per* Windeyer J.

[28] [1973] 1 W.L.R. 349, 379 (C.A.). An earlier illustration may be found in *Wilson* v. *Northampton & Banbury Jctn Ry* (1874) 9 Ch. App. 279, 284 *per* Lord Selborne L.C.

[29] See Guest (ed.), *Chitty on Contracts: General Principles* 24th ed. (1977), vol. 1, 776. For recent indications that the basis for primary equitable relief is broadening, see *North West Beverages Ltd* v. *Pepsi-Cola Canada Ltd* (1971) 20 D.L.R. (3d) 341 (Man. Q.B.) and *Baxter Motors Ltd* v. *American Motors (Canada) Ltd* (1973) 40 D.L.R. (3d) 450 (B.C.S.C.) (Anderson J. adopting the langnage of Sachs L.J. in *Evans Marshall*), cited by Brown, *Specific Performance in a Planned Economy* (paper delivered at the Eighth Annual Workshop on Commercial and Consumer Law, Toronto, October 1978). See also *Yule Inc.* v. *Atlantic Pizza Delight Franchise (1968) Ltd* (1977) 17 O.R. (2d) 505 (Div. Ct.).

[30] Which is not to say that the conflict cannot be avoided. The purchaser who has bought realty in order to resell and actually resells may elect to sue the reluctant vendor for damages only, although his or her failure to obtain title to the property may result in exposure to a suit for specific

formal criteria may be, their application to the unusual case calls for their re-examination.[31] The next issue to be investigated is the manner in which the courts have responded to the tensions created by the conflict between the rule and its reasons.

III. The courts' treatment of contracts for the sale of land purchased for resale or investment

A. *Canada*

The specific enforcement of contracts for the sale of land purchased for resale, investment, or speculation has not been the subject of much judicial activity. Perhaps the first occasion upon which the issue arose in Canada occurred in *Prittie* v. *Laughton*,[32] where the plaintiff brought an action for specific performance of an agreement or option for the sale of land. Meredith C.J., in dismissing the claim, rested his judgment on the plaintiff's failure to satisfy the court that the contractual document in question was plain and

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performance by the subvendee. See text, *infra*, Part V.

Earlier decisions are sensitive to the requirement of a case by case consideration, although the language employed is often equivocal. See, *e.g.*, *Adderley* v. *Dixon*, *supra*, note 14 *per* Leach V.C.: "Courts of Equity decree the specific performance of contracts... because damages at law *may not, in the particular case,* afford a complete remedy. Thus a Court of Equity decrees performance of a contract for land, not because of the real nature of the land, but because damages at law, which must be calculated upon the general money value of land, *may not be a complete remedy to the purchaser, to whom the land may have a peculiar and special value.*" [emphasis added]. See also *Chitty on Contracts: General Principles*, *supra*, note 29, 775; *Loan Inv. Corp. of Australasia* v. *Bonner* [1968] N.Z.L.R. 1025, 1046 (C.A.) *per* Richmond J., dissenting; *aff'd* [1970] N.Z.L.R. 724 (P.C.).

[31] Kronman, *Specific Performance* (1978) 45 U. of Chi. L. Rev. 351, argues that although the concept of "uniqueness" (depending as it does on the intrinsic characteristics of the good in question) does not admit of an economic analysis, there are a number of economic rationales operating in favour of specific performance when the object has no ready substitutes: *e.g.*, the cost of investigation of the purchaser's subjective evaluation of the interest coupled with the risk of undercompensation militate against mere pecuniary damages. See Brun, *supra*, note 13, 940-43 for an argument that "uniqueness" should not give rise to a finding that a *vendor's* remedy at law is inadequate. Rather, the test should be the "factual remarketability" of the property within a reasonable time after the purchaser's repudiation.

[32] (1902) 1 O.W.R. 185 (Div. Ct.). See also O'Neill, *Specific Performance of a Contract for Purchase and Sale of Land* (1973) 21 Chitty's L.J. 109, 110-11; Reiter & Sharpe, *Wroth* v. *Tyler: Must Equity Remedy Contract Damages?* (1979) 3 Can. Bus. L.J. 146, 154-155, n.. 23.

legible. This factor, coupled with uncertainty as to price, proved fatal. The plaintiff had not requested damages in the alternative, and, according to Meredith C.J., the evidence failed to support such a claim.[33] However, the judgment went on to say:

> But, in addition to these circumstances, the cause is one in which the plaintiff might well be left to his common law remedy for breach of contract. The lots, apparently about 20 in number, were to be sold for $100 altogether, an average of $5 each. They were bought to sell again for the purpose of speculation only. They were tax title lots in Toronto Junction. No one can doubt the feasibility of going into the market and being able to buy abundantly of such lots.... It is not a case in which damages will not "afford a complete remedy": *Adderley* v. *Dixon*, 1 S. & S. 608. Here damages will completely compensate.[34]

Putting aside the fact that *Adderley* v. *Dixon* had nothing whatever to do with speculative contracts for the sale of land, it is easy to agree with the sentiments expressed in the above passage, provided that one or two necessary qualifications are stated. First, there was no evidence to warrant the supposition that the plaintiff had already subcontracted or assigned his rights under the original agreement or option; accordingly, there was no danger of denying or precluding the exercise of a third party's rights by refusing specific relief. Second, it appears that Meredith C.J. regarded the lots in question, namely, "tax title lots in Toronto Junction" as perfectly substitutable, in the sense that exactly equivalent lots in *Toronto Junction* were readily available on the market. Thus a unique opportunity to speculate was not being forfeited. Finally, it should be noted that there was no attempt to deny specific relief on the basis that an agreement entered into for speculative purposes was void or unenforceable as contrary to public policy.[35]

In *Roberto* v. *Bumb*[36] the Ontario Court of Appeal was given the opportunity of addressing the question of the availability of specific performance where damages were alleged to be an adequate remedy for the breach of a contract for the sale of land. Laidlaw J.A. was the only member of the Court to respond. After stating that if the agreement was otherwise unobjectionable and valid in form, specific performance would be decreed as "a matter of course", Laidlaw J.A. continued:

> It has been said that where damages are sufficient compensation for breach of contract, specific performance should not be decreed. But I

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[33] *Ibid.*, 186.

[34] *Ibid.*, 187.

[35] If such had been the case, damages at common law would presumably not have been awarded in any event.

[36] *Supra*, note 26. See also O'Neill, *supra*, note 32, 111.

> think that where the substance and essentials of a valid contract are sufficiently defined the Court ought to enforce actual performance of it unless there are special circumstances for not doing so. The affairs of modern business and society depend increasingly upon a strict fulfilment of obligations voluntarily undertaken by parties, and I think that a person seeking relief from his contractual burdens must clearly establish to the satisfaction of the court such circumstances as render discharge by him unnecessary or inexpedient. That has not been done in this case.[37]

Although one commentator has observed that this decision "demonstrated a lenient approach in finding inadequacy of damages,"[38] it seems more accurate to state that Laidlaw J.A. was willing to decree specific performance whether or not damages could be held inadequate. In any event, there is nothing in the report to support the vendor's contention that damages might adequately compensate the purchaser for his loss. Furthermore, one scrutinizes the decision in vain for a reference to any motives of the purchaser which might indicate a proposed nonpersonal use. If the plaintiff had resold or assigned his interest, that fact was not thought important enough to mention. The remarks of Laidlaw J.A. concerning "strict fulfilment of obligations" would seem to apply equally to contracts for the sale of chattels, which are usually remediable by damages and not by specific performance.

In *Armstrong & Armstrong* v. *Graham*,[39] LeBel J. did not even consider refusing equitable relief although the plaintiffs had resold the land to a third party who subsequently withdrew from the sale when the defendant wrongfully refused to execute the conveyance. Damages for the lost sale[40] were awarded in addition to specific performance. There was no argument made that the decree should not be ordered simply because the plaintiffs had quantified their loss by contracting to resell the property, and the result reached is inconsistent with such a view.

On one occasion the Supreme Court of Canada enunciated a view similar to that expressed by Laidlaw J.A. in *Roberto*. In *Kloepfer Wholesale Hardware & Automotive Co.* v. *Roy*[41] Kerwin J. emphatically rejected the contention that damages were an adequate remedy although the plaintiff allegedly acquired the land for use as an investment:

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[37] *Ibid.*, 311.

[38] O'Neill, *supra*, note 32, 111.

[39] [1947] O.W.N. 295 (H.C.) *per* LeBel J. (as he then was).

[40] LeBel J. directed a reference to the Local Master to determine the damages recoverable as a result of the lost sale.

[41] *Supra*, note 12.

> Finally, as to the suggestion that damages would be sufficient because it is contended that the plaintiff desired to use the property as an investment, it is sufficient to say that generally speaking, specific performance applies to agreements for the sale of lands as a matter of course.[42]

There is no evidence in any of the reports of the case to suggest that the purchaser had actually resold or assigned his equitable interest[43] in the premises either before or after the contract was formed. The only evidence of any intention to use the land as an investment is that contained in Kerwin J.'s remarks, quoted above. However, Kerwin J.'s approach is consistent with that of Laidlaw J.A. in *Roberto,* for the question of adequacy of damages is ignored, subsumed or overcome by the assertion (or conclusion) that specific performance applies to the category of agreements for the sale of land as a matter of course.

What then can be gleaned from the Canadian authorities decided prior to the *Heron Bay* and *Chaulk* decisions? The *dicta* of Meredith C.J. in *Prittie* can be severely restricted by reference to the perfectly substitutable nature of the realty there in issue. *Roberto* and *Kloepfer Wholesale Hardware* suggest that specific performance will be decreed even where the purchaser entered into the contract of sale with an investment intention, regardless of whether damages might be considered an adequate remedy. The result achieved in *Armstrong* is consistent with such a position, and could perhaps be construed as support for the more extreme proposition that specific performance will be decreed even though the purchaser has actually resold or assigned the equitable interest created by the contract of sale. Thus, although there is no direct authority on the availability of specific performance where the plaintiff transfers or intends to transfer his or her equitable interest, the decisions in the two recent cases, insofar as they suggest that specific performance is not available to a purchaser who acquires real property for the purposes of investment, are open to considerable doubt.

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[42] *Ibid.,* 472 (Estey and Fauteux JJ. concurring). Locke and Cartwright JJ. did not discuss the issue, nor did the Ontario Court of Appeal: [1952] 1 D.L.R. 158.

[43] Although the basis for the decree of specific performance is the absence of an adequate remedy in damages, the decree has the effect of creating a proprietary interest (*i.e.,* an interest enforceable against persons other than the grantor: Jackson, *Principles of Property Law* (1967), 83-85; *cf.* Maitland, *supra,* note 12, passim). It has been suggested, however, that the award of specific performance "does not necessarily connote an equitable right": Note, (1973) 89 L.Q.R. 326, 329.

B. *Australasia*

Sir Garfield Barwick, Chief Justice of the High Court of Australia, has twice commented on the availability of the equitable remedy where the purchaser bought the property intending to develop or hold it for commercial purposes. In *Pianta* v. *National Finance & Trustees Ltd*,[44] all members of the Court agreed that in the circumstances of that case, a solicitor retained by owners to protect their interests concerning a proposed sale had no authority to conclude a binding agreement of sale. Barwick C.J. then considered whether specific performance was otherwise available:

> There was a faint endeavour made on behalf of the appellants to support the refusal of a decree [of] specific performance on the ground that, because the respondent was a land developer, damages would be an adequate remedy. But in my opinion this proposition is without foundation in law, even if the respondent had had no other business than that of subdividing and selling land and had made a decision to subdivide and sell the subject land.[45]

This passage is not entirely clear. Did Barwick C.J. consider damages in such a case to be an adequate remedy, yet hold nonetheless that specific performance was available for the enforcement of that *type* of contract (that is, a contract for the sale of land) as a matter of course? Or did he think that as a matter of law, damages for breach of a contract for the transfer of an interest in realty were to be deemed inadequate, for reasons left unarticulated?[46] The last sentence in the statement quoted above is tantalizingly ambiguous. Is Barwick C.J. referring to a general decision to subdivide and resell or to a specific intention to subdivide and resell the subject land at a certain price? If the former, damages could be inadequate because speculative, unascertainable or difficult to prove.[47] If the latter, it could well be contended that the purchaser, by alienating

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[44] (1964) 38 A.L.J.R. 232. Kitto, Windeyer, Owen and Menzies JJ. concurring. See also Starke & Higgins, *Cheshire and Fifoot's Law of Contract* 3d Aust. ed. (1974), 589.

[45] *Ibid.*, 233.

[46] Spry, *supra*, note 13, 58, cites *Pianta* for the proposition that in such a case, damages will not usually be regarded as an adequate remedy for the purchaser.

[47] *Decro-Wall Int'l S.A.* v. *Practitioners in Mktg Ltd* [1971] 1 W.L.R. 361 (C.A.); *Tanenbaum* v. *Bell Paper Co.* (1956) 4 D.L.R. (2d) 177 (Ont. H.C.). See also *Behnke* v. *Bede Shipping Co.* [1927] 1 K.B. 649; *Hogg* v. *Wilken* (1975) 5 O.R. (2d) 759, 51 D.L.R. (3d) 511 (H.C.), cited by Reiter & Sharpe, *supra*, note 32, 150, n. 12.

the proprietary interest for a sum certain, has quantified the loss and hence rendered damages an adequate remedy.[48]

Sir Garfield Barwick was provided with an opportunity to amplify his views in *Pianta* when *Loan Investment Corp. of Australasia* v. *Bonner*[49] was argued in the Privy Council. The contract provided that land was to be sold for £13,300, but of that amount £11,000 was to be "deposited" with the purchaser by the vendor without security for ten years at a stipulated rate of interest. When the vendor-respondent repudiated, the purchaser-appellant claimed specific performance. Lord Pearson, delivering the majority opinion of the Judicial Committee,[50] held that "the contract was neither in form nor in substance an ordinary contract for the sale of land with a usual ancillary provision for part of the price to remain on loan from the vendor to the purchaser".[51] His Lordship continued: "If a composite contract includes what is in substance and reality a long-term unsecured loan, the loan ought not to be treated ... as something different simply by being connected with a sale of land."[52]

The respondent had argued *inter alia* that the contract could not be enforced by specific performance because: (1) as the purchaser wanted the land solely for commercial[53] purposes as part of its general business, the land did not possess a peculiar and special value to it; (2) the purchaser had not suffered any loss that could not have been adequately compensated by an award of damages, since (a) the property had been purchased solely for commercial purposes, and (b) the contract provided for an unsecured loan, the value of which, not being "peculiar or special", could not justify specific performance.[54] Besides refusing the decree for the reason already given, Lord Pearson appeared to consider these other submissions in the following passage:

> This composite contract was predominantly in the nature of a commercial bargain. The appellant company wanted the property not for their own use, but for selling, letting, mortgaging and perhaps developing, and they

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[48] See the discussion of calculation of damages, *infra*, Part V.

[49] [1970] N.Z.L.R. 724 (P.C.).

[50] Viscount Dilhorne, Lords Hodson and Donovan concurring.

[51] *Supra*, note 49, 734.

[52] *Ibid.*

[53] There was no attempt made, either by counsel or by any member of the Judicial Committee, to differentiate between the intention to resell, to invest or to speculate. Hence the term "commercial" is used to indicate a nonpersonal use.

[54] *Supra*, note 49, 727.

> wanted the loan to help in financing their business generally.... If the appellant company can show that they have been deprived of a good bargain, ... they are entitled to proper damages. On the whole, damages are a sufficient and suitable remedy [.][55]

One wonders whether this reason could stand alone as a ground for refusing specific relief had the Judicial Committee not already stated that the contract was not specifically enforceable in any event. Sir Garfield Barwick delivered a very cogent and compelling dissent. He first refuted the majority position — that the contract could not be specifically performed because a "principal transaction" within it provided for a simple loan — by focusing attention on the foundation for that proposition: generally an award of damages as a remedy for the breach of an agreement to lend money constitutes adequate compensation.[56] But it does not follow that a contract to lend money can never in any circumstances be specifically performed:[57] *cessante ratione legis, cessat ipsa lex.* Where damages are not an adequate remedy, even in the case of a contract which provides for an unsecured loan, the decree can be ordered. In the instant case, specific performance was the correct choice because damages would not adequately compensate, since the property was an appreciating asset, and the plaintiff would only have to part with

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[55] *Ibid.*, 735. This statement echoes the words of Turner J. in the New Zealand Court of Appeal (*supra*, note 30, 1043): "[T]his purchaser decided to enter into this contract for the purchase of land not with the object of becoming the owner of a particular piece of real property, to which he attached some sort of importance, but simply so as to acquire an unencumbered asset capable of being sold or mortgaged, upon which it could raise finance upon sale or loan. If this was the object of the purchaser in entering into this agreement, the transaction is about as far as possible from the agreement for the purchase of land referred to by Sir John Leach V.-C. in *Adderley* v. *Dixon* ... where he explains the applicability of specific performance to contracts for the sale of land as being 'not because of the real nature of the land, but because damages at law ... may not be a complete remedy for the purchaser, *to whom the land may have a peculiar and special value*' " [emphasis in text]. It is respectfully suggested that the two purposes motivating a purchaser, set out in the first sentence quoted above, are not incompatible but complementary. A purchaser may especially prize a particular piece of property precisely because of the unique investment or speculative opportunities afforded by its acquisition.

[56] *Supra*, note 49, 741. The majority had stated that specific relief for a contract to repay money should be refused because the court could not supervise repayment, and because of inequality between the lender and borrower where the loan was unsecured. Sir Garfield Barwick disagreed.

[57] *Beswick* v. *Beswick, supra*, note 27; *Beech* v. *Ford* (1848) 7 Hare 208, 68 E.R. 85 (Ch.), cited by Sir Garfield Barwick, *ibid.*, 742.

a small cash outlay, the balance being repayable at the end of a lengthy period.[58]

Sir Garfield Barwick then took issue with the majority conclusion that the purchaser, having only a commercial interest in the land, should be denied primary equitable relief. After indicating that the earlier English authorities established the principle that the purchaser's decision to acquire particular land demonstrated an idiosyncratic evaluation without more, he concluded as follows:

> The authorities and established principle do not mean, in my opinion, that only those who want the land for some reason over and above the fact that it is land can have specific performance of the contract. Otherwise, for example, developers who buy land merely as a means of profit making or a person who having bought land has already subsold it before suit could not have specific performance.... No two pieces of land can be identically situated on the surface of the earth. When a buyer purchases a parcel, no other piece of land, or the market value of the chosen land can be considered, in my opinion, a just substitute for the failure to convey the selected land.[59]

The ambiguities raised by Barwick C.J.'s judgment in *Pianta* have thus been resolved. Damages for the breach of a contract for the sale of land are definitionally inadequate, whether or not the purchaser merely contemplates a resale or has actually subsold the realty before suit. It is respectfully suggested that the doctrine enunciated by Sir Garfield Barwick is correct, and should be followed in preference to that propounded by Lord Pearson. A distinction and consequent reconciliation of the different opinions might, however, be possible. Lord Pearson, it may be recalled, considered that the two transactions involved characterized the contract as a "commercial bargain". Hence damages were an adequate remedy because a principal component of the agreement was an unsecured loan, which could not be specifically enforced. Had the loan transaction not been present, the contract may not have been viewed as a "commercial bargain", but simply as an agreement for the sale of land; specific performance could then be decreed, whether the motives of the purchaser were commercial or otherwise. The weakness

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[58] *Ibid.*, Sir Garfield Barwick also remarked that the "noticeable reluctance" to award specific performance was due (in part) to the "singular advantage" which the purchaser would obtain if the contract as a whole were specifically performed.

[59] *Ibid.*, 745. Richmond J., the dissentient in the court below, agreed that damages were not an adequate remedy (*supra*, note 30, 1046-47) for reasons similar to those given by Sir Garfield Barwick, and stated that damages based on differences in the market value of the land were unreliable, nominal or negligible and a poor substitute for the land itself.

of this reconciliation is that it minimizes the emphasis Lord Pearson placed on the reasons for which the appellant attempted to acquire the property.

It appears that the conclusions reached in the earlier Canadian cases are largely compatible with Barwick C.J.'s reasoning in *Pianta* and *Bonner*. The opinion of Meredith C.J. in *Prittie* that the availability of substitutable lots precluded specific performance cannot be reconciled with Barwick C.J.'s view, for the latter was unable to accept the assertion that interests in realty are substitutable. As far as the Australian judge was concerned, the court had no satisfactory mechanism for determining the monetary worth of the land in question as valued *by the purchaser*.[60] If the court is to attempt to compensate the purchaser for the breach of contract, it is the purchaser's evaluation of the promisor's performance "as distinct from what the promisee, or anyone else has offered to pay for it"[61] that really matters. By accepting the evaluation of supposed substitutes by others in lieu of the promisee's evaluation, the court runs a considerable risk of under- or overcompensating the purchaser.[62]

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[60] Kronman, *supra*, note 31, 360-61, argues that an economic justification for specific relief depends on the difficulties created by a promisee who subjectively evaluates the worth of a substitute selected in place of the contract subject. The least costly substitute must still be determined by the evidentiary process, and this expensive exercise renders specific performance a more efficient remedy.

[61] *Ibid.*, 361.

[62] *Ibid.* Although Kronman excepts the case of the purchaser interested in reselling the property from his statement that the court cannot simply infer the promisee's evaluation from the values that others place on the property or any supposed substitutes, the exception is qualified. Thus Kronman states that money damages may be undercompensatory where the promisee intended to hold the property for some time as an investment rather than resell immediately. In the latter case Kronman considers that it is perhaps reasonable to treat any loss "as equal to the difference between the contract price and the price at which he could have sold it to someone else" at whatever the relevant date (date of breach or date of performance).

However, the *Hadley* v. *Baxendale* (*infra*, note 81) principles do not necessarily permit the purchaser to recover this amount from the vendor. Where the proposed resale price is either less than or more than the market price (if any such price can be calculated) at the relevant date (date of breach or date of performance), any award of damages based on the difference between purchase price and market price will be either under- or overcompensatory: see text, *infra*, Part V.

Where the court assesses damages as the difference between the contract price and a particular resale price to a third party, damages may also be either under- or overcompensatory, when compared to the difference between the purchase price to the plaintiff and the price at which he or she would have been prepared to resell, as Kronman illustrates (*ibid.*, n. 43).

This proposition is in turn qualified by the recognition that a degree of reasonableness is required to ensure that merely because a purchaser values a readily obtainable substitute less than his or her peers do, damages are therefore inadequate:

> In asserting that the subject matter of a particular contract is unique and has no established market value, a court is really saying that it cannot obtain, at reasonable cost, enough information about substitutes to permit it to calculate an award of money damages without imposing an unacceptably high risk of undercompensation on the injured promisee. Conceived in this way, the uniqueness test seems economically sound.[63]

C. *The United States*

In the United States, the decree for specific enforcement of contracts concerning the sale of land has been generally available, although there is some debate regarding the application of equitable principles to the remedy itself.[64] However, there have been occasions upon which specific performance has been refused because the court concluded that the land was of no particular value to the purchaser; hence damages were deemed adequate.[65] On the other hand, land has been described as intrinsically "peculiar" so that specific performance will be granted upon the assumption that all contracts concerning that category must, perforce, relate to the transfer of something unique.[66]

1. Authorities favouring specific performance where the purchaser has resold the land

The American courts have had many opportunities to consider whether specific performance should be decreed where the land

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[63] *Ibid.*, 362.

[64] See text, *supra,* pp. 517-18 and accompanying footnotes.

[65] *Blake* v. *Flaharty* 44 N.J. Eq. 228, 14 A. 128, 129 (1888), *rev'g* 10 A. 158 (Ch.): "The lot described is a small, unimproved piece of land without any peculiar value to the complainant for business purposes, ... or for any use to which he may wish to apply it."

[66] *Paddock* v. *Davenport* 107 N.C. 717, 12 S.E. 464, 464-65 (1890) *per* Shepherd J.: "The true principle upon which specific performance is decreed ... is founded upon the inadequacy of legal remedy by way of pecuniary damages. This principle is acted upon (1) where there is a peculiar value attached to the subject of the contract which is not compensable in damages. The law assumes land to be of this character 'simply because' says PEARSON, J., in Kitchen v. Herring, 7 Ired. Eq. 191, 'it is land, — a favorite and favored subject in England, and every country of Anglo-Saxon origin'."

Shepherd J. also stated that the basis of the remedy did not depend on an arbitrary distinction between different types of property. Yet he still maintained that land was *assumed* to be peculiar, thereby justifying equitable relief in *all* such cases.

was purchased for general purposes of speculation, investment or immediate resale. It seems that a principal reason for awarding specific relief, especially where the realty has actually been subsold,[67] is that to do otherwise encourages additional litigation:[68]

> The fact that the vendee has made a contract for the resale of the land to a third person does not deprive him of the right to specific performance. He will be liable in damages for breach of this new contract, and these damages cannot be accurately determined without litigation. He has a right that the vendor shall make the transfer as agreed, in order to enable him to perform specifically his contractual duty to the new vendee and to avoid litigation and the payment of such damages.[69]

The above comment reflects two related propositions: (1) additional litigation should be avoided where possible; and (2) the remedy should be decreed in order to protect the title of the subvendee. It is this latter objective that provides justification for many of the decisions. In *Roaring Fork Land & Cattle Co.* v. *O'Brien*,[70] the plaintiffs had resold their interest in the land to a third party. The defendant's objection was that the plaintiffs, having alienated their interest, had no right to the decree. Coyte J. (Silverstein C.J. and Dufford J. concurring) held that the plaintiffs were under a duty to protect the title of their grantees, "and therefore had standing to enforce this suit in equity".[71] Nothing was said regarding the adequacy of damages. In this case, as in many others, the purchasers had "conveyed" their interests by a "deed of warranty" to the subvendee, and it was this general warranty deed which gave rise to the duty placed upon the purchasers to protect their vendee's

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[67] *Restatement of the Law of Contracts*, §360, comment (b).

[68] *Quaere* whether *The Judicature Act*, R.S.O. 1970, c. 228, s. 18(8) could be utilized to effect the same end. The section is aimed at avoiding "multiplicity of proceedings" between *the parties*, and does not purport to deal with the more general notion that additional litigation should be avoided even if it does not involve the same parties.

[69] *Supra*, note 67.

[70] 476 P. 2d 276 (Colo. App. 1970).

[71] *Ibid.*, 278. See also Corbin, *supra*, note 16, §1143, n. 60, citing *Blair* v. *Morris* 212 Ala. 91, 101 So. 745 (1924); and Note, *Specific Performance — Suit by Vendee who has Sold to a Third Party* (1925) 34 Yale L.J. 802; *McCullough* v. *Newton* 348 S.W. 2d 138 (Mo. 1961); *Ackerman* v. *Maddux* 26 N.D. 50, 143 N.W. 147 (1913); *Shannon* v. *Freeman* 117 S.C. 480, 109 S.E. 406 (1921); *Patterson* v. *T. J. Moss Tie Co.* 46 Tenn. 405, 330 S.W. 2d 344 (1959); *Bittrick* v. *Consolidated Improvement Co.* 51 Wash. 469, 99 P. 303 (1909); Simpson, *Fifty Years of American Equity* (1936) 50 Harv. L. Rev. 171, 174, n. 18.

title.[72] But it would seem to matter little whether the subsequent contract expressly or impliedly bound the purchaser to "warrant and defend"[73] the title, since the purchaser's claim to specific performance depends on the validity of the initial contract: the fact that the purchaser is bound to sue for specific performance does not necessitate the conclusion that the court is bound to award it. However, it does seem clear that by decreeing specific performance, the courts are both minimizing the likelihood of a second action by the subpurchaser and protecting the ability of that subpurchaser to acquire and maintain good title.[74]

Right of subpurchasers and the desire to avoid litigation are not the only reasons given for decreeing specific performance in these cases. In *Radiant Realty Co.* v. *Sheinbaum*,[75] Hofstadter J., aside from relying on § 360 of the *Restatement of the Law of Contracts*, stated that the decree was necessary because the anticipated profits on resale may not have been included in calculating an award of damages.[76] Furthermore, even if awarded, the damages were probably not collectible, except by the sale of the property in question. For both these reasons, damages were not an adequate remedy.

Occasionally judges react adversely to the argument that the equitable right should be made to depend on the motives or intentions of the purchaser regarding the property. For example, in *Loveless* v. *Diehl*,[77] Smith J. said:

> Whether they kept it, sold it, or gave it away was of no concern to the sellers. To refuse specific relief on account of the proposed resale would establish an unsound precedent, diminishing the transferability of property, since in similar situations prospective buyers would be reluctant

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[72] Corbin, *supra*, note 16, § 1143, 129: "... if the purchaser has resold to another person, with covenant of warranty, the defendant's breach not only causes him to lose his profit, but also to be liable in damages to the new purchaser."

[73] Dobbs, *Remedies* (1973), 836.

[74] *Loveless* v. *Diehl* 236 Ark. 129, 364 S.W. 2d 317 (1963).

[75] 9 Misc. 2d 1009, 171 N.Y.S. 2d 252 (1958); noted, (1958) 33 N.Y.U.L. Rev. 1183. See also Corbin, *supra*, note 16, § 1143, 130; Dobbs, *supra*, note 73, 848.

[76] It was uncertain whether there was sufficient evidence to demonstrate that the defendants had contracted in contemplation of the resale. Any additional profits beyond the market value of the property would not otherwise be compensable. See also 7 A.L.R. 2d 1198, 1209, § 3. For a general treatment of the availability of damages to a purchaser, including claims for lost profits as a result of being unable to use the land, see 11 A.L.R. 3d 719, 722; 48 A.L.R. 12.

[77] *Supra*, note 74. See also Corbin, *supra*, note 16, § 1143, 130; Dobbs, *supra*, note 73, 848.

> to bind themselves to a purchase contract, for fear that it might prove to be unenforceable.[78]

Whatever the merits of the view that the decree should be ordered in order to enhance the "transferability of property," the motives and intentions of the purchaser are relevant to the extent that they affect the central question as to the adequacy of damages. If subsequent dealings with the land demonstrate that damages are indeed adequate, specific performance should be denied.[79]

In all of the American cases examined thus far, the purchaser had subsequently entered into a valid and enforceable contract with a third party for the resale of the land. Is the situation any different where the terms of that subsequent contract, especially the term regarding price, are unknown? In *Walcis* v. *Kozacik*,[80] the original vendor attempted to resist specific performance by arguing that damages (being the difference between the initial purchase price and the amount receivable from the subpurchaser) were an adequate remedy. This method of calculation is not necessarily within the scope of the *Hadley* v. *Baxendale*[81] rules, since the purchaser under the original contract may have advantageously secured a resale price greater than current market value.[82] However, Nichols J. did not reject the vendor's contention on that basis. He chose a narrower technical ground:

> But there is nothing in the special findings to show upon what terms appellee [original purchaser] had agreed to sell the property.... It does not appear as to whether the parties have continued to treat the contract as still in effect, nor that appellee had agreed to sell for a definite amount under such circumstances that his damages could be ascertained.[83]

2. Authorities refusing specific performance where the purchaser has resold the land

As has been seen, all of the American decisions discussed to this point are in favour of ordering the decree, notwithstanding the re-

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[78] *Ibid.*, 321. See also de Funiak, *supra*, note 22, 643, who agrees that equitable relief should not depend on the motives of the purchaser.

[79] It is the writer's view that damages are certainly not adequate where the land has been subsold, as was the case in *Loveless*. See text, *infra*, Part V.

[80] 86 Ind. App. 484, 156 N.E. 589 (1927).

[81] (1854) 9 Ex. 341, 156 E.R. 145.

[82] If the proposed resale price were known to the original vendor, the entire amount would be recoverable: see *supra*, note 76.

[83] *Supra*, note 80, 592. Nichols J. also indicated that "[e]ven if such damages were ascertainable, still it is not the law that, because of such fact, resort must be had to the remedy at law rather than to equity for the enforcement of specific performance".

sale of the land in question. There are, however, some authorities which could be read to favour a contrary view. In *Thweatt* v. *Jones*,[84] the plaintiff arranged with one of the defendants that he would purchase property in his own name from one Jones in order to hold it for the benefit of the first defendant. Boysen, the first defendant, in fact purchased the land from Jones, the second defendant, directly, thereby preventing the plaintiff from obtaining the property. Could Thweatt obtain specific performance of his valid contract of sale with Jones? It appeared that Thweatt's compensation was to be the difference between the purchase price of the land to him and $4.20 per acre.

Thayer J. (Sanborn and Shiras JJ. concurring) characterized the relationship between Thweatt and Boysen as one of agency. Thweatt's remedy accordingly lay in an action against Boysen for damages for breach of his agency contract;[85] and damages being an adequate remedy, specific performance was denied. This is not an entirely satisfactory line of analysis, although the result seems just. We are accustomed to seeing the request for equitable relief denied where, *as between the same parties*, damages are an adequate remedy; in *Thweatt* the plaintiff was told that specific performance was inappropriate because he had a cause of action on a different and separate contract.[86] On the other hand, a decree of specific performance granted to the plaintiff in these circumstances could result in the subpurchaser having to bring a second action on his contract to recover the land, should the purchaser refuse to convey

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[84] 87 F. 268 (8th Cir. 1898). See also Corbin, *supra*, note 16, § 1143, 128; Bird & Fanning, *Specific Performance of Contracts to Convey Real Estate* (1934) 23 Ky L.J. 380, 384; Note, *Specific Performance of Contracts to Convey Land When the Vendee has Contracted to Sell to a Third Person* (1921) 21 Colum. L. Rev. 80, 84.

[85] Where the subvendee induces the original vendor to convey directly to him or her in breach of the original vendor's contract with the plaintiff purchaser, the purchaser can join the original vendor and the subvendee as defendants in an action for breach of contract and recover the benefit of his or her bargain: Note, *supra*, note 84, citing *McLennan* v. *Church* 163 Wis. 411, 158 N.W. 73 (1916) as authority for this proposition.

[86] There could well be difficulties faced by the plaintiff in attempting to recover damages on the "agency" contract. If that were the case, should specific performance be awarded because damages might be difficult to obtain or collect? In *Thweatt*, Thayer J. adverts to the problem in the following passage at page 271: "It is not even alleged in the bill that the defendant Boysen is insolvent, and that it is necessary for that reason to set aside the convenyance to Boysen, and to vest the title to the property in the plaintiff, for the purpose of securing his claim to compensation for services rendered in negotiating the alleged purchase."

the property. Thus, the award of damages, at least where the subvendee is a co-defendant, is preferable to specific performance, since additional litigation is thereby prevented.

Presiding over a similar set of circumstances, the court in *Marthinson* v. *King*[87] emphasized that the direct transfer of title to the "subpurchaser/principal" passed the property in the manner anticipated by the combined effects of both contracts. By reading the terms of the two contracts together, it was clear that the plaintiff "acquired no right to hold the title to the property permanently".[88] An alternative method of characterizing the plaintiff's position, both in *Thweatt* and in *Marthinson*, is to classify him as a trustee, rather than as a mere agent: he is therefore not beneficially entitled to specific performance and should be estopped from asserting any equitable interest in the property.[89]

The net result in *Marthinson* does, however, favour the view that where the purchaser quantifies his loss, as evidenced by his agency relationship with the individual beneficially interested in the land, specific performance will be denied. The subject-matter of the option contract in *Marthinson* was a "cross-tie camp and outfit", together with certain growing timber; all these items were eventually held to be personal property rather than realty.[90] *Marthinson* has been approved in several other cases dealing with the availability of the decree for the enforcement of contracts concerning personal property.[91]

Perhaps the most notorious example of the refusal of the decree where the purchaser had contracted to resell occurred in *Hazelton*

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[87] 150 F. 48 (5th Cir. 1906). See also Hume, *Specific Performance of Contracts to Convey Land* (1933) 21 Ky L.J. 348, 349; Brun, *supra*, note 13, 946, n. 44.

[88] *Ibid.*, 53.

[89] In *Bird* v. *Hall* 30 Mich. 374 (1874), specific performance was decreed on facts similar to those in *Marthinson*. *Bird* v. *Hall* may be distinguished, insofar as the plaintiff's claim against his principal had not matured before the suit in equity was litigated, and as Note, *supra*, note 84, 84, n. 24 indicates, damages at law could not be awarded in the absence of an anticipatory breach. Furthermore, the plaintiff was entitled to hold the property as security for payment by his principal, and to that extent can be viewed as holding an equitable interest in the land.

[90] *Supra*, note 87, 52.

[91] *E.g.*, *Hawaiian Pineapple Co.* v. *Masamari Saito & Libby, McNeill & Libby of Honolulu, Ltd* 24 Haw. 787 (1919); *Pacific States Automotive Fin. Corp.* v. *Addison* 261 P. 683 (Idaho 1927); *Trustees of Columbia Univ.* v. *Mortgagee Investors Corp.* 89 N.Y.S. 2d 324 (1949).

v. *Miller*,[92] where, in a suit for specific performance, the plaintiff alleged that he had entered into a subsequent contract to convey the property to a third party for a stipulated amount. Shepard C.J. dismissed the plaintiff's appeal on the following ground:

> Having no other purpose, and having fixed and rendered certain the damages sustained by the breach of the contract, his sole remedy is at law. Further discussion, and the citation of authorities in support of this conclusion are unnecessary.[93]

If the authorities Shepard C.J. found unnecessary to cite were specifically concerned with the question whether a plaintiff could obtain the decree where he or she had subsequently contracted to resell for an agreed amount, it is most unfortunate that they were not cited, since apart from *Thweatt* the writer has been unable to locate any case decided prior to 1905 even remotely on point. The effect of this decision, then, is to deny the property to the third party who must in turn sue his or her vendor for damages for breach of contract. Even though there was no evidence to show the purpose for which the third party in the case, the United States Government, had purchased the land, its rights to the property itself were still thwarted.[94] The only saving grace in the case is that there was an indication in the plaintiff's bill that the defendant intended to transfer the property directly to the United States Government in any event.[95] One wonders whether the Court would have held in the plaintiff's favour if there were any prospect of the defendant conveying the land to a *bona fide* purchaser.

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[92] 25 App. D.C. 337 (1905), *aff'd* on another ground *sub nom. Hazelton* v. *Sheckells* 202 U.S. 71. See also Corbin, *supra*, note 16, §1143, 128, n. 57; Clark, *supra*, note 16, §43; Spry, *supra*, note 13, 58; Simpson, *supra*, note 71, 174; Note, *supra*, note 84, 82; Bird & Fanning, *supra*, note 84, 384; Hume, *supra*, note 87; Note (1905) 5 Colum. L. Rev. 473; Note (1905) 18 Harv. L. Rev. 625; Cox, *Specific Performance of Contracts to Sell Land* (1928) 16 Ky L.J. 338, 339-40; Jones, *Specific Performance of Contracts for the Conveyance of Real Estate* (1933) 22 Ky L.J. 143, 144; Van Hecke, *Equitable Remedies* (1959), 14.

[93] *Ibid.*, 341-42.

[94] See Note (1905) 18 Harv. L. Rev. 625; Cox, *supra*, note 92, 340.

[95] Cox, *supra*, note 92, 340, argued that *Hazelton* v. *Miller* did not furnish authority which was inconsistent with the third party's right to specific performance, since the plaintiff's bill "did not show that the third party was asking performance of the contract by the vendee". It is difficult to understand why the author saw a need to impose a formal pleading requirement upon the plaintiff before specific relief would be decreed. One would think that the transfer of the actual property purchased, rather than monetary compensation, constitutes the usual expectation of the subpurchaser. In any event, specific performance may not yet be due.

Hazelton has received mixed reviews from the commentators. One writer,[96] referring to subsequent case law to the contrary,[97] stated: "A budding heresy that equity will not specifically enforce a land contract at the suit of a purchaser who has contracted to resell the land has been nipped [.]"[98] Cox, writing on the nature of the relationship between contracts for the sale of land and the equitable remedy, refers to Clark's criticisms[99] and admits that they "seem well grounded".[100] The unsuccessful plaintiff's exposure to an action by his or her purchaser, coupled with the lost right of the latter to specific performance, are the reasons given for yet another writer's disapproval.[101] Perhaps the most telling criticism of *Hazelton* concerns the actual calculation of damages in order to negate the reasoning that damages consist simply of the difference between the two contract prices.[102] These "technical" objections are sufficiently important to warrant more detailed attention, and shall be further considered.[103] Not unexpectedly then, the *Restatement of the Law of Contracts*[104] also rejects the doctrine so casually enunciated in *Hazelton.*

On the other hand, four commentators writing in the *Kentucky Law Journal* approve the proposition that damages are an adequate remedy where the plaintiff has subsequently resold the property, and go further in advocating the view that specific performance should not be awarded unless the plaintiff can affirmatively demonstrate that damages are inadequate.[105] This superficially attractive view fails to take the right of the subpurchaser into account, and does not deal with the problem created by the plaintiff's liability should an action be brought by the disgruntled subvendee. In addition, the proponents of *Hazelton* seem to assume that the appropriate quantum of damages consists of the difference between the two contract prices, but as shall be seen, this will not necessarily constitute the proper quantum when assessing damages.

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[96] Simpson, *supra,* note 71, 174.

[97] *Mier* v. *Hadden* 148 Mich. 488, 111 N.W. 1040 (1907); *McVoy* v. *Baumann, supra,* note 24; *Shannon* v. *Freeman, supra,* note 71.

[98] Simpson, *supra,* note 71, 174. See also Spry, *supra,* note 13, 58, n. 31.

[99] Clark, *supra,* note 16, § 43.

[100] Cox, *supra,* note 92, 340.

[101] Note (1905) 18 Harv. L. Rev. 625.

[102] Note, *supra,* note 84, 82-84.

[103] See text, *infra,* Part V.

[104] § 360.

[105] Hume, *supra,* note 87; Jones, *supra,* note 92; Bird & Fanning, *supra,* note 84.

In light of the well-considered disapproval of the reasoning in *Hazelton,* it is not surprising to find that specific performance is generally decreed where the plaintiff has resold the premises. Occasionally, the remedy is refused where there is no evidence that the land has been resold. In *Suchan* v. *Rutherford,*[106] the purchasers sued for the rescission of a contract for the sale of land, whereupon the vendors counterclaimed for specific performance or damages for breach of contract. Taylor J.[107] refused to order specific performance on the basis that the land involved was not unique, but instead, common to the general area. Sales of similar land were said to be frequent, so that the market value of the property was readily calculable.[108] Unfortunately, Taylor J. was prepared to concede that specific performance would have been available to the plaintiffs as purchasers had the vendors refused to perform.[109] He thus refused to apply the "mutuality" doctrine which one would think should compel a different result regarding the purchasers' remedy if the vendors really have no right to the decree. The vendors were ultimately relegated to relief by way of damages.[110]

Of course, *Suchan* is not directly concerned with the situation where the plaintiff-purchaser has himself or herself resold the premises to a third person. In view of Taylor J.'s apparent concession that the equitable remedy was nonetheless available to the vendee, the appropriateness of his remarks concerning the uniqueness of the property is perhaps open to some doubt.[111]

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[106] 90 Idaho 288, 410 P. 2d 434 (1966). See also Brun, *supra,* note 13, 939, n. 18.

[107] McFadden and Smith JJ. concurring; McQuade C.J. and Knudson J. dissenting.

[108] *Supra,* note 106, 438.

[109] *Ibid.,* 440.

[110] *Ibid.,* 443.

[111] In *Watkins* v. *Paul* 95 Idaho 499, 511 P. 2d 781 (1973), the Supreme Court of Idaho approved *Suchan* v. *Rutherford,* Donaldson C.J. (Shepard, McQuade and McFadden JJ., Scoggin D.C. concurring) stating at page 783: "Here, as in *Suchan* v. *Rutherford* ... '[i]t cannot be seriously contended that the remedy at law via damages was not adequate, plain, speedy and complete in this case.' ... The evidence fails to show that the plaintiffs need the land in question for any particular, unique purpose, which is one of the main reasons for granting specific performance; on the contrary, the plaintiffs' own evidence shows that they seek to obtain the land only so they may resell it for profit. Under these circumstances, specific performance would bring the plaintiffs no greater relief than would damages in the amount of their lost profit."

Unlike *Suchan* v. *Rutherford,* it was the purchasers who here sought equitable relief.

Almost all of the American decisions considered so far have turned on the issue whether damages could be considered an adequate remedy, or whether the specific enforcement of the contract was necessary in order to protect a third party's right to the subject-matter of the contract. However, there have been cases where specific performance was refused, not on these grounds, but because the contract has been characterized as "gambling" or "speculative".

3. Gambling and speculative contracts

From 1920 to 1922, three such cases were litigated in South Carolina. The first was *Schmid* v. *Whitten.*[112] In that case, Whitten (the defendant) agreed to sell his homestead to Schmid for $1,150. Schmid took possession as a tenant and subsequently gave one Morrison an option to purchase for $1,900. Morrison in turn contracted to sell to one Lyles (presumably for an even greater amount). When Whitten refused to complete the contract, Schmid sued for specific performance. Watts J., delivering the majority judgment,[113] held in favour of the defendant and refused the decree. After deciding that Schmid was not interested in the property as a home, but rather that "he was on the make,"[114] the judgment proceeds as follows:

> [I]t is [a] rule of absurdity if a court of equity intends to decree specific performance in such cases, and lend their [*sic*] aid and assistance to enforcing such barefaced gambling and speculative contracts. One of the curses of the country at present is the gambling speculative craze, whereby a lot are out for easy money and a desire for quick riches.[115]

Since the plaintiff was referred to a court of law for his remedy in damages,[116] one can only suppose that the gambling or speculative nature of the contract (the Court did not draw any distinction bet-

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[112] 114 S.C. 245, 103 S.E. 553 (1920). See also James, *Specific Performance of Speculative Land Contracts* (1939) 3 U.S.C. Selden Soc'y Y.B. 29; Corbin, *supra,* note 16, § 1143, 128; Note, *supra,* note 71; Note, *supra,* note 84; Cox, *supra,* note 92.

[113] Gage and Fraser JJ. concurred. Gary C.J. and Hydrick J. (concurring) dissented. The majority judgment was originally written as a dissent.

[114] *Supra,* note 112, 553.

[115] *Ibid.,* 553-54. Watts J. then stated that there were "a lot of good people engaged in the real estate business, legitimately buying and selling, but the case at bar presents no such features". One wonders how Watts J. was able to differentiate the "good people" from Schmid, who was presumably one of the bad.

[116] *Ibid.,* 554.

ween the two categories)[117] rendered it illegal,[118] void, or unenforceable in equity, but did not affect its validity at law.

The unusual aspects of this decision (apart from the Court's condemnation of speculative contracts) lie in the matters not discussed. There is no mention of the issue of the adequacy of damages, nor are the rights of the optionee and his subpurchaser deemed worthy of mention.[119] *Schmid* was followed two years later by the same court in *Sumner* v. *Bankhead*,[120] where the vendor sought specific performance of a contract for the sale of land. The facts disclose that the plaintiff had only recently acquired the equitable interest in the property under a contract of sale, and had not yet received a conveyance from the legal owner. Bankhead, the defendant, agreed to purchase the property, but refused to pay the purchase price when Sumner tendered the deed (Sumner having in the meantime obtained the legal title). The only defence considered at trial and on appeal was that the contract was speculative.[121]

Cothran J., dissenting, had doubts whether the contract between Sumner and Bankhead was in fact speculative, although he conceded that Sumner had entered into the previous contract with the original owner with speculative motives, and that Bankhead contracted for the land in order to speculate with it. In other words, Sumner may not in fact have been speculating when he resold to

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[117] Note, *supra*, note 84, 81. The writer points out that the contract should not be considered a gambling contract since in that type of transaction, "there is no intention ever to acquire the property", which lack of intention is apparently rebutted by the fact that the purchaser, in bringing suit for specific performance, evidently desires the land. If the contract were a gambling contract, it would be "contrary to public policy and ... unenforceable both at law and in equity": *Flagg* v. *Baldwin* 38 N.J. Eq. 219 (1884); *Lowry* v. *Dillman* 59 Wis. 197, 18 N.W. 4 (1884).

The writer then states that "speculative" contracts are enforceable at law (citing *Dillaway* v. *Alden* 88 Me 230, 33 A. 981 (1895)), and after examining the likelihood of injury or inconvenience to the public if land speculation contracts were enforceable in equity, concludes that there is no good reason why these contracts should not be enforced in courts exercising equitable jurisdiction.

[118] James, *supra*, note 112, 31, states that the Court held the contract illegal, but in all fairness to the majority judgment, Watts J. did not go so far, although he did refuse to lend the Court's aid to enforce it.

[119] The dissenting judges do not expressly address the issue which forms the basis for the majority opinion, but since both were prepared to decree specific performance, one can infer that they rejected the majority view on the question.

[120] 119 S.C. 78, 111 S.E. 891 (1922). See also James, *supra*, note 112.

[121] *Ibid.*, 893 *per* Cothran J. (dissenting).

Bankhead: "it was rather the consummation, the closing out, of a previous speculative intent, which should not be permitted to inject its poison into this valid contract."[122] This fine distinction may possess merit. If the defendant is able to vitiate the contract (at least with respect to its specific enforcement) by alleging some "improper" motive on behalf of the plaintiff, that is one thing. If the defendant is able to allege his own "improper" motive as a defence to the plaintiff's otherwise valid claim, that is entirely a different matter.

Cothran J. delivered a furious but well-reasoned dissent.[123] He rejected the doctrine enunciated in *Schmid* (even if the facts were found to support a speculative intent) for the reason that "the promulgation of that opinion"[124] had wrought havoc in commercial transactions; "that opinion" was also responsible for "the disintegration of the moral obligation to comply with solemn contracts,"[125] and (ironically enough in view of the reasons underlying the majority judgment in *Schmid*) "that opinion" led to "the opening of a port of refuge to those who, with their eyes wide open, and, their greed for quick riches excited, are willing to repudiate their engagements under disappointing results [.]"[126] This last comment, together with another further along in the judgment,[127] has led one commentator to remark that the doctrine enunciated in *Schmid* therefore operates to defeat its own purpose.[128]

Whatever the quantum of damages awarded in the ordinary dispute, Cothran J.'s view is certainly justifiable in the instant case, since the contract itself provided the measure of damages — forfeiture of the initial payment.[129] Cothran J. then embarked upon an ex-

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[122] *Ibid.*

[123] Fraser J. (Gary C.J. and Watts J. concurring) delivered the majority opinion. Gary C.J. thought himself bound by *Schmid.*

[124] *Supra,* note 120, 893.

[125] *Ibid.*

[126] *Ibid.*

[127] *Ibid.,* 893-94: "If the purpose to be accomplished by the *Schmid* v. *Whitten* Case be to discourage men 'free, white and twenty-one' from entering into contracts of speculation, ... the means employed create a positive inducement for such enterprises. It presents a 'heads and tails' proposition. If the advancement in value anticipated by the speculator be realized, he pockets his profits with the exultation of a 'Jack Horner'; if not, he pleads the speculative features of the contract, and under the protection of *Schmid* v. *Whitten,* retires with a whole financial skin, but with a tattooed reputation."

[128] James, *supra,* note 112, 31.

[129] *Supra,* note 120, 892 *per* Fraser J.

haustive analysis of stock speculation contracts, and demonstrated that these transactions were not *per se* illegal, void, or unenforceable. He concluded that in the absence of a factor affecting the exercise of the chancellor's discretion (and a speculative motive was not such a factor), the plaintiff had a "legal" right to specific performance.[130]

Before leaving *Sumner*, it should be noted that by refusing to accept legal title, the purchaser was not apparently precluding any subsequent sale (just as in *Scarborough* v. *Register*, [131] a very tersely reported decision of the same court to the same effect a year later,[132] no third party was involved). Thus these two cases stand for the proposition that specific performance will be denied a plaintiff who enters a contract for the sale of land with a general speculative intention, whether or not damages are an adequate remedy. *Schmid* goes even further, for two subsequent purchasers were prejudiced by the refusal to grant the equitable remedy.[133]

Despite the denial of specific performance in all three decisions, Cothran J. may well have had the last word, at least in South Carolina. He wrote the majority opinion in *Welling* v. *Crosland*,[134] which involved a syndicate resisting specific performance although it was

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[130] *Ibid.*, 897.

[131] 123 S.C. 59, 116 S.E. 97 (1923). See also James, *supra*, note 112.

[132] Marion J. thought himself bound to follow *Schmid* and *Sumner* although his own "individual" views were "in entire accord with those so clearly and forcefully presented in the dissenting opinion of Mr. Justice Cothran in the case of *Sumner* v. *Bankhead*". Watts and Fraser JJ. concurred. Cothran J. did not participate. Gary C.J. did not sit.

[133] In view of the fact that there are few reported cases on the question, one might wonder why three such cases, all going against the party seeking specific performance, arose in South Carolina, the first being litigated in 1920. In *Welling* v. *Crosland* 129 S.C. 127, 123 S.E. 776 (1924), Fraser J. (dissenting) provides an explanation. From 1920 on, prices of cotton began rising. For this reason, and because the boll weevil was rapidly approaching, the price of cotton lands underwent sudden escalation. After the boom, vendors demanded specific performance, but in the light of post-boom land prices, this would have severely jeopardized the solvency of many purchasers, who, even if able to meet their contractual obligations, would be left with relatively worthless land. Damages at law, being assessed with market value at the date of breach in mind, operated to save the purchaser. Presumably the same circumstances militated against the purchaser when he or she claimed specific performance before the maximum level of prices was reached. He or she would only be content with damages where the market price at the date of breach was higher than the contract price.

[134] *Ibid.* Gary C.J. and Marion J. concurred; Watts and Fraser JJ. dissented. See also James, *supra*, note 112, 36; Corbin, *supra*, note 16, § 1143, 128.

contractually bound to purchase the land. One of its grounds of objection was that the property was to be resold at auction. Cothran J. distinguished the earlier cases:

> This case does not come at all within the rule declared in *Schmid* v. *Whitten, Sumner* v. *Bankhead,* and *Scarborough* v. *Register* [citations omitted], where the purchasers never expected to do anything with the land except to hold it for a brief time and gamble upon the rise in value. Here the syndicate expected to hold an auction sale and realize profits, but if that failed, to farm or rent it.
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> It certainly would be remarkable to hold that a contract for the purchase of land which had been carried out to the extent of payment of part of the purchase price, an entry upon the land by the purchaser, a survey and division, and an attempted auction sale, should be held so vicious that a court of equity would decline to decree specific performance, for the reason that the purchaser contemplated a profit by the transaction.[135]

The distinction suggested by Cothran J. is a very fine one, although it emanates from the opinion of Watts J. in *Schmid* itself.[136] Where the principal motivation for the purchase — resale at a profit — remains unrealized, the purchaser has little choice but to make the next best use of the property. The articulated presence of a subsidiary farming or renting intention does not therefore seem to be a very strong basis for distinguishing *Schmid* and its progeny from *Welling.* Furthermore, realizing a profit by auction should not be considered differently from realizing a profit by private agreement. In addition, the length of time the property is retained before disposition (given that an intention to speculate exists) must surely be irrelevant. Indeed, if speculation *per se* is considered objectionable, one might think that the more deliberate and lengthy the technique of profit-making, the more reprehensible the scheme. These difficulties indicate that distinctions based on the methods of resale employed or on the existence of other possible uses for the land are ultimately unhelpful.[137]

As in *Sumner,* the plaintiffs in *Welling* were the vendors. Unlike *Sumner,* it appears reasonably clear that the plaintiffs in *Welling* were not themselves guilty of any speculative intent; it was the defendants who sought to rely on their own speculative motive to defeat the vendors' claim to specific performance. This possible ground

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[135] *Ibid.,* 780.

[136] See *supra,* note 115.

[137] For a more detailed analysis of purchasers' intentions regarding future commercial exploitation of land, see text, *infra,* Part IV.

of distinction was not mentioned by Cothran J. in *Welling*, but it is not inconsistent with the decision in *Schmid*, where the speculating purchaser was refused specific performance. Thus it would seem from the actual results in these four South Carolina cases that regardless of status as plaintiff or defendant, the party guilty of "speculation" will lose.[138] However, the language utilized in the majority judgments of all these cases points to a broader conclusion — that is, that the presence of a speculative motive vitiates the contract. Equity, it is said, will refuse to specifically enforce such a transaction, even if courts of law allow a speculating party to sue for damages.

Cothran J.'s final distinction in *Welling* was that the remedy would not be refused if the contract was (partially) executed. However, it would seem that whether the contract is partially executed or executory, specific performance should be decreed if the contract is in all other respects valid and enforceable.

The dissenting judges in *Welling* did not generally object to Cothran J.'s views, perhaps because Cothran J. made no attempt to directly overrule the earlier decisions. The process of distinguishing continued in *Armstrong* v. *Henson*,[139] where a lower court decision in favour of a purchasing farmer was upheld. Although the vendor relied on *Schmid*, the applicability of that precedent was rejected:

> I do not understand that the Supreme Court in that case meant to outlaw the business of bona fide estate dealers or to close the doors of equitable relief to them, nor was it meant to be understood as holding that a farmer who engages to purchase a farm as an investment and for farming purpose [*sic*], even though he may have anticipated and expected that he might sell at a profit, is engaged in speculation within the meaning of the decision[.][140]

As was the case in *Welling*, an attempt has been made to distinguish one type of speculation from another. Admittedly the

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[138] Which is not to say that a speculating party may not win, if the other party is speculating as well: *Sumner, supra*, note 120.

[139] 139 S.C. 156, 137 S.E. 439 (1927). See also James, *supra*, note 112, 36.

[140] *Ibid.*, 440 *per* McIver Circuit J. His Honour continued: "In a sense, almost all purchasers of real estate, or at least many of them, are speculative; that is, the purchaser ultimately expects to sell and make a profit. The desire to buy and sell at a profit is the very life of trade and is not a reason for denying equitable relief, so long as it appears that the contract was made in good faith, intended really to be carried out, and an actual investment made. The very able opinion of Mr Justice Watts [at 103 S.E. 554] recognizes that there is such a thing as 'legitimately buying and selling' lands, and that, in such a case, relief would not be denied [.]"

farmer who can prove to the court that he or she was primarily interested in the land for farming purposes is in a stronger position than the morally reprehensible and rapacious land speculator whose sole interest in the property is the profit to be made by its resale. Leaving aside any possible prejudice to subvendees[141] (and *Welling*, *Armstrong*, and *Scarborough* did not involve the rights of ascertainable subpurchasers), the concept of "speculative purpose" seeks to differentiate legitimate resale (where a legitimate intention to obtain a profit is allowed) from illegitimate resale (where specific performance will be denied). The workability of this approach is considered in more detail in the next section.

The decision of McIver Circuit J. was affirmed on appeal. Cothran J., perhaps made wary by the problems encountered in limiting "speculation", could not resist a final comment: "I think that the case of *Schmid* v. *Whitten* is wrong in principle and should be distinctly overruled."[142]

Schmid has not fared well in the one other state in which it was contended that speculative motives precluded equitable relief. In *Waller* v. *Lieberman*,[143] the defendant vendor sought to resist specific performance, arguing that the original purchaser had made the contract for the purpose of speculation. Stone J. for the Court rejected this contention:

> If we were to deny specific performance of every contract for the purchase of land made for speculative purposes, but few decrees for specific performance would be granted, for, as a rule, purchasers of real estate buy property in good faith frequently with the intention of selling it again at a profit[.][144]

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[141] In *Shannon* v. *Freeman*, *supra*, note 71, specific performance was decreed by the South Carolina Supreme Court where the purchaser had resold to a third person. There is no mention of speculation in this case.

[142] *Supra*, note 139, 441. Another shadow of doubt was cast by the comments of Marion J. in *White* v. *Douglas* 128 S.C. 411, 123 S.E. 259 (1924): "The contention that the doctrine of *Schmid* v. *Whitten* and *Sumner* v. *Bankhead* [citations omitted] may be soundly extended to the witholding of personal judgment in a proceeding to foreclose a mortgage founded upon a speculative land transaction is manifestly untenable, *even if the validity of the theory* applied in those cases be conceded ..." [emphasis added]. See also James, *supra*, note 112, 35-36.

[143] 214 Mich. 428, 183 N.W. 235 (1921).

[144] *Ibid.*, 240. The original purchaser had assigned his interest to another.

IV. Investment, resale and speculation: the meaning of commercial use[145]

An analysis of the case law reveals that where specific performance has been refused, the courts have sometimes been content to deny this form of relief simply because the purchaser failed to prove that the realty was required for personal use. However, the dichotomy of "personal use/nonpersonal use" or "personal use/commercial use" is too broad to permit of a proper understanding of the various nonpersonal or commercial uses that can be made of land. In *Heron Bay*,[146] Weatherston J. seemed to assimilate the nonpersonal purpose of "investment" to the nonpersonal purposes of "development" and "resale". Gushue J.A. in *Chaulk*[147] treated "investment" and "resale" as if the terms were interchangeable. Similar tendencies are also apparent in many of the other authorities examined in the previous sections of this paper.[148] The purpose of this section is to present a more detailed categorization in order to determine whether specific performance may be appropriate for some kind or kinds of intended nonpersonal use but not for others.

A term often utilized to indicate an intended nonpersonal or commercial use of land is "investment", yet this term has not been defined in those judgments that rely on the classification to avoid decreeing specific performance. It is suggested that the concept of nonpersonal use contains two contrasting subcategories — "investment" on the one hand and "resale" on the other. It is also suggested that the term "speculation" is concerned with a particular form of "resale", or that it represents a point or a category somewhere along the continuum between "resale" and "investment".

When land is bought for the purposes of investment, two possible and not inconsistent intentions may be present in the mind of the purchaser. One purpose may be to utilize the property as a capital (revenue-producing) asset by leasing it to others. This purpose may or may not be accompanied by a present or future intention to develop the land (especially where the property is undeveloped) in order to render it more profitable (that is, in order to generate a greater rental revenue). The other purpose behind the purchase

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[145] I am grateful to Professor Kathleen Lahey for drawing my attention to the need for discussing the various categories of commercial or nonpersonal use.

[146] *Supra*, note 1.

[147] *Supra*, note 7.

[148] See, *e.g.*, *Pianta*, *supra*, note 44; *Bonner*, *supra*, note 49.

may be to hold the land for a period of time in order to realize any increase in the value of the property upon a subsequent disposition. Where land is purchased as this sort of "investment", it may also be that the vendee decides to lease or otherwise exploit the premises in the meantime.

Where land is purchased with the intention that it will be subsequently sold, the land has been bought for "resale". What, then, is the distinction between land purchased for "resale" and land purchased for "investment" where the investment purpose is to achieve a profit by disposing of the realty itself rather than by utilizing the premises to produce rent? It is submitted that the only basis upon which a distinction can be made is the length of the period that the land is retained before sale.[149] From the standpoint of the appropriate remedy, the only reason to draw this distinction is that it may assist in determining the response to the question of adequacy of damages.

In the case of land acquired for complex commercial development, it is contended that specific performance is to be preferred to damages because of the difficulties inherent in the calculation of the quantum of damages that might otherwise be awarded. Even assuming that losses caused by forgone commercial expectations of the type under discussion are within the *Hadley* v. *Baxendale* principles in any given set of circumstances, it is still true that these losses are generally going to be classified as "speculative" or very difficult to assess. The fact that the property has been acquired for commercial purposes does not mean that the land is not "unique" or of "some special value" to the vendee.[150] A unique investment opportunity does not lose its unique character because it is of a commercial rather than of a sentimental or personal nature. The other difficulty arises out of the assumption that such losses are in fact recoverable under the rubric of *Hadley* v. *Baxendale.* However, as Richmond J. pointed out in *Bonner,* damages for the loss of the bargain "could be nominal or negligible and a poor substitute for the land itself whether as an investment or as a property with future possibilities of development".[151] Since an economic rationalization for

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[149] This is not to say that other bases cannot be taken into account when the distinction between investment and resale is made in other contexts.

[150] *E.g., Calgary Hardwood & Veneer Ltd* v. *CNR* [1977] 4 W.W.R. 18 (Alta S.C.) cited by Reiter & Sharpe, *supra,* note 32, 155, n. 24. In this case, the plaintiff purchased land for commercial purposes, requiring railroad servicing.

[151] *Supra,* note 30, 1047 (C.A.).

specific performance is based on a dearth of relevant information regarding proper substitutes[152] (even if this information is otherwise admissible), it is contended that in these circumstances, specific performance, rather than damages, is the appropriate remedy.

If the purchaser has obtained the realty in order to resell it at a profit, the purpose for which the land has been acquired may be characterized as either "investment" or "resale". An individual who buys land only to resell it at a profit is seen as treating the property as if it were mere business inventory. Where there is no intention to retain the land for a (relatively) lengthy period, but rather an intention to sell in the near future, the court is much more capable of accurately assessing the actual loss through a calculation of the market value of the property in question or its close substitute. The shorter the period of retention, the more accurate the assessment is likely to be, for the overall loss will not include any loss arising from a forgone development prospect. Thus we can properly speak of the purpose of "resale" when the vendee intends to sell in the short term; otherwise the property is purchased as an "investment", even though the purchaser may not intend to utilize the land to produce a usufruct. Damages are more appropriate in the case of a purchaser with an intention to resell in the short term than in the case of a purchaser who intends to hold the land as an "investment", for development or otherwise. The only difficulty here is that the *Hadley* v. *Baxendale* rules require market valuation at the date of breach,[153] whereas the purchaser necessarily intends to retain the property for a lengthier period of time; thus damages calculated in this way may not be an accurate measure of the vendee's loss, and may well undercompensate.

"Speculation" is apparently present when property is held for a brief time in the hope that a rise in value will occur.[154] To that extent, "speculation" seems to be similar to the concept of "resale", and the same reasoning should apply. The courts have experienced problems in attempting to differentiate some types of speculation from others,[155] but one factor suggests itself as relevant: the purchaser's lack of expertise or inclination to utilize the land otherwise than as an asset for short term resale. Since an assessment of damages based on the difference between the contract price and

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[152] See text, *supra*, Part II, and accompanying footnotes.

[153] A more detailed analysis of the *Hadley* v. *Baxendale* principles is undertaken in Part V, *infra*.

[154] *Welling* v. *Crosland*, *supra*, note 133, *per* Cothran J.

[155] See text, *supra*, Part III.

the "market value" of the property at the intended date of disposition (assuming that the court can take the price at that hypothetical date into account) is likely to be more accurate than an assessment that attempts to take lost development opportunities into account, damages will be a more appropriate remedy in such cases than they are in the case of land purchased for "investment" purposes.

The fact that it is easier to assess damages in one situation than in another does not mean that damages are a more appropriate remedy than specific performance in any of the cases considered. It is suggested that unless courts have sufficient information to determine the market value of the property in question at the hypothetical disposition date, and are willing to base their damages awards on the difference between contract price and market value as at that date, specific performance should be decreed in all such cases.

Where the purchaser has actually resold the land before legal title is conveyed, the question arises whether specific performance should be awarded rather than damages. This question is considered in the following section.

V. The calculation of damages where specific performance is refused

The foregoing survey of the decisions in several common-law jurisdictions makes it apparent that some courts have refused specific performance because damages were considered an adequate alternative mode of redress. Occasionally, the quantum of damages envisioned as adequate is said to be the difference between the two contract prices.[156] However, damages for breach of contract are not necessarily awarded on this basis. The problem of quantification of damages must now be addressed.[157]

A. *The relationship between resale price and market value*

Let us suppose that V contracts to sell land to P for $20,000, and that P has subcontracted to sell the property to S for $23,000. Should P obtain specific performance upon V's refusal to convey, P will profit by $3,000. However, V may not be able to convey title to P

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[156] See, *e.g.*, *Walcis* v. *Kozacik*, *supra*, note 80.

[157] The reader is referred to Note, *supra*, note 84, 82-85, where the author demonstrated that damages were not an adequate remedy by utilizing calculations similar to those appearing in the text.

if through no fault, but because of an honest mistake, V does not have title to all of the land. Specific performance with respect to all the land will not be decreed in these circumstances. Until very recently, should P sue for damages against the honestly mistaken V, P's recovery would be limited by the rule in *Bain* v. *Fothergill*[158] to nominal damages, costs of investigating title, and the return of purchase moneys with interest. In *A. V. G. Management Science Ltd* v. *Barwell Developments Ltd*,[159] the Supreme Court of Canada overthrew by way of *obiter* the principle enunciated in *Bain* v. *Fothergill*, notwithstanding its well-established position in Canadian jurisprudence.[160] Accordingly, V will now be liable for substantial damages for failure to convey legal title.[161] How are these damages to be ascertain-

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158 (1874) L.R. 7 H.L. 158, 43 L.J. Ex. 243. The rule in *Bain* v. *Fothergill* has hitherto prevented purchasers from recovering substantial damages for breaches of contracts to sell or lease land in Canada. See, *e.g.*, *Lobel* v. *Williams* (1915) 7 W.W.R. 1042 (Man. C.A.); *Maitland* v. *Mathews* (1915) 8 W.W.R. 274 (Alta C.A.); *Rotman* v. *Pennett* (1921) 49 O.L.R. 114 (C.A.); *Wetmore* v. *Gilbert* (1921) 48 N.B.R. 208 (Ch. D.); *Besnard* v. *La Corporation Episcopale Catholique Romaine De Saskatchewan* (1916) 10 W.W.R. 806 (Sask. S.C.); *Baier & Baier* v. *Bougie* (1963) 44 W.W.R. 608 (B.C.S.C.); *Peacock* v. *Wilkinson* (1915) 8 W.W.R. 600 (S.C.C.).

159 (1978) 92 D.L.R. (3d) 289 (S.C.C.).

160 The Supreme Court of Canada had approved *Bain* v. *Fothergill* in *Ontario Asphalt Block Co.* v. *Montreuil* (1913) 52 S.C.R. 541, despite a vigorous dissent by Fitzpatrick C.J. in which he indicated that the rule was anomalous and should not be applied in Canada, where vendors experience far less difficulty in proving a marketable title than do their English counterparts. In *O'Neill* v. *Drinkle* (1908) 1 Sask. L.R. 402, Lamont J. also stated that *Bain* v. *Fothergill* should not apply when land transfers were far simpler and more expedient than in England. His comments were subsequently disapproved. See *McAndie* v. *Jackson* (1911) 1 W.W.R. 10 (Alta S.C.); *Black* v. *Magill* (1914) 6 W.W.R. 623 (Sask. S.C.); *Peacock* v. *Wilkinson*, *supra*, note 158.

161 The same result would follow if the rule in *Bain* v. *Fothergill* were excluded (although otherwise applicable), as, for example, where V has wilfully refused to convey or where his inability to convey has been caused by a fraudulent conveyance to a *bona fide* purchaser for value without notice: *Ridley* v. *De Geerts* [1945] 2 All E.R. 654 (C.A.); *Goffin* v. *Houlder* (1920) 90 L.J. Ch. 488; *Wright* v. *Dean* [1948] Ch. 686; *Sandford* v. *Murray* (1908) 2 Alta L.R. 87; *Dunn* v. *Callaghan* (1908) 8 W.L.R. 169 (Alta C.A.); *Pinsonneault* v. *Lesperance* (1925) 58 O.L.R. 375 (C.A.); *Armstrong & Armstrong* v. *Graham*, *supra*, note 39; *Littleproud* v. *Craig* (1927) 60 O.L.R. 182 (H.C.); *Trenholm* v. *Hicks* (1969) 1 N.B.R. (2d) 548 (Q.B.); *Stewart* v. *Gunn* (1974) 5 N. & P.E.I.R. 291 (P.E.I. C.A.).

Although the rejection of *Bain* v. *Fothergill* in the *Barwell* case was not necessary for the decision, Laskin C.J. (Ritchie, Spence, Dickson and Estey JJ. concurring) was at pains to minimize the effect of *Ontario Asphalt Block Co.* v. *Montreuil*, *supra*, note 160, stating that the former case was

ed? The ordinary and accepted measure for calculating damages for loss of bargain is the difference between the contract price and market value at the date of breach.[162] However, where the property has

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decided at a time when the Supreme Court of Canada was "still subject to the Privy Council and through it to the House of Lords in matters of common law. That situation no longer obtains, and this Court has asserted its freedom not only to depart from its own decisions, but from Canadian decisions of the Privy Council as well [.]" (p. 298). Laskin C.J. also indicated that *Bain* v. *Fothergill* should likewise not apply to those provinces whose land transactions are "governed by a registration of deeds and documents system such as exists in the Atlantic Provinces, in parts of Ontario, and in parts of Manitoba." (p. 301).

Notwithstanding this recent pronouncement by the Supreme Court of Canada, the decision in *Ontario Asphalt Block Co.* v. *Montreuil* is still technically binding on lower courts, although it is most unlikely that the rule in *Bain* v. *Fothergill* will be followed in any court from now on. For the purposes of calculating damages, I shall assume in the text that the restrictive *Bain* v. *Fothergill* principle no longer applies. Where the result achieved by calculating damages in accordance with *Bain* v. *Fothergill* produces a different result, these calculations will be depicted in accompanying footnotes.

[162] *I.e.*, at the date of communication of the acceptance of repudiation: *Cull* v. *Heritage Mills Devs. Ltd* (1975) 5 O.R. (2d) 102 (H.C.). It is arguable that *Wroth* v. *Tyler* [1974] Ch. 30 changes the assessment of damages for breach of contracts to convey realty to the difference between the contract price and the market value at the date of judgment, a figure which will usually be higher than one calculated according to date of breach in times of escalating land prices. *Wroth* v. *Tyler* has been generally accepted in Canada. (But see *Woodford Estates Ltd* v. *Pollack* (1978) 22 O.R. (2d) 340, 345 (H.C.) where Lerner J., in refusing to award the plaintiff vendor damages based on market value at the date of trial, appeared to confine *Wroth* v. *Tyler* to its unusual fact situation. The value of the property in *Woodford* had considerably depreciated since the date of breach.) For an analysis of the impact of the decision, see Reiter & Sharpe, *supra*, note 32, and Jolowicz, *Damages in Equity — A Study of Lord Cairns' Act* (1975) 34 Cambridge L.J. 224.

In *Wroth* v. *Tyler*, the plaintiffs were, to the defendant's knowledge, unable to purchase an "equivalent" house at the date of breach, and thereby to mitigate their loss. Where the plaintiff is able to invest his or her funds elsewhere at the date of breach, the date of assessment should be the earlier date, not the date of judgment: *A. V. G. Management Science Ltd* v. *Barwell Devs. Ltd* (1976) 69 D.L.R. (3d) 741 (B.C.S.C.) *per* McKenzie J., *aff'd* on this point by all members of the B.C.C.A. in (1977) 83 D.L.R. (3d) 702. See also *A. S. A. Constr. Pty Ltd* v. *Iwanov* [1975] 1 N.S.W.L.R. 512 (Eq.). Where the plaintiff has purchased property for the purposes of investment, speculation or resale, it is more likely than not that there are sufficient funds for alternate investments. Thus the date utilized in the calculation of damages in this section of the paper is the date of breach. But *cf. Metropolitan Trust Co.* v. *Pressure Concrete Serv. Ltd* (1975) 9 O.R. (2d) 375 (C.A.), where *Wroth* v. *Tyler* was misapplied, and damages awarded

been resold by the vendor to a *bona fide* purchaser at a higher price than the purchaser has contracted to pay, some courts have suggested that the appropriate measure of damages is the difference between the two prices.[163] Similarly, where the purchaser has resold at a price greater than the contract price, the difference between the two figures has been said to represent the plaintiff's loss.[164] The

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in equity although the purchase was for commercial purposes.

Where the quantum of damages is computed, the plaintiff is normally under a duty to mitigate his or her loss. Generally speaking, a purchaser claiming specific performance is under no such obligation so long as there is some "fair, real and substantial justification for [specific] performance": *Asamera Oil Corp.* v. *Sea Oil & Gen. Corp.* (1978) 89 D.L.R. (3d) 1, 26 (S.C.C.) *per* Estey J. According to Estey J., a plaintiff who has agreed to purchase a *particular piece of real estate* would not be under a duty to mitigate once a writ has been issued, provided that the claim for specific performance is prosecuted with "due diligence". Whether a purchaser acquiring realty for commercial purposes is under a duty to mitigate is therefore a circular question, since a claim for specific performance may well be denied if decisions like *Heron Bay* and *Chaulk* are followed.

Where the property is purchased for commercial purposes and the plaintiff pursues specific performance, any alternative property bought in order to mitigate damages may have to be liquidated in order for the purchaser to pay the purchase price. It cannot be that by mitigating when able, the purchaser renders specific performance unavailable. The purchaser may of course elect to claim damages only.

[163] *Ridley* v. *De Geerts, supra,* note 161; *Goffin* v. *Houlder, supra,* note 161; *Sandford* v. *Murray, supra,* note 161; *Dunn* v. *Callahan, supra,* note 161; *Pinsonneault* v. *Lesperance, supra,* note 161; *Paseika* v. *Fox* [1921] 1 W.W.R. 1104 (Man. K.B.), where the plaintiff, at the defendant's urgings, purchased the property from the true owners at a higher price than that contracted for with the defendants. The defendant was held liable to reimburse the plaintiff for the difference. In *Trenholm* v. *Hicks, supra,* note 161, a fresh demand by the vendor for a higher price was held to show the market value of the property. See also *Davies* v. *Russell* [1971] 2 O.R. 699 (H.C.).

There are two American decisions indicating that the subsequent resale price may be ignored when determining the quantum of the first purchaser's damages. In *Cushing* v. *Levi* 117 Cal. App. 94, 3 P. 2d 958 (1933) (cited by Kronman, *supra,* note 31, 378, n. 85), the plaintiff contracted to purchase realty for $80,000, but the vendor sold the property to a *bona fide* purchaser for $112,500. At trial the market value of the property at the date of breach was said to be $90,000. Rather than receiving $32,500, the plaintiff was awarded $11,000 in damages. See also *Grummel* v. *Hollenstein* 90 Ariz. 356, 367 P. 2d 960 (1962) (cited by Kronman, *ibid.,* 378-79).

[164] *Engell* v. *Fitch* (1869) L.R. 4 Q.B. 659; *Littleproud* v. *Craig, supra,* note 161, where it was said that *prima facie* the value at the date of breach is the price realized by the vendor on resale. There the purchaser had resold. Logie J. added that that figure was not conclusive, and gave judgment for less than the difference. In *Armstrong & Armstrong* v. *Graham, supra,* note 39, LeBel J. awarded the plaintiffs both specific performance and damages

same principle has been applied to a vendor's claim for damages.[165] The difficulty with this approach is that the resale price (achieved either by the vendor or the purchaser) may not be identical to the market price at the relevant date. Some courts, perhaps in order to overcome this problem, have taken the subsequent contract price as representative of the market value of the property,[166] thereby resolving the issue by ignoring its existence (although on many of these occasions there is little evidence available to indicate the market value except for evidence of the amount realized on resale).

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for the loss of their subsale. He indicated that the appropriate measure of damages was the sum which would place the plaintiffs in the same position as if the agreement had been performed, and referred the issue to the Local Master to determine the amount of damages payable because of the plaintiffs' inability *to complete the subsale.*

[165] *Dobson* v. *Winton & Robbins Ltd* [1959] S.C.R. 775. Where the vendor sues only for damages, there will be a duty upon him or her to mitigate the loss. In *100 Main St. Ltd* v. *W.B. Sullivan Constr. Ltd* (1978) 20 O.R. (2d) 401 (C.A.), the Court held that due to the presence of the duty to mitigate, damages should be calculated "on the basis of a finding of the highest price obtainable within a reasonable time after the contractual date for completion following the making of reasonable efforts to sell the property commencing on that date" (*per* Morden J.A., 421). (See also *Tozer* v. *Berry* [1955] O.W.N. 399 (C.A.); *Hickey* v. *Paletta* (1972) 14 N.R. 4 (Ont. H.C.), *aff'd* (1973) 14 N.R. 3 (C.A.), *aff'd* (1974) 14 N.R. 1 (S.C.C.).) By adopting this principle, the Court rejected the views enunciated in *Jamal* v. *Moolla Dawood, Sons & Co.* [1916] 1 A.C. 175 (P.C.), where the seller of shares succeeded in realizing a greater amount on the resale of the securities than would have resulted had they been sold at the date of breach. The Judicial Committee held that any "profits" (or losses) made in this fashion were the result of the seller's own speculation; accordingly, the purchaser remained liable for the difference between the contract price and market value at the date of breach. (See also *Keck* v. *Faber* (1916) 60 Sol. J. 253; *Noble* v. *Edwardes* (1877) 5 Ch. D. 378, *rev'd* on another point (1877) 5 Ch. D. 392 (C.A.); *York Glass Co.* v. *Jubb* (1926) 134 L.T. 36 (C.A.).) Morden J.A. conceded at page 420 that where the market had risen (as in *Jamal*), the results reached could be justified by recognizing that the party in breach, as a matter of policy, should not be permitted to take advantage of fortuitous market conditions so as to reduce the vendor's compensable loss. This implies that if the market has fallen since the date of breach, the purchaser will be liable for the difference if the vendor's efforts to mitigate are "reasonable". It is suggested that the Ontario approach embodies the sounder policy.

[166] *Chugal Properties Ltd* v. *Levine* [1971] 2 O.R. 331 (H.C.), *rev'd* on another ground [1972] 1 O.R. 158 (C.A.), *aff'd* 33 D.L.R. (3d) 512 (S.C.C.); *Pinsonneault* v. *Lesperance, supra,* note 161; *Littleproud* v. *Craig, supra,* note 161; *Ridley* v. *De Geerts, supra,* note 161; *Farantos Dev. Ltd* v. *Canada Permanent Trust Co.* (1975) 7 O.R. (2d) 721 (H.C.).

An approach based on the status of the vendor as constructive trustee is likely to lead to a different and more just result in those cases where the vendor has improperly resold the property. Any profit obtained in excess of the market value will be retained by the vendor under the contract damages principle,[167] but will be disgorged if a constructive trust approach is adopted.[168] In one sense of the word, the purchaser is overcompensated if he or she receives an amount greater than the difference between the contract price and market value; however, to do otherwise permits a vendor to profit from his or her own breach of contract. The imposition of a constructive trust upon all the profit realized from a wrongful resale creates a disincentive to the vendor attempting to resell in breach of the initial agreement of sale.[169] Where the realty has been purchased by the complaining vendee for commercial purposes, this approach begs the questions, for the constructive trust can only be utilized if specific performance could be decreed.

B. *Calculation of damages where market value is less than resale price*

If the market value is lower than the subcontract price of $23,000 to S, that is, $22,000, P would recover the difference between $20,000 and the latter figure — $2,000.[170] Since P would have made an additional $1,000 profit if the court had ordered specific performance, damages are not an adequate remedy. It is only if the profitable subcontract is within the contemplation of the parties, as required by *Hadley* v. *Baxendale,* that the purchaser would be entitled to his or her actual loss; even then, it is unclear whet-

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167 See Treitel, *The Law of Contracts* 4th ed. (1975), 618 (approved in *Asamera Oil Corp.* v. *Sea Oil & Gen. Corp., supra,* note 162, 30): "In general, damages are based on loss to the plaintiff and not on gain to the defendant. They are not, in other words, based on any profits which the defendant may have made out of the breach."

168 See *Restatement of the Law of Restitution (Quasi Contracts and Constructive Trusts),* §198, §202; *Restatement of the Law of Trusts* (2d), §202; Scott, *The Law of Trusts* 3d ed. (1967), vol. 3, §202, vol. 5, §503; Goff & Jones, *The Law of Restitution* 2d ed. (1978), 490 *et seq.* See generally *Coy* v. *Pommerenke* (1911) 44 S.C.R. 543; *Othen* v. *Crisp* [1951] O.W.N. 459 (C.A.); *Boryczko* v. *Toronto Polish Veterans' Ass'n* [1958] O.W.N. 118 (H.C.). In *Toronto-Dominion Bank* v. *Uhren* (1960) 24 D.L.R. (2d) 203 (Sask. C.A.), Culliton J.A. (as he then was) stated that the trustee's liability could never be less than the amount realized from the sale of the properties in question.

169 Kronman, *supra,* note 31, 380.

170 If the rule in *Bain* v. *Fothergill* were applicable, P would not recover any substantial damages.

her extraordinarily high profits would be within the *Hadley* v. *Baxendale* requirements, unless the actual amount of pending profit or a reasonable approximation thereof was known to the defendant before the breach.[171] Furthermore, apart from the disparity between P's actual loss and the usual award of damages, P may well be made a defendant to a claim by S for either specific performance with damages as an alternative claim or rescission[172] of the contract. Rescission seems more likely in these circumstances, given the hypothesis that the subcontract price is greater than the market value of the property. But the point remains that P will be liable to

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[171] This reasoning depends on the proposition that a court would accept that market value may differ from the subsequent contract price. In *Littleproud* v. *Craig, supra,* note 161, Logie J. seemed to think that the resale price was too high (see note 164, *supra*). If one of the aims of the *Hadley* v. *Baxendale* rules is to further the expectation interest, then in light of a contract of resale between P and S, the only sum that could do so is the difference between the two contract prices. In *Brading* v. *McNeil & Co.* [1946] Ch. 145, it was held that the resale price was irrelevant, but there the subcontract price was less than the market value. Where the resale price is higher than market value, the plaintiff will need to demonstrate that both parties contemplated a resale within the requirements of *Hadley* v. *Baxendale*: but see *Engell* v. *Fitch, supra,* note 164, where the Court of Exchequer Chamber said that there was no general rule of law that a purchaser of land could recover the loss of profit on a resale, or that the parties must be taken to have contemplated a resale. In *Bain* v. *Fothergill,* Lords Chelmsford and Hatherley thought that a loss on resale was too remote because land was not generally purchased for the purposes of resale. See also McGregor, *McGregor on Damages* 13th ed. (1972), 477-81, and *Diamond* v. *Campbell-Jones* [1961] 1 Ch. 22.

Whether this proposition should be followed today is another matter. See *Ridley* v. *De Geerts, supra,* note 161, *per* Lord Greene M.R. Where the knowledge of a particularly profitable commercial use is "brought home" to the vendor, recovery for the expected profits could well result: *Diamond* v. *Campbell-Jones, ibid.,* 36 *per* Buckley J.; *Cottrill* v. *Steyning & Littlehampton Bldg Soc'y* [1966] 1 W.L.R. 753, 756 (Q.B.); *Biggin* v. *Permanite Ltd* [1951] 1 K.B. 422, 436 *per* Devlin J. (sale of goods).

If the parties knew that the plaintiff had entered or intended to enter a contract for the resale of land in excess of market value, would it matter that the resale price was extraordinarily lucrative? Although Megarry J. (as he then was) thought not in *Wroth* v. *Tyler, supra,* note 162, 61, it has been suggested by Lawson, *Damages — An Appraisal of Wroth* v. *Tyler* (1975) 125 New L.J. 300, 301, that Megarry J.'s view, even if sound in principle, defies precedent: *Horne* v. *Midland Ry* (1873) L.R. 8 C.P. 131; *The Arpad* [1934] P. 189 (C.A.); *Household Machines Ltd* v. *Cosmos* [1946] 2 All E.R. 622 (K.B.); *Victoria Laundry (Windsor) Ltd* v. *Newman Inds. Ltd* [1949] 2 K.B. 528 (C.A.); *Heskell* v. *Continental Express* [1950] 1 All E.R. 1033 (K.B.). But *cf. Asamera Oil Corp.* v. *Sea Oil & Gen. Corp., supra,* note 162, 16.

[172] *E.g., Hamann* v. *Galbraith* (1914) 6 W.W.R. 920 (Sask. S.C.).

any action that S may bring, and will therefore be ordered to pay costs, aside from any other damages awarded. If P is sued by S before in turn bringing suit against V, it appears that P can recoup the costs of defending the previous action,[173] if reasonably incurred, as against V. However, P has been subjected to the trouble and some noncompensable expenses involved in two actions. Specific performance should therefore be awarded, since damages will not normally constitute an adequate remedy in these circumstances.

C. *Calculation of damages where market value is equal to resale price*

If the market value at the relevant date is the same as the subcontract price, that is, $23,000, the plaintiff would recover $3,000 by way of damages from V, together with those costs reasonably incurred in defending any claim brought by S. Aside from the possible application of the rule in *Bain* v. *Fothergill* to any claim for damages by S against P, the subpurchaser's action would yield nominal damages only if the market price remains the same as the subcontract price. But P has still been troubled by having to litigate two claims instead of just one. In addition, an award of damages instead of specific performance will deprive S of the land itself. Although P may well have required the premises for commercial purposes, no such characteristic necessarily attaches to S, who may have purchased the land for personal use and enjoyment. For these reasons, then, it is suggested that, even in these circumstances, damages are an inadequate remedy, and that a decree of specific performance is preferable.

D. *Calculation of damages where market value is greater than resale price*

If the market value of the property when the conveyance is due to S from P has dramatically risen to $25,000, it would appear that P should be able to recover $5,000 (being the difference between P's contract price with V and the market value) against V if the latter refuses to transfer title to the former. It would seem rather strange, however, if an award of damages were to have a greater

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[173] *Hill* v. *Barwis* (1908) 7 W.L.R. 428 (Alta S.C.). But *cf. McEachern* v. *Corey* (1916) 10 Alta L.R. 478, 489 *per* Harvey C.J., *rev'd* on other grounds (1916) 10 Alta L.R. 490 (C.A.); *Hammond* v. *Bussey* (1888) 20 Q.B.D. 79 (C.A.) (sale of coal); *Royal Trust Co.* v. *Fairbrother & Valentine* [1922] 1 W.W.R. 8 (Alta C.A.); *Pflug & Pflug* v. *Collins* [1952] O.R. 519 (H.C.). See also McGregor, *supra*, note 171, 493-525.

value than a decree of specific performance. Indeed, there appears to be little reason why P should pursue specific performance if a claim for damages against V is worth more. The reason that P would in fact attempt to obtain specific performance from V is that S would sue P to recover the difference between the subcontract price ($23,000) and the market value of the land ($25,000). P is under an obligation to do his or her best to remove those defects in title which prevent performance, and is therefore obligated to sue V if V wrongfully refuses to convey.[174] In order to avoid the additional difficulties associated with two actions, it seems that P would institute proceedings for specific performance against V rather than limit his or her claim to damages only.

Would damages be considered adequate so as to preclude specific performance in these circumstances? If P is awarded the normal measure of damages (namely, the difference between the contract price of $20,000 and the market value of $25,000), it will be because the court has concluded that the actual resale to S by P was not within the contemplation of the parties as constituting "special circumstances" for the purposes of the "second rule" in *Hadley* v. *Baxendale*. In *Brading* v. *McNeill & Co.*,[175] the resale price of a lease together with a commercial enterprise (which was regarded by Evershed J. as involving real property) was less than the market value. Evershed J. nevertheless refused to award the difference bet-

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[174] Even if the rule in *Bain* v. *Fothergill* is invoked, both English and Canadian courts have refused to apply that rule to the situation under discussion, although the reason that P cannot convey to S is a "defect in title" and therefore nominally within the rule's ambit. See *Engell* v. *Fitch, supra,* note 164; *Bain* v. *Fothergill, supra,* note 158, 209-10 *per* Lord Hatherley; *Royal Bristol Permanent Bldg Soc'y* v. *Bomash* (1887) 35 Ch. D. 390; *Day* v. *Singleton* [1899] 2 Ch. 320 (C.A.); *Re Daniel, Daniel* v. *Vassall* [1917] 2 Ch. 405; *Braybrooks* v. *Whaley* [1919] 1 K.B. 435; *Thomas* v. *Kensington* [1942] 2 K.B. 181; *O'Neill* v. *Drinkle, supra,* note 160; *Ontario Asphalt Block Co.* v. *Montreuil, supra,* note 160; *Miller* v. *Hostyn* (1913) 5 W.W.R. 543 (Alta S.C.); *Goodchild* v. *Bethel* (1914) 8 Alta L.R. 98 (C.A.); *Lobel* v. *Williams, supra,* note 158; *Armstrong* v. *Graham, supra,* note 39; *Trenholm* v. *Hicks, supra,* note 161; *Pitcher* v. *Shoebottom* [1971] 1 O.R. 106 (H.C.); *Farantos Dev. Ltd* v. *Canada Permanent Trust Co., supra,* note 166.

Where, on the other hand, the vendor covenants for title in the conveyance or transfer document itself, but because of a defect in title is unable to convey that which was purportedly conveyed, the rule in *Bain* v. *Fothergill* has been held not to apply. See, *e.g., Lock* v. *Furze* (1866) L.R. 1 C.P. 441; *Ellam* v. *Acadia Trust Co.* (1914) 6 W.W.R. 1083 (B.C.C.A.); *Bowra* v. *Henderson* [1942] O.R. 734 (H.C.); *Aaroe & Aaroe* v. *Seymour* (1957) 7 D.L.R. (2d) 676 (Ont. C.A.).

[175] *Supra,* note 171 *per* Evershed J. (as he then was).

ween the contract price and the resale price, preferring instead to be guided by the market value of the property (a greater amount) at the date of repudiation.[176] Thus if it is not possible to resort to the actual price obtained on the resale to S (and this appears to be the case where there is no particular resale contemplated), P will be able to recover $5,000 by way of damages although he or she is bound to resell the property to S for only $3,000 more than was paid to V for the land. Leaving aside any discussion of P's liability to S for more than nominal damages if the latter sues P for failure to convey title, it appears that damages are far more than an adequate remedy. Should specific performance be refused, P is $2,000 better off than he or she would be if the equitable remedy had been decreed. However, S may now sue P for damages, being the difference between the subcontract price ($23,000) and the increased market value ($25,000).[177] Thus P is left with the benefit of the bargain, but remains subject to an action for damages by S. By refusing to award specific performance in P's claim against V, P is permitted, indeed compelled, to breach the resale contract with S. Accordingly, it is suggested that damages are not an adequate remedy on these facts. The abrogation of the rule in *Bain* v. *Fothergill* at least ensures that S is able to recover substantial damages from P; otherwise, S would be deprived of both the land (if specific performance is refused in P s claim against V) and significant damages for its loss.

On the other hand, the circumstances surrounding the resale by P to S may have been within the parties' contemplation as in-

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[176] Reliance was placed on *Rodacanachi* v. *Milburn* (1887) 18 Q.B.D. 67 (C.A.) and *Williams* v. *Agius* [1914] A.C. 510 (H.L.). Both cases concerned the sale of goods.

[177] If *Bain* v. *Fothergill* applies to a claim by S against P, failure to order specific performance in P's action against V enriches P at S's expense — which is not to suggest that S could maintain an action against P based on restitution or unjust enrichment, unless favoured by a particularly innovative court. The principal hurdle for S to overcome is that the "benefit" received by P has resulted from an impersonal price increase in the market value of the property beyond the subcontract price, rather than from a transfer of any benefit by S to P (beyond any purchase moneys). Another major problem is that the rule in *Bain* v. *Fothergill* was equally applicable to claims for damages for breach of contract and those for rescission. If S is unable to obtain substantial damages because of this admittedly anomalous rule, utilization of any restitutionary principle or cause of action would circumvent its application if expectation damages were awarded. Now that the *Bain* v. *Fothergill* rule has been discarded, this argument is less significant.

terpreted and understood by an application of the *Hadley* v. *Baxendale* principles. Normally a plaintiff would attempt to invoke the "contemplation" criterion in order to benefit from any increase in his or her resale price beyond market value. But the question remains as to whether a defendant may in turn rely on knowledge of a particular resale contemplated by the plaintiff to limit the latter's claim in damages to the difference between the two contract prices if the subcontract price is less than market value. In *McEachern* v. *Corey,* Harvey C.J. stated:

> The profit on a resale is not ordinarily something that can be allowed, but in the present case it is, I think, the real measure of damage, because the plaintiffs having made a re-sale, they could not have realized any more out of the land than the profit on such re-sale and consequently their failure to obtain the title from the defendant resulted in the loss of that profit, but no more.[178]

However, it must be conceded that in *McEachern* v. *Corey* there was no evidence to assist in determining the market value of the land in question.[179] In *Biggin & Co.* v. *Permanite Ltd,*[180] Devlin J., although dealing with a contract for the sale of goods, acknowledged that the principle could operate in favour of the defendant rather than the plaintiff:

> It has often been held... that the profit actually made on a subsale which is outside the contemplation of the parties cannot be used to reduce the damages measured by a notional loss in market value. If, however, a subsale is within the contemplation of the parties, I think that the damages must be assessed by reference to it, whether the plaintiff likes it or not.[181]

As *McGregor on Damages*[182] indicates, similar observations have fallen from the lips of Lord Pearce in *Koufos* v. *C. Czarnikow Ltd,*[183] and Denning L.J. in *Trans Trust S.P.R.L.* v. *Danubian Trading Co.*[184]

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[178] *Supra,* note 173, 488.

[179] *Ibid.,* 487. It also does not appear whether Harvey C.J. was considering the problem of a resale price less than market value.

[180] *Supra,* note 171; *rev'd* on other grounds [1951] 2 K.B. 314 (C.A.). See also McGregor, *supra,* note 171, 134.

[181] *Supra,* note 171, 436, *per* Devlin J.

[182] *Supra,* note 171, 134.

[183] [1969] 1 A.C. 350, 416 (H.L.): "Additional or 'special' knowledge, however, may extend the horizon to include losses that are outside the natural course of events. And of course the extension of the horizon need not always *increase* the damages; it might introduce a knowledge of particular circumstances, *e.g.,* a subcontract, which show that the plaintiff would in fact suffer *less* damage than a more limited view of the circumstances might lead one to expect." [emphasis in text]

[184] [1952] 2 Q.B. 297, 306 (C.A.): "The buyers knew that the sellers could not obtain the goods at all unless the credit was provided. The foreseeable loss

Both of these cases, like *Biggin & Co.* v. *Permanite Ltd,* dealt with contracts for the sale of goods. There seems to be no reason why this principle should not apply to similar circumstances involving realty rather than personalty. Should the court decide not to award specific performance, P's claim in damages, limited as it is by the subsequent resale price of $23,000 to S, would be for $3,000. However, P is still subject to an action by S in damages for breach of contract if P is unable to convey legal title when required. Where the subcontract price to S is exceeded by the market value, S will now succeed in a claim for the difference — in this case, $2,000.[185]

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was the loss of profit, no matter whether the market price of the goods went up or down. It is, therefore, the proper measure of damages."

[185] Some early authorities support S in an action for substantial damages where P (a purchaser to an uncompleted contract) enters into a subsequent contract of sale knowing that the legal title remains outstanding. See *Hopkins* v. *Grazebrook* (1826) 6 B. & C. 30, 108 E.R. 364 (K.B.); *Robinson* v. *Harman* (1848) 1 Exch. 850, 154 E.R. 363; *Vallier* v. *Walsh* (1857) 6 U.C.C.P. 459; *Hutchison* v. *Schleuter* (1908) 8 W.L.R. 682 (Sask. S.C.). This "exception" to the rule in *Bain* v. *Fothergill* was rejected: *Hopkins* v. *Grazebrook* was expressly overruled by the House of Lords in *Bain* v. *Fothergill.* See also *Moody* v. *McDonald* (1906) 4 W.L.R. 303 (Man. S.C.); *McAndie* v. *Jackson, supra,* note 160; *Black* v. *Magill, supra,* note 160; *Maitland* v. *Mathews, supra,* note 158; *Besnard* v. *La Corporation Episcopale Catholique Romaine De Saskatchewan, supra,* note 158; *Rotman* v. *Pennett, supra,* note 158.

In *Bain* v. *Fothergill,* Lord Chelmsford left open another avenue to recovery — an action for deceit. Assuming that the misrepresentation is as to a fact and is fraudulent, expectation damages for loss of bargain resulting from the tort of deceit are not awardable: *Derry* v. *Peek* (1889) 14 App. Cas. 337 (H.L.); *Parna* v. *G. & S. P'ties Ltd* (1969) 5 D.L.R. (3d) 315 (Ont. C.A.). (But *cf. Watts* v. *Spence* [1975] 2 W.L.R. 1039 (Ch.), criticized in Note (1975) 91 L.Q. R. 307.) Rather, damages are calculated to place the plaintiff in the position that he or she would have occupied had the misrepresentation never occurred. See also *Bedard* v. *Junkin* [1956] O.W.N. 287 (C.A.); *Hepting* v. *Schaaf* [1964] S.C.R. 100. For an interesting argument in favour of permitting a purchaser to recover damages for loss of bargain where fraud is proved, see McGregor, *supra,* note 171, 472-73.

Where V has refused to specifically perform by executing a conveyance when he or she can do so, substantial damages may be awarded. A possible exception may exist in Ontario: see *The Vendors and Purchasers Act,* R.S.O. 1970, c. 478, s. 4(c). Standard form agreements for the sale of land frequently contain terms purporting to limit the vendor's liability for damages where the vendor is either unwilling or unable to remove otherwise valid objections to title. The terms provide that the agreement shall be null and void, and the deposit money returned to the purchaser without interest. Courts have utilized two techniques to overcome this type of term (and the operation of *Bain* v. *Fothergill* itself). First, it is said that the rule — and the

Whether P is awarded $5,000 or $3,000 in damages against V, S will be able to obtain damages for his or her loss of bargain, due to the abolition of the rule in *Bain* v. *Fothergill*; otherwise, S would be left without the land or compensating damages. If P's suit against V for specific performance is denied, S thereby fails to obtain the land, and P is exposed to an action for breach of contract by S. Accordingly, it must be concluded that whether the subsequent resale price is less than, more than, or equal to the market value of the property in question, damages are not an adequate remedy; to refer again to *Evans Marshall & Co.* v. *Bertola S.A.*, [186] "it [does not seem] just, in all the circumstances, that [P] should be confined to his remedy in damages".[187]

VI. Conclusions

The refusal to decree specific performance where real property has been acquired for the purposes of investment, speculation, or resale is contrary to the weight of authority in the United States, Canada and Australasia. Those cases supporting the opposite view do not generally pay sufficient attention to the considerations governing the award of damages at common law where a contract for the sale of land has been breached. Where land is purchased for nonpersonal purposes, the overall characterization of the contract as "investment" or "speculative" prevents discriminating analysis. In those cases where the purchaser has effected a resale, serious problems emerge in assessing the quantum of damages to be awarded in lieu of the equitable decree.

Whilst the court should attend primarily to the dispute between the immediate parties to the litigation, it should be recognized that the decision not to decree specific performance adversely affects the subpurchaser. If specific performance is awarded, however, nul-

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contractual term — extend only to excuse defects in title and not problems of conveyancing (although this distinction is not always free from difficulty): *Farantos Dev. Ltd* v. *Canada Permanent Trust Co.*, *supra*, note 166. Secondly, and perhaps inconsistently, it is said that a vendor may not rely on the term (or indeed the rule) when no reasonable attempt to remove the defect in title has been made: *Mason* v. *Freedman* [1958] S.C.R. 483; *Farantos Dev. Ltd* v. *Canada Permanent Trust Co.*, *ibid.* Now that *Bain* v. *Fothergill* is no longer authoritative, a vendor's attempt to preserve the effect of the restriction by including a term to similar effect in the contract would meet with the same obstacle.

[186] *Supra*, note 28.

[187] See text, *supra*, p. 519.

tiplicity of proceedings will be avoided, the subpurchaser will obtain the property contracted for[188] (or substantial damages in lieu thereof),[189] and the purchaser will not be unduly penalized or enriched, as might have occurred with an award of damages.

Where the rights of a third party are not involved because the purchaser has not yet effected a subsale, the problems associated with calculation of damages are not dissipated, for *Hadley* v. *Baxendale* may still be invoked by the plaintiff to claim damages in excess of the difference between contract price and market value when the defendant is fixed with the requisite degree of knowledge. However, the rights of subpurchasers not requiring consideration, the analysis may be simpler with respect to the amount of damages awardable should the decree be refused. It is at this juncture that distinctions based on the precise purpose for the acquisition need to be drawn. Where the vendee purchases realty in order to create a unique development opportunity by holding the premises over an extended period and changing the character of the land, the court will generally be unable to estimate his or her loss. At the other extreme, a purchaser who acquires property solely in order to hold it for a very short time before selling at a profit is much more likely to be adequately compensated by an award of damages.

The very concept of "market value" (which is invoked in the assessment of damages when specific performance is unavailable) implies substitutability. Yet "market value" and monetary compensation are not invoked when a purchaser desirous of securing a certain plot of land for personal occupation claims the equitable remedy. Why should "uniqueness" be confined to a noncommercial context? In an extreme situation, such as that found in *Prittie*,[190] completely substitutable property might be obtainable. Subject to this caveat, it is submitted that damages are seldom adequate as an alternative to the specific performance of contracts for the sale of land.

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[188] Courts have refused to decree specific performance when to do so would require the defendant to breach a contract with a third party: *Willmott* v. *Barber* (1879) 15 Ch. D. 96, 107 *per* Fry J.; *Warmington* v. *Miller* [1973] 2 W.L.R. 654, 660-61 (C.A.) *per* Stamp L.J. Conversely, a court should decree specific performance when to refuse to do so would require the plaintiff to breach a contract with a third party.

[189] The subpurchaser, unlike his or her vendor who perhaps is not entitled to 'equitable' damages, may well qualify for the more generous award under the rubric of *Wroth* v. *Tyler*, *supra*, note 162.

[190] *Supra*, note 32.