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REMEDY OF SPECIFIC PERFORMANCE – SUPERVISION AND CHANGING TRENDS

Cooperative Insurance Society Ltd v *Argyll Stores (Holdings) Ltd*

I. INTRODUCTION

UNDER common law, damages are generally the primary remedy for an action involving an invasion of the plaintiff's contractual rights or a failure by the defendant to perform obligations owing to the plaintiff. Although damages have often been given as of right, monetary compensation cannot possibly be expected to be the panacea for all such disputes.

Specific performance, on the other hand, has traditionally been viewed as a secondary and discretionary remedy,[1] and the general perception is that it is to be considered only when damages have been found to be inadequate. In fact, there are certain categories of disputes where, because of other countervailing factors, the courts are known to be unwilling to award specific performance (regardless of the inadequacy of damages). Contracts involving personal service come readily to mind since for this category of cases the courts are wary of infringing upon the defendant's personal liberties or of coercing the already-embittered litigants to work together. Another frequently encountered category comprises cases where the courts are ill at ease with the notion of defendants having to keep in operation businesses that are no longer profitable.

An excellent example of a case that falls within the latter of the two aforementioned categories is the recent *Cooperative Insurance Society Ltd* v *Argyll Stores (Holdings) Ltd*.[2] The dispute for the present case sparked off when Argyll Stores, which controlled a chain of supermarkets throughout

[1] In contrast to the civil law system where the plaintiff has the right to exact specific performance as the primary remedy; see Szladits, "Concept of Specific Performance in Civil Law" IV Am J Comp L 208, 212, Dawson, "Specific Performance in France and Germany" 57 Mich L Rev 495, Jackson, "Specific Performance of Contracts in Louisiana" 24 Tulane L Rev 400, and Kronman, "Specific Performance" 45 U Ch L Rev 351.

[2] [1996] 3 WLR 27 (CA); [1997] 2 WLR 898 (HL).

England, decided to close down 27 of its less successful outlets after the corporate management team had completed a major review of the business. One of the unprofitable supermarkets that had been identified for closure was located at the Hillsborough Shopping Centre. Included in the 35-year lease agreement which Argyll Stores had signed with the plaintiff landlord, Cooperative Insurance Society, for this particular retail space were the following clauses that were relevant to the arguments set forth during the proceedings:[3]

(i) the negative covenant contained in Clause 4(12)(a) which specified that the lessee was "not to use or suffer to be used the demised premises other than as a retail store for the sale of food, groceries, provisions and goods normally sold from time to time by a retail grocer, food supermarkets and food superstores ..."

(ii) the positive covenant contained in Clause 4(19) which directed the lessee "to keep the demised premises open for trade during the usual hours of business in the locality, and to keep the display windows properly dressed in a suitable manner in keeping with a good class parade of shops."

After the announcement of the closure plans, the regional surveyor of Cooperative Insurance Society's investment department immediately sent a letter of protest to his counterpart at the Hillsborough supermarket and reminded the latter of the Clause 4(19) covenant to keep the outlet open during business hours. Also included in the letter was an invitation to the supermarket to continue operating (with the offer of some temporary reduction in rental rates) until a suitable assignee could be found. The supermarket did not reply but went ahead with the closure plans by dismantling all of its fixtures and fittings on the premises. An action was therefore taken against Argyll Stores for specific performance of the Clause 4(19) covenant or for damages.

The diversity of views expressed in the judgments delivered by the High Court (Judge Maddocks), Court of Appeal (Leggatt LJ, Roch LJ and Millett LJ) and House of Lords (Lord Browne-Wilkinson, Lord Slynn, Lord Hoffmann, Lord Hope and Lord Clyde) is particularly interesting to study, especially since the reversal by the appellate judges (but with Millett LJ dissenting) of the trial judge's exercise of discretion in not granting specific performance has, in turn, been dramatically overturned by their Lordships. One can perhaps

[3] *Ibid*, at 901 (HL).

discern within the litigants' arguments the tension existing between the two conflicting schools of thought on the matter – the preference of the common law system for damages as opposed to the civil law approach where specific performance is regarded as the primary remedy with damages playing only a supplemental role.[4] The case additionally considers various other factors (such as modern tendencies and changing attitudes), each of which ought to be considered as well in order to arrive at an in-depth understanding of the role played by and expected of specific performance.

II. First-instance Decision

Before delving into a study of the judgment delivered by the House of Lords, it would be instructive to review the decisions of the first-instance and appellate courts since many of the views expressed by the judges at these two hearings also mirrored the underlying concerns shared by others – practitioners and academics alike.

Judge Maddock's unwillingness to award specific performance was largely based on the so-called 'settled practice' of ordinarily not granting orders that would require a defendant to continue running a business. In the trial judge's opinion, "an order to carry on a business, as opposed to an order to perform a single and well-defined act was difficult to enforce by the sanction of committal; and where a business was being run at a loss, specific relief would be too far-reaching and beyond the scope of control which the court should seek to impose."[5]

Adopting a traditionalist outlook, Judge Maddocks felt bound by precedent and there was no call for reforms in the judgment that he delivered. In contrast, Slade J (as he then was) felt disconcertingly fettered by authorities in *Braddon Towers* v *International Stores*,[6] another first-instance case involving a dispute similar to that between Cooperative Insurance Society and Argyll Stores: "[The plaintiff's counsel] submitted that common sense and justice required the grant of a mandatory injunction in the present case and invited me to create a precedent by ordering the defendants to carry on the business of a supermarket accordingly ... In all the circumstances, without the fetter of authority, I would be inclined, on the special facts

4 However, the House of Lords suggested that, in practice, the difference may not be so marked. In the civil law system, for instance, this remedy is also not available where the contract is impossible to perform or where personal services (save for rare exceptions) are required; see Szladits, *supra*, note 1, at 216.

5 *Supra*, note 2, at 902 (HL).

6 [1987] 1 EGLR 209.

of this case, to grant an injunction broadly of the nature sought."[7] Although Slade J reluctantly agreed with the defendant's submission that "the court is precluded from granting a mandatory injunction compelling someone to carry on a business",[8] he took the opportunity to urge that "the rationale which lies behind the rule or practice may perhaps need rethinking, at least in relation to those cases where it would be possible to define with sufficient certainty the obligations of the person enjoined to carry on a business."[9]

It ought to be pointed out, in all fairness, that Braddon Towers actually had a stronger case than Cooperative Insurance Society since the lease in the *Argyll Stores* dispute did not contain the following clause that was unfortunately present in the one signed by International Stores: "At all times of the year during the normal business hours of the locality ... to keep the shop open as a first-class shop and at all times to keep the display windows suitably and attractively dressed ... and *not to do or permit or suffer to be done anything which may injure the goodwill of the said business and or any other businesses carried on in the Centre*."[10] Based on the emphasized portion of the clause, one could thus argue that International Stores had covenanted not to spoil the goodwill of the other shop tenants who clearly were not party to the contract that the two litigants had entered into. Interestingly, for other cases such as *Beswick* v *Beswick*,[11] the fact that the promisee could not recover damages for third-party beneficiaries was also a consideration in favour of an order for specific performance.

III. Appellate Decision

The Court of Appeal (with Millett LJ dissenting) found this case appropriate for an assault on the settled practice of not granting specific performance. There were three principal factors that prevailed upon the majority judges (Leggatt LJ and Roch LJ): no attendant need for court supervision, deplorable

7 *Ibid*, at 213.

8 *Ibid*, at 212. Before he reluctantly made this pronouncement, Slade J chided the defendants for having "committed a serious continuing breach of the covenants ... without any apparent consideration for the plaintiffs or the other occupants of the shopping centre ... [although] they undertook their obligations under the lease with their eyes open, and after negotiation, expressly contracted with the plaintiffs to observe them".

9 *Ibid*, at 213.

10 *Ibid*, at 210. The *Braddon Towers* ruling was heavily relied upon by Leggatt LJ and Roch LJ in their reversal of the first-instance court's decision in the *Argyll Stores* case. However, the presence of this covenant in the lease signed by International Stores makes the *Braddon Towers* case a stronger candidate for specific performance (although it was not granted) than for the case encountered in the *Argyll Stores* dispute.

11 [1968] AC 58 (HL).

conduct of the defendant and inadequacy of damages for the aggrieved plaintiff. Each of these three factors would have to be looked at in turn.

(a) *Need for Supervision*

Judge Maddock's adherence to settled practice was severely criticised by the appellate majority who felt that the unquestioning application of this rule must not be left unchallenged. Drawing support from the *dicta* of those more recent cases[12] where the courts had not been so inhibited by the settled-practice precept, both Leggatt LJ and Roch LJ independently came to the conclusion that the need-for-supervision problem (often cited as one of the reasons for the court's aversion to specific performance)[13] could actually be obviated if the contract had defined the terms with sufficient precision to permit the court to make an order that would be clear enough for the defendant to recognise the scope of the work imposed on him. The present case was thought to be such an instance: The lease directed Argyll Stores to remain open for trading during normal business hours in keeping with a good class parade of shops and Leggatt LJ was convinced that "... without descending to excessive detail the court would well be able to tell the defendants what is expected of them".[14] These two appellate judges could not resist embracing the call sounded by Slade J in *Braddon Towers*[15] for a systematic re-evaluation of the rationale behind the settled practice of not favouring specific performance. Also cited in the appellate judgment were Lord Wilberforce's decision in *Shiloh Spinners* v *Harding*[16] that "where it is necessary and, in my opinion, right to move away from some 19th century authorities, is to reject as a reason against granting relief, the impossibility for the courts to supervise the doing of work"[17] and Megarry J's speculation in *Giles* v *Morris*[18] that "one day, perhaps, the courts will look again at the so-called rule that contracts for personal service ... will not be specifically enforced [as] such a rule is plainly not absolute and without exception; nor do I think that it can be based on any narrow consideration such as

12 See, *eg*, Lord Wilberforce in *Shiloh Spinners Ltd* v *Harding* [1973] AC 691, 724; and Megarry J in *CH Giles & Co Ltd* v *Morris* [1972] 1 WLR 307, 318. See also *Posner* v *Scott-Lewis* [1987] 1 Ch 25 and *Hill* v *Parsons & Co* [1972] Ch 305.

13 See Jones and Goodhart, *Specific Performance* (2nd ed, 1996), at 44; and Sharpe, *Injunctions and Specific Performance* (2nd ed, 1992), at 7.340.

14 *Supra*, note 2, at 32 (CA).

15 *Supra*, note 6, at 213.

16 *Supra*, note 12.

17 *Ibid*, at 724.

18 *Supra,* note 12.

difficulties of constant supervision by the court ... and there is normally no question of the court having to send its officers to supervise the performance of the order of the court".)[19]

Adopting the view that "the day envisaged by Megarry J has arrived ... for rethinking the rationale of this rule",[20] both Leggatt LJ and Roch LJ took Judge Maddocks to task for having "shown an unwarrantable reluctance to order specific performance ... [since] the result in practice would be that the common form of words of this covenant would hardly ever, if ever, be construed as meaning what they say."[21] Believing firmly that a gentleman would be loath to break any promises, Leggatt LJ went on to point out that "where a responsible and substantial company such as Argyll have undertaken to keep one of their stores open for a stipulated period, I see no reason why they should not be held to their bargain" and he then castigated the defendant for having "acted with gross commercial cynicism, preferring to resist a claim for damages rather than keeping an unambiguous promise."[22] In fact, high idealism was the underlying emphasis of the concluding statement in Leggatt LJ's judgment: "This is not a court of morals, but there is no reason why its willingness to grant specific performance should not be affected by a sense of fair dealing."[23]

(b) *Wanton Misconduct*

Given the majority judges' leaning towards the keeping-of-promises ideal, it was clear that the case for the defence was not helped by what the appellate court perceived to be the wanton conduct of Argyll Stores in stripping the Hillsborough supermarket premises of all the fixtures and fittings whilst not replying to the offer contained in the letter of protest sent by Cooperative Insurance Society: "One matter that has been quite apparent in this appeal is that the defendants behaved very badly."[24] Even Millett LJ (who did not agree with the majority decision to award specific performance) acknowledged that "the defendants could expect little sympathy for the wasted expenditure which might be incurred when they had so acted at their peril."[25] The appellate judges' admonition echoed that of Bacon VC who had

[19] *Ibid*, at 318.
[20] *Supra*, note 2, at 37 (CA).
[21] *Ibid*, at 33.
[22] *Ibid*, at 34. One could, in fact, argue that the keeping of promises best protects the plaintiff's expectation interest.
[23] *Ibid*.
[24] *Ibid*.
[25] *Ibid*, at 40.

"characterised with contumely the defendant's attitude"[26] in the 19th-century case of *Greene* v *West Cheshire Railway*[27] and ordered the specific performance of an agreement to construct and maintain a siding alongside a railway line upon land belonging to the plaintiffs.

Prompted in all likelihood by their poor image of Argyll Stores' actions, the majority judges utilised this misconduct as a springboard to explore whether support could additionally be derived from any related considerations pertaining to the equitable remedy of mandatory injunction. Although Cooperative Insurance Society did not exactly apply for a mandatory injunction, the underlying principles for this particular remedy could arguably be relevant as the objective of the present lawsuit was basically to repair or undo a wrong (*viz,* to re-operate a supermarket which should not have been closed down in the first place). It is known that this relief usually entails a drastic positive step to reverse the breach of a negative injunction, often with great waste of resources. The test to be applied involves seeking a delicate balance between the burden of compliance to be borne by the defendant and the benefit to be accrued to the plaintiff.[28] In *Wrotham Park* v *Parkside Homes*,[29] for instance, mandatory injunction was disallowed and the court refused to order the demolition of certain houses that had been built in breach of a negative covenant because there would otherwise have been sheer wastage of resources. The burden of compliance, if imposed on the defendant, would obviously have outstripped the harm inflicted by him on the plaintiff. However, one ought to add a rider to this general rule since there were also other instances[30] where the court decided in favour of a mandatory injunction – despite the costs incurred in rectifying the wrong – especially when evidence could be adduced to substantiate the allegation that the defendant had acted in flagrant disregard of the plaintiff's rights. As for Argyll Stores, both Leggatt LJ and Roch LJ found that, on balance, the gravity of the misconduct outweighed the financial burden of re-opening the supermarket outlet "even if the expense to him is out of all proportion to the advantage thereby accruing to the plaintiff"[31] but Millet LJ expressed the concern that "to compel a defendant for an indefinite period to carry on a business which he considers is not viable, or which for his own

[26] *Ibid*, at 32.
[27] (1871) LR 13 Eq 44.
[28] This weighing of the relative prejudices was also featured in Davies J's consideration in the *Posner* v *Scott-Lewis* case (*supra*, note 12, at 36).
[29] [1974] 1 WLR 798.
[30] *Wakeham* v *Wood* (1981) 125 Sol J 608; *Gross* v *Wright* [1923] 2 DLR 171; *Redland Bricks Ltd* v *Morris* [1970] AC 652, 663 and 666. See also Sharpe, *supra*, note 13, at 1.590.
[31] *Supra*, note 2, at 38 (CA).

commercial reasons he has decided to close down, is to expose him to potentially large, unquantifiable and unlimited losses".[32]

(c) *Inadequacy of Damages*

Furthermore, the majority judges found that damages were inadequate as a remedy to compensate Cooperative Insurance Society for the loss of the supermarket outlet:

> ... the closure of the [supermarket] store would have a damaging effect on the whole shopping centre, particularly if it was not accompanied by the prospect of early re-opening. It was likely that fewer customers would be attracted to the centre and that this would lead in due course to a reduction in the level of rents obtainable for other units as they fell to be reviewed or re-negotiated. There would also be greater difficulty in finding new tenants and an increased risk of void units. All this would adversely affect the value of the freehold reversion. In addition, irrecoverable losses would be sustained by the plantiffs' other tenants, and this would reflect badly on the plantiffs.[33]

With regard to the last item listed in the preceding paragraph, Roch LJ added that "the plaintiffs' claim for damages cannot include compensation for their loss of revenue from other units in the shopping centre ... [and] those involved in the other businesses, who assumed obligations under their leases in reliance on there being a supermarket in the shopping centre ..., have no remedy against the defendants."[34] One might suspect that the majority judges could have been attempting a tact reminiscent of that employed in cases such as *Beswick* v *Beswick*[35] where the fact that the promisee was not able to recover damages for third-party beneficiaries was itself a consideration in favour of an order for specific performance. However, there was no necessity to address the issue of third-party beneficiaries in the *Argyll Stores* case because, as Lord Hoffmann had explained when the dispute later came before the House of Lords, neither the lessor nor the lessee had actually made any representation to the other tenants in the Hillsborough Shopping Centre that the supermarket was to remain open for business at all times.

[32] *Ibid*, at 42.
[33] *Supra*, note 2, at 40 (CA).
[34] *Ibid*.
[35] *Supra*, note 11.

In an earlier comparison (under the preceding heading),[36] it had already been noted that the position of the plaintiff in the *Braddon Towers* case was strengthened by yet another requirement in the lease directing the supermarket "... not to do or permit or suffer to be done anything which may injure the goodwill of ... any other businesses carried on in the Centre."[37] Even then, Slade J felt fettered about awarding specific performance although the closure of International Stores could be regarded as having diminished the business of practically all the other shops in Braddon Towers. There was, in contrast, no similar injunction in the contract signed by Argyll Stores. If, on the other hand, the agreement had contained such a covenant, there would arguably have been some resemblance to the situation encountered in the *Beswick* case (where the court was not averse to breaking new ground) and the additional concern over third-party beneficiaries might help tilt the balance and buttress any bold move forward for specific performance.

(d) *Dissent of Millett LJ*

Although Leggatt LJ and Roch LJ adopted a robust stance and vigorously sought to tear away the shibboleths which in their opinion were fettering Judge Maddocks, Millett LJ elected for a different approach that was interesting and somewhat prescient. The dissenting judge was convinced that the polarity of perspectives was reflective of the underlying tension that existed between the two schools of thought on the matter.[38] Whilst the proponents of specific performance emphasised the morality of keeping one's promises and insisted on the enforcement of the defendant's positive contractual obligations as possibly the best means of protecting the plaintiff's interest, the opponents of this doctrine put forth damages as the far superior remedy (in terms of

[36] See discussion in text under Heading II; *supra*, note 10.

[37] *Supra*, note 6, at 210.

[38] The dissension, in fact, harks back to the days of rivalry between Sir Edward Coke and Lord Ellesmere LC. As Millett LJ (*supra*, note 2, at 43) had noted, "Sir Edward Coke resented the existence of an equitable jurisdiction which deprived the defendant of what he regarded as a fundamental freedom to elect whether to carry out his promise or to pay damages for the breach. Modern economic theory supports [this view]: an award of damages reflects normal commercial expectations and ensures the more efficient allocation of scarce resources. The defendant will break his contract only if it pays him to do so after having taken the payment of damages into account; the plaintiff will be fully compensated in damages; and both parties will be free to allocate their resources elsewhere. Against this there is the repugnance felt by those who share the view of Fuller CJ [*Union Pacific Railway* v *Chicago, Rock Island and Pacific Railway* (1896) 163 US 564, 600] ... that it is an intolerable travesty of justice that a party should be allowed to break his contract at pleasure by electing to pay damages of the breach."

economic efficiency);[39] unfortunately, none of the authorities furnished a clear enough rationale for the categorical resolution of this dispute.

Although Millett LJ acknowledged that "it would do the court no credit if it declined to make an order merely on the ground that it had become the practice not to do so",[40] he also concurred with the trial judge in finding that "there was nothing which required him to treat the case as exceptional ... [and hence] it was one in which the ordinary practice should be followed."[41] Recognising the importance of maintaining predictability and certainty in commercial law, the dissenting judge further observed that "the existence of the practice is ... beyond dispute"[42] because "over the centuries rules of practice have evolved so that the parties can know in advance which contractual obligations will be specifically enforced and which sound in damages only."[43] Settled practice was not without its own merits and he was acutely sensitive to "... the dangers inherent in disturbing past transactions based on the known practice of the court."[44] His stand on this issue could be summarised thus:

> Consistent practice, no less than common error, makes the law. The equitable jurisdiction should not be exercised in a manner which would defeat the commercial expectations of the parties at the time when they entered into their contractual obligations.[45]

Moral ideals ought to be weighed against the harsh realities of economic waste and inefficiency. In answer to the moralists (who insisted that the defendant must abide by his contractual promises), Millett LJ painted the absurd scenario of Argyll Stores being compelled to operate the supermarket either at a loss for the remaining 19 years of the lease or until the onset of bankruptcy. If not properly administered, equitable remedies could be transformed into ugly instruments of oppression which would bring about wealth depletion (rather than wealth creation). His concern over the prospect of disproportionate losses was, naturally, in line with the general object

[39] However, not all of the economists share the same views on this economic-efficiency theory; see Kronman, "Specific Performance" (*supra*, note 1) *contra* Schwartz, "The Case for Specific Performance" (89 Yale LJ 271, 279). See also general discussion of Hillman, "Theories of Economic Analysts of Contract Law and their Critiques", in *The Richness of Contract Law* (1997), ch 6.

[40] *Supra*, note 2, at 44 (CA).

[41] *Ibid*, at 40.

[42] *Ibid*, at 41.

[43] *Ibid*, at 43.

[44] *Ibid*, at 44.

[45] *Ibid*.

of avoiding remedies that might prove to be unduly burdensome on the defendant.

(e) *Implication of Appellate Ruling*

The ruling pronounced by the majority judges must have set alarm bells ringing for the business community since by this reckoning retailers had to study the contractual details very carefully before committing themselves to tenancy agreements containing such covenants to carry on with the business.[46] There existed the possibility – especially under unfavourable conditions of low or negative profitability over the foreseeable future – that they might find themselves enslaved to the losing concern for the remaining duration of the lease. If there was an assignment clause in the lease, the tenant caught in the dilemma could attempt to find another to take over the premises but then the problem would rear its ugly head again if the unsuspecting replacement subsequently encountered financial setbacks that required a similar closure of the venture. Fortunately for the business community, any consternation over these dire implications was promptly dispelled after the matter had been resolved by the House of Lords.

IV. House of Lords' Decision

The House of Lords' unanimous ruling against the Court of Appeal's award of specific performance was timely in arresting the runaway situation that could have been triggered off by the radical (but impractical) views of Leggatt LJ and Roch LJ. Judge Maddock's decision was fully vindicated by Lord Hoffmann who, when delivering the House's judgment, firmly reiterated that "specific performance is traditionally regarded in English law as an exceptional remedy as opposed to the common law damages to which a successful plaintiff is entitled to as of right"[47] and that in general "specific performance will not be ordered when damages are an adequate remedy"[48] – in stark contrast with the civil law system (in countries such as France and Germany) which had elected for the converse approach of relying on specific performance as the *prima facie* remedy with damages regarded as the exception.[49]

46 See also Jones and Goodhart, *supra*, note 13, at 53-54.

47 *Supra*, note 2, at 902 (HL).

48 *Ibid*, at 903.

49 Lord Hoffmann rightly pointed out that, in practice, the differences between these two systems were not as marked as what the generalised statements had represented; see also, *supra*, note 4.

(a) *Clarification of Fundamentals*

That settled practice remained operative even when damages might not prove to be adequate, was unambiguously re-affirmed by their Lordships. Since the majority judges on the Court of Appeal were uncertain of the exact basis for this doctrine and had in fact been mystified by Judge Maddock's unwavering observance of this rule, Lord Hoffmann found it necessary to clarify the fundamentals in the hope of dispelling any misconceptions that still persisted.

Although recognising that "the most frequent reason given in the cases for declining to order someone to carry on a business is that it would require constant supervision",[50] the House of Lords also noted that "there has ... been some misunderstanding about what is meant by continued supervision."[51] The term, it was stressed, did not envisage the situation where "the judge (or some other officer of the court) would literally have to supervise the execution of the order."[52] Compliance of an order for specific performance had, instead, to be secured through the quasi-criminal procedure of punishment for contempt of court (*viz,* a fine or even committal) where "... supervision would in practice take the form of rulings by the court, on applications made by the parties, as to whether there had been a breach of the order [and] it is the possibility of the court having to give an indefinite series of such rulings in order to ensure that the execution of the order which has been regarded as undesirable."[53]

However, pointed out Lord Hoffmann, "this [contempt-of-court threat] is a powerful weapon – so powerful, in fact, as often to be unsuitable as an instrument for adjudicating upon the disputes which may arise over whether a business is being run in accordance with the terms of the court's order."[54] If indeed compelled to conduct business in this manner, the defendant would effectively be placed at the mercy of the plaintiff who could wield the contempt-of-court weapon to dictate unfair demands. In Sharpe's opinion, this might lead to further injustice since "in such circumstances a specific decree in favour of the plaintiff will place him in a bargaining position *vis-à-vis* the defendant whereby the measure of what he will receive will be the value to the defendant of being released from performance [and it is possible that] if the plaintiff bargains effectively, the amount he will set will exceed the value to him of performance and will approach the cost

50 *Supra*, note 2, at 903 (HL).
51 *Ibid*.
52 *Ibid*.
53 *Ibid*.
54 *Ibid*, at 904.

to the defendant to complete."[55] One could not expect businessmen to operate under such absurd conditions.

The pro-business disposition of the House led their Lordships to express their concern that a contempt-of-court finding (together with the prospect of punishment) might damage the standing of the defendant in the business community. Various problems could ensue:

(i) Despite having concluded from an earlier review that it was no longer viable to run his business, the defendant would have to comply with the court's order and continue with the loss-making activities. Risk-taking has always been the preserve of businessmen, and a court order to keep a business in operation is therefore tantamount to gross interference.

(ii) There was a strong likelihood of the plaintiff having to make repeated applications to enforce the order, hence chalking up additional expenses for both litigants (in terms of legal services and court fees) as well as for the state (in terms of judges' time and costs of running the judicial infrastructural framework). Rightly so had the economic theorists branded it as an anathema, a sheer waste of resources without any end gain in mind.

(iii) The bitter relationship already existing between the disputing parties would invariably erupt into sustained hostilities since "the order for specific performance prolongs the battle ... [with the accompanying] flow of complaints, solicitors' letters and affadavits"[56] whereas the award of damages is able to bring the action to a speedy conclusion and the litigants would not have to deal with each other thereafter.

In effect, their Lordships had severely undermined the aspersions cast by the majority judges on the Court of Appeal with regard to the validity of settled practice. There was no hint of ambivalence in Lord Hoffmann's pronouncement that "the settled practice is based on sound sense."[57]

[55] *Ibid*, at 906; House of Lords cited Sharpe, "Specific Relief for Contract Breach", in *Studies in Contract Law* (1980), ch 5.
[56] *Supra*, note 2, at 906 (HL).
[57] *Ibid*.

(b) *Modern Trends*

The House of Lords had also to address the modern trends that apparently attracted the attention of the Court of Appeal since both Leggatt LJ and Roch LJ preferred the views expressed in the more recent judgments to what they had dismissively labelled as 'outmoded' practice.[58] A useful aid, proposed Lord Hoffmann, was to identify two categories of cases on the basis of their operational parameters. Referring first to those decisions where the judges had appeared to be more relaxed about the supervision issue, his Lordship pointed out that this category of cases[59] actually pertained largely to orders that had the attainment of certain end results as their objectives. In contrast, the orders issued in the second category of cases involved the conduct of certain activities – usually over extended periods of time – and were thus susceptible to the "possibility of repeated applications for rulings on compliance with the order."[60] The House utilised this distinction to help explain why specific performance had been granted for some of the earlier decisions but disallowed for the others. For orders to achieve results, there could be some relaxation in the supervision rule provided, of course, that there were no other objections. One such objection that might be raised was whether the terms had been properly defined since lack of imprecision in the specification of the expected results would make it difficult for the court to ascertain the level of compliance on the part of the defendant; in this regard, his Lordship did not agree with the appellate majority that there was no imprecision in the wording of the Clause 4(19) covenant to keep the business open.

That these learned judges had arrived at different conclusions on the same issue was interesting in itself. Perhaps the interpretation adopted by each of the judges was coloured by his own philosophical persuasion. The appellate judges were clearly of the conviction that one should be discouraged from breaking promises but then this ran counter to the school of thought endorsed by their Lordships that economic efficiency should be ranked high on the scale of priorities and specific performance was certainly not a remedy that fitted in with the scheme of things for the latter group of 'settled practice' adherents.

[58] See, *eg*, Burrows, *Remedies for Torts and Breach of Contract* (2nd ed, 1994), 380-381.
[59] See, *eg*, *Wolverhampton Corp* v *Emmons* [1901] 1 KB 514 and *Jeune* v *Queens Cross Properties Ltd* [1974] Ch 97.
[60] *Supra*, note 2, at 904 (HL).

(c) *Conduct of Defendant*

As had been noted earlier,[61] the Court of Appeal took issue with Argyll Stores for the misconduct of the supermarket staff which, in the opinion of all three appellate judges, was irresponsible and reprehensible. There was, in the House of Lords' view, no justification for over-reaction in this manner as the defendant's actions did not warrant the exaggerated words of denunciation so liberally hurled by the appellate court. In fact, their Lordships even advised that the matter should be placed in its proper perspective; after all, Argyll Stores was likely to have been influenced by their perception of the 'settled practice' tradition and the supermarket management could have presumed that Cooperative Insurance Society ordinarily would have been satisfied with damages as compensation for the breach of the lease.

Finally, the House highlighted the observation that both lessor and lessee were equally large companies and there was thus no question of the court having to bend over backwards in order to extend a helping hand to the weaker party. Each had sufficient financial resources and was perfectly capable of taking care of matters relating to their own interests. Neither of the litigants was riding on any moral high horse to pursue some lofty principle. Since the quest they had was simply to generate profits, damages would undoubtedly be an appropriate and, in fact, adequate remedy. Hence, Lord Hoffmann concluded that the Court of Appeal wrongfully interfered with Judge Maddock's exercise of discretion and restored the latter's award of damages.

V. Conclusions

The entire proceedings – at the first-instance and appellate hearings as well as before the House of Lords – for the legal tussle between Cooperative Insurance Society and Argyll Stores have provided valuable insights into the substantive law relating to the thorny issue of specific performance. Of interest too are the various snippets of behind-the-scene information on the array of proclivities and polarities that provide clues to help one fathom the underlying considerations and concerns.

With regard to substantive law, the House has furnished some useful pointers on the meaning of court supervision and the consequent impact on the judges' exercise of discretion. In so doing, their Lordships have strengthened the policy justification behind the 'supervision impediment'

[61] See discussion under Heading III(b); *supra*, note 24.

in certain categories of cases. Also dealt with are many of the factors explaining why the common law system does not, in general, prefer specific performance as the primary remedy – difficulty of supervising the order, inefficient allocation of resources, threat of blackmail, and invasion of personal and business liberties.

Other perspectives have emerged too. The House has, for instance, rightly recognised that it is not the role of the court to interfere with business decisions – especially to continue operating an economically untenable business. Neither is it the role of contract law to punish those who had breached their contracts. Yet another is the caution (which has struck a rather resonant note in this case) that the goal-posts should not be too readily shifted since ample notice must be given for others to re-orientate themselves to the new directives and thereafter to re-order their routines accordingly. Millett LJ's comment on this is worth repeating:

> Consistent practice, no less than common error, makes the law. The equitable jurisdiction should not be exercised in a manner which would defeat the commercial expectations of the parties at the time when they entered into their contractual obligations.[62]

Predictability in commercial law, as in many other areas of law, is a virtue that has served many well. There are merits to time-honoured practices; jettisoning them too swiftly as outmoded without a proper examination of the original factors that had spawned them in the first place, is inadvisable. Modernity has a part to play as well; the modern theory of economic expediency has additionally helped to shore up the foundations for the common law system's reliance of damages as the primary remedy for the breach of contracts in this area of law.[63] Of course, critics may later take the House to task for not having tempered economics with an infusion of equitable morals. Only time will tell whether some other delicate balance has to be found between these two conflicting criteria.

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[62] *Supra*, note 45; also reproduced under Heading III(d).

[63] Subject to the caveat mentioned in *supra*, note 39.

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