

A STUDY ON MALAYSIAN COURT APPROACHES IN DETERMINING THE AWARD OF SPECIFIC PERFORMANCE

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Abstract— In Malaysia, a remedy of specific performance is governed by the Specific Relief Act 1950. Section 11 of the Specific Relief Act 1950 does provide the cases which specific performance may be granted. However, the section is not an exclusive right of a claimant because the court is given a discretionary power to award this remedy. Thus, the objective of this paper is to examine and analyze the current possible circumstances used by the Malaysian court in determining the award of specific performance. To achieve this objective, secondary data from Malaysian court cases year 2014 up to October, 2015 were collected from Current law Journal (CLJ) and Malayan Law Journal (MLJ). Statistical Package for the Social Science (SPSS) was used to analyze data.

Index Terms— Discretionary power, Remedy, Specific Relief Act 1950, Specific Performance.

I. INTRODUCTION

Remedies are defined as an order of court to a person whose right has been infringed.¹ It also refers to a relief granted by the court to a party who initiates legal action against a party who has failed to perform a contract. Since British intervention, the Malaysian court has provided several remedies such as damages, specific performance, injunction and *quantum meruit* with different functions. However, this paper will only focus on the specific performance which operates upon a decree of court.

Specific performance is not stipulated in the Contracts Act 1950 but mainly governed by the Specific Relief Act 1950. Previously, specific performance was governed by the Specific Relief Enactment 1899 which derived from the Indian Specific Relief Act 1977. This Enactment was later substituted by the Specific Relief (Malay States) Ordinance 1950 and presently it is set out in the Specific Relief Act 1950.² Specific performance refers to a relief for an innocent party to force a defaulting party to perform his promise.³ This relief is given to a plaintiff upon a discretionary power of court to compel a contracting party to perform his or her obligation that has been promised in the contract. In the case of *MMI Industries Sdn Bhd v Let Sin Industries Sdn Bhd [2010] 1 CLJ 36*, Abdul Malik Ishak, JCA said that; An order for specific performance has the effect of ordering a contracting party to do what he has

undertaken to do. It is an equitable remedy. It cannot be asked for as of right. It is certainly a discretionary remedy but the discretion cannot be exercised arbitrarily or capriciously. The exercised of the discretion is always governed by fixed rules and principles.

This remedy is meant to compel the performance of an act of a breaching party so that he ought to complete his obligation pursuant to contract entered.⁴ However, it is not an exclusive right of a claimant but completely subjected to the discretion of the court and the court shall not be bound to award this remedy.⁵ Therefore, this study was conducted to examine the other possible approaches upon court verdict in granting the specific performance. Thus it is hope that the findings are expected to be guidelines for future cases.

II. SPECIFIC RELIEF ACT 1950: SOME GUIDELINES

Specific Relief Act 1950 (after this is referred to “SRA”) was published in Gazette on 13 June 1974 as Laws of Malaysia Act 137 and enforceable in 4th July 1950.⁶ According to section 4(b) of SRA provides that specific relief is given by ordering a party to do the act which under his obligation stipulated in the contract. This emphasizes that the innocent party by an order of court may compel the breaching party to perform his obligation in the contract. The SRA does provides

¹ Birks, P. (2000). Rights, Wrongs and Remedies. *Oxford Journal and Legal Studies*.

² Fong, C. M. (2010). *Contract Act In Malaysia*. Selangor: Sweet & Maxwell Asia.

³ Ping, T. H. (2013). Seeking Specific Performnace in Cases Of Breach of Sale and Purchase of Land in Malaysia. *Malayan Law Journal*.

⁴ Rose, H. L. (2004). On the Enforcement of Specific Performance in Civil Law Countries. *International Review of law and Economic* 24, 473-487.

⁵ Dahlan, N. H. (2004). Limitation Period of Action For Specific Performance In Contract of Sale of Land: Malaysian Legal Position. *IJUM Law Journal*, 111-143.

⁶ *Specific Relief Act* . (1950). Kuala Lumpur: International law Book Services.

guideline for a claimant in Chapter II (section 11 to section 29) to claim the specific performance. However, section 11 does not guarantee that a claim of specific performance will be enforced. Being an equitable relief, the specific performance will depend on a decree of court.⁷

Section 11(a) of SRA does stipulate that, the court may enforce the specific performance in the case when the act agreed to be done is in the performance of a trust. When a person is appointed as a trustee and misapplied the trust, the specific performance may be granted for those beneficiaries. However, specific performance cannot be granted in the event the contract is made by the trustee in excess of his or her power or in breach of contract.⁸

Section 11 of SRA further provides that, the specific performance may be granted in the event of uncertainty of actual damage or inadequate of monetary compensation. The SRA is silent on what constitute uncertainty or inadequacy of damages to enable the court to award specific performance. The court will refer to the precedent and well-established situations where damages are deemed to be inadequate. However, the approach used only as a reference and guideline because at the end only the court will determined either damages is adequate in granting or refusing the specific performance.⁹ This could be referred to the case of *Mesuntung Property Sdn Bhd v Kimlin Housing Development Sdn Bhd* [2014] 7 CLJ, where in this case, *David Wong Dak Wah JCA* held that, .

...the appellant's claim of specific performance is not a frivolous and baseless claim. Neither is it a futile claim in that it is bound to fail. Whether it fails or not should be determined by the courts.

Furthermore, being an equitable remedy, the court upon its discretionary power will consider different approaches depending on the subject matter of the contract to determine the adequacy of damages. If the contract involves transfer of movable property or sale of goods, the unique of the goods on the ground that impossible for the purchaser to acquire the goods at the market shall be taken into consideration.¹⁰ In the case of *Eicobina (M) Sdn Bhd v Mensa Mercantile (Far East) Pte Ltd* [1994] 1 MLJ 553, the court held that,

the specific performance could not be granted to the appellant due to availability of goods in the market. Damages would be an adequate relief.

Moreover, with regard to the contract involving on transfer of immovable property the specific performance may specifically enforceable.¹¹ The land matters are assumed to be unique and payment of damages from the breaching party would not afford adequate relief to a claimant thus persuading the court to grant the specific performance.¹²

Besides section 11 of SRA, section 20 and section 21 of SRA also can be referred where these two sections provide the order for specific performance that cannot be granted. According to section 20 of SRA, among the contracts which specific performance cannot be granted are where monetary compensation is adequate relief, unreasonable certainty of terms of contract and a contract involves continuous performance. Furthermore, section 21 of SRA emphasizes that a decree of specific performance cannot be granted if the performance of a contract can cause unfair advantages and hardship to the breaching party. This section promotes justice to both parties even the breaching party has caused difficulties to the innocent party.

III. ANALYSIS AND FINDING

Current study collected 37 Malaysian Court cases either from MLJ and CLJ from year 2014 up to October 2015 in order to know the current approach taken by the court in determining the award of specific performance. Since 2014, there were only 21 cases brought to the High Court and 16 cases were brought to the Court of Appeal and Federal Court. The frequency and percentage was analyzed in the descriptive analysis. The background of the cases, the application of specific performance at the Malaysian High Court and the appeal stage of specific performance either at Court of Appeal or Federal Court was tabulated as follows.

Table 1: The Background of Cases. N=37

No.	Cases	Percent (%)
1.	Year	2015 2014
3.	High Court Jurisdiction N= 21	Central Region Northern Region Southern Region Others
4.	Appellate Jurisdiction N=16	Court Appeal Federal Court
5.	Types of Contract	Sales and Purchase Agreement of Property land Sales and Purchase of Shares Others

Table 1 showed that, the application for specific performance were decreased about 24.4% in 2015 as compared to year 2014, taking into consideration that the current study only studied the cases reported up to October 2015. Table 1 also showed that, the plea of

⁷Fong, C. M. (2010)

⁸ Section 20(e) of SRA and could refer to the illustration a, b, c or d of section 20

⁹ Cunningham, R. M. (2006). *The Adequacy of Damages as a Remedy for Breach of Contract*. Retrieved September 30, 2015, from <https://www.academia.edu>

¹⁰ Ibid, 2006

¹¹ Section 11(2) of SRA

¹² Ping, T. H. (2013)

specific performance via originating summon at first trial was not only limited in one state but was filed at all over Malaysia where the highest cases was reported at Central Region either Kuala Lumpur, Shah Alam or Putrajaya. Not even reported at the High Court in its original jurisdiction, the originating summon for specific performance was also appealed up to Court of Appeal or Federal Court in appellate jurisdiction. Section 11(2) and illustration (c) to section 11(1) of SRA provides that the court may enforce specific performance when the contract involved transfer of immovable property such land or house and transfer of share. Thus, by referring to section 11(2), Table 1 hereby revealed that, the most popular types of contract involved on the application of specific performance was the contract of the sale and purchase of immovable property which achieved 64.9% more than the contract of sale of shares only 10.8%. The claims for specific performance from year of 2014 up to October 2015 were not only limited to the types of contracts that are specified in the SRA but also involved the concession contract, joint venture agreement, lease agreement, sale and purchase agreement of debt, memorandum of understanding even oral agreement.

Table 2: The Application of Specific Performance at High Court in its Original Jurisdiction

No.	High Court Jurisdiction		Percent (%)
1.	High Court Decision N=21	Allowing (Yes)	18.9
		Refusing (No)	37.8
2.	First Approach : Court refers to Specific Relief Act 1950 N=21	Section 11	14.3
		Section 21	4.8
		Section 23	4.8
		Other sections under SRA	14.3
		The court has not referred to SRA or other Acts	61.9
3.	Other Sections or Acts (14.3%)	Chapter VII of the Specific Relief Act 1950	4.8
4.	Second Approach: Allowing The Application	Section 26 of the SRA1950	9.6
		Plaintiff is ready to perform the contract by tendering the full payment purchase price	33.6
5.	Third Approach: Dismissing the Application	Whether the claim within the Limitation Act 1953	9.6
		contract was not complete/ no formal contract executed	14.4
		Land still under caveat	4.8
		Defendant breached the contract	14.4
		Plaintiff was not ready to perform the contract	9.6
		No room for two courts to order Specific Performance	4.8
		Defendant was a state authority	4.8
		The action was barred by the Limitation Act 1953	4.8
		The land has been disposed to the third party thus it was not available to the Plaintiff	4.8
		The Defendant as the seller was not the owner of the land	4.8

Table 2 concerned with the application of the specific performance by a claimant in a first stage of trial at the Malaysian High Court (the court). Section 21 of SRA states that, the jurisdiction to decree specific performance is discretionary and this was tabulated in

No.1 of Table 2 that since 2014 up to October 2015 only 18.9% cases involved the application of specific performance was allowed and 37.8 % was dismissed by the High Court. The court was not bound to grant specific performance merely because the contract entered by a claimant was involving immovable property as referred to section 11(2) of SRA. In determining the enforceability of specific performance the court was guided by judicial principles which is about 61.9% and also referred to sections available in the SRA. Among the popular section used by the court was section 11 which is about 14.3%, followed by section 21 about 4.8 % and section 23 about 4.8%. Beside these sections, the court also referred to other sections such as section 26 and Chapter VII of SRA and the rules of equity.

As mentioned earlier, the SRA provides guidelines to the court and lawyers with regard to the application of specific performance. In this study the authors found that despite of the SRA the court also looked at the possibility on part of plaintiff to perform his obligation in the contract. Table 2 revealed that almost 33.6% the court considered on whether plaintiff was in the state of readiness to complete the contract or not. In the case of *Agrokor Sdn Bhd v Perakayan TM(M) Sdn Bhd, THNG Bay SNG & Ors* [2015] 6 MLJ 594. The plaintiff in this case had been discharged its onus of proving readiness and willingness to perform his part in the contract once he tendered the purchase price with its solicitor. *Lim Chong Fong JC* has referred to a decision made by *Abdul Malik Ishak JCA* in the case of *MMI Industries Sdn Bhd v. Let Sin Industries* [2010] 1 CLJ 36 and held that, it is imperative that the party seeking for specific performance must show to the satisfaction of the court that he is ever or continuous ready and willing to complete the contract.

This appears to be subjective as to what amount to readiness and willingness on part of plaintiff to perform. From the cases studied, the court considered that the state of readiness on part of the plaintiff was proven once the plaintiff had tendering the balance purchase price. This approach is seems to be lenient in the case of *Zakaria Mohammad & Anor v. Datuk Syed Sobri Syed Hashim & Anor* [2015] 1 LNS 300, when the court discharged the state of readiness and willingness on part of plaintiff after it was proven that he had obtained the Citibank loan to settled the balance of purchase price and accordingly specific performance was granted to the plaintiff. Furthermore, failure on part of the plaintiff in proving his readiness would fatal his claim of specific performance. No.5 of Table 2 revealed that about 9.6% the court dismissed the plea of specific performance once the plaintiff failed to prove his readiness and willingness to perform the contract. In the case of *Perisai Wira Sdn Bhd v. Harum Minat Sdn Bhd* [2014] 5 CLJ 88, the court held that specific performance was not available to the plaintiff because

there was no evidence proved that the plaintiff was ready to perform the contract once the court found that there was no enforceable contract entered between the parties.

Beside the above, according to section 9 of the Limitation Act 1953 provides that all action relating to recovery of land should be made within 12 years from the date of accrual of the cause of action. This limitation of time should be observed in applying the specific performance with regard to immovable property. From the cases studied, almost 14.4% the plea of specific performance involved the issue of limitation of time. From 14.4% cases, about 9.6% the court granted the specific performance for the action taken within 12 years and 9.6% the application of specific performance were fatal due to the delay on part of the plaintiff in commencing an action against the defendant.

Different approach has been taken in the case of *Somy Seethiah v Intensiftek (M) Sdn Bhd [2014] 4 CLJ 44*, where *Lee Swee Seng JC* introduced an alternative approach in order to know whether specific performance was enforceable or not. In this case plaintiff had two times sent the letter of termination to the defendant. It was unfortunate if the notice of termination was effective so that it waive the plaintiff's right for the specific performance. The court found that the letter were not reached the defendant thus it would appear that the parties has no intention to terminate the contract and specific performance was ordered to the plaintiff.

It is a trite law that there must be a complete contract executed between the plaintiff and the defendant so that specific performance may be enforced¹³. No.5 of Table 2 exposed that almost 14.4% uncompleted contract were unable to enforce specific performance. The award of specific performance cannot be granted if the land was still under caveat in which about 4.8%. From the cases studied, the court has also considered on whether the defendant has breached the contract or not. Table 2 showed that about 14.4% the court reluctant to enforce specific performance when the court found that the defendant had breached the contract and the court normally grant damages in lieu of specific performance. In addition to the above, the court dismissed the application of specific performance when the court found that the defendant had sold the land to multiple buyers and the specific performance had been granted to the first buyer so that it waives another buyer to obtain specific performance under the same subject matter. Table 2 also revealed in which 4.8% case the court appended that no room for two courts to order specific performance of the same land to two different persons¹⁴.

¹³ Mahabuilders Berhad v. Hotel Rasa Sayang SBn bhd [2014] 3 CLJ 661

¹⁴ Edwin Ak Omang &Anor v Jemin Ak Longun [2014] 11 MLJ 399.

Furthermore, the enforcement of specific performance will also subject to Section 29(1) of the Government Proceeding Act 1956. This section barred the court from granting specific performance against a state government. Table 2 showed that since 2014 up to October 2015 only 4.8% case involved the originating summon against a state government. Moreover, Table 2 also revealed that only 4.8% case the specific performance cannot be enforced against defendant if the land as the subject matter of the contract has been disposed to the third party as a bona fide purchaser before the completion of the contract. This remedy is also impossible to be granted if the defendant as the seller was not the true owner of the land.

Table 3: The Application of the Specific Performance at Court of Appeal or Federal Court. N=16

No.	Appellate Jurisdiction	Percent (%)
1.	Decision N=16	Allowing(Yes) 31.3
		Dismissing (No) 68.8
2.	First Approach: Specific Relief Act 1950 N=16	Section 11 12.5
		Section 21 6.3
		Other sections under SRA 12.6
		The court has not referred to SRA or other Acts 68.6
3.	Other sections under SRA (18.8%)	Section 28 and section 18 6.3
		Section 33 6.3
4.	Second approach: Reason for allowing the application	Readiness and willingness on part of Plaintiff 18.9
		Defendant has abandon the contract and ready to complete the contract 12.6
		SP can be enforceable through Equity 6.3
5.	Third approach: Reason for dismissing the application	Plaintiff was not ready to perform the contract 18.9
		Defendant has breached the contract 18.9
		Defendant wind up and specific performance might cause hardship to the defendant 6.3
		Plaintiff failed to prove the balance of probabilities in his case 6.3
		Restriction of the title of the land 6.3
		The action was barred by the Limitation Act 1953 6.3
		Plaintiff failed to follow the court procedure/ruling 6.3
		Defendant was adjusted bankrupt 6.3

In Malaysia, the Federal Court is the highest court and its decision will bind all the lower courts but it is not bound by its own decision. This is known as *stare decisis* or doctrine of binding precedent which was adopted from the common law. Since 2014 up to October 2015, there were only 16 cases brought to the appellate jurisdiction either Court of Appeal or Federal Court (the appellate court). Among the decided cases, only 31.3% applications of specific performance were allowed and the rest were dismissed. The appellate court has also referred to the

SRA in determining the award of specific performance in which 12.6% of section 11 and 6.3% of section 21. Despite these two sections, the court also used other sections stipulated in the SRA such as section 28 and section 18 of SRA. However, most of the cases in which about 62.5% the court had not used SRA 1950 as its main references but preferred judicial basis.

The appellate court has affirmed the approach used by the High Court in allowing the award of specific performance particularly on the capability on part of plaintiff to perform the contract. In the case of *Reignmont Estate Sdn Bhd v. Jaya Ikatam Plantations Sdn Bhd* [2014] 5 CLJ 134, the court appended that: *the legal position of readiness on part of plaintiff where it was referred to financial capacity, while willingness referred to conduct wanting performance or disposition. Readiness also consisted of having access to funds and this was not defeated merely because the party was depending on a loan to be advanced.*

The conduct of the plaintiff had been inferred from the facts and circumstances of the cases prior and subsequent to the filing of the suit in order to adjudge the availability of the plaintiff to perform the contract. The application for the specific performance was fatal when the plaintiff failed to pay the balance purchase price as agreed in the contract even though the deposit has been paid. No 5 of Table 3 showed that 18.9% cases the court dismissed the application of Specific performance when the plaintiff failed to tender the balance purchase price.

Furthermore, the appellate court rectified the approach taken by the High court at first instance on whether defendant has breached the contract or not. If the answer is in the affirmative, the court will refer to section 18 of the SRA that is to substitute the specific performance with the monetary damages due to the fact that the defendant has breached the contract and unable to perform his obligation in the contract. Table 3 revealed that the specific performance was enforced to 6.3% cases when the appellate court satisfied that the defendant had not breached the contract and about 18.9% specific performance were not available due to defendant breached.

Beside the SRA and the above approaches, the appellate court also referred to the rules of equity in allowing the specific performance as in the case of *Badan Pengurusan Tiara Duta v Timeout Resources Sdn Bhd* [2015] 1 MLJ 110. The parties in this case have entered into a lease agreement for the lease of premises for a period of five years. The lease was not registered at any relevant land office so that it was null and void. However, the court of the opinion that the lease was still good and enforceable in equity thus a decree of specific performance was available.

In addition to the above discussion and analysis, the appellate court upheld the decision of the High Court

judge that the application of specific performance will be subjected to the Limitation Act. According to Table 3, about 6.3% cases were barred by the Limitation Act 1953 because the action commenced by the plaintiff was outside the time limit. Furthermore, this study encountered that the appellate court shall also have taken into consideration on the ability of the parties in the contract. For instance about 6.3% cases where the court dismissed the specific performance and declared that the sale and purchase agreement was null and void due to a party in the contract has been adjusted bankrupt.

Being a special remedy in its character, the specific performance would only be available to the plaintiff upon discretionary of the court. Indeed, section 21(2)(a) provides that the court may not enforce specific performance if it caused hardship to the defendant. In the case of *Shirley Koh Gek Ngo & Anor v Tanah Emas Bio-Tech (M) Sdn Bhd* [2014] 6 MLJ 77, the appellate court dismissed the application of specific performance because to compel the defendant to perform his obligation in the contract would cause hardship to him due to his financial distress. Therefore, specific performance was not fit and a proper remedy.

CONCLUSION

This study revealed that since 2014 up to October 2015, the court has not only referred to the SRA as its main references in determining the possibility of the specific performance. This study encountered several approaches taken by the court in either granting or refusing the specific performance. As for the first approach, the court will refer to the SRA as its primary reference. The reasons given by court in allowing the specific performance would be the second approach then, the reasons for refusing the award of specific performance will be the third. From This study also the authors found that in allowing the award of specific performance, the court will refer to the SRA and shall consider the reasons under the second approach as mentioned above however, the approaches might have a possibility to be overlap on one another. This means, the court shall not refers to only one reason in order to allow the application for specific performance to one case but sometimes will consider both reasons or any other reasons. This approach was also applied to the cases where the court had dismissed the application of the specific performance.

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