IS LAND REALLY UNIQUE?: REVISITING SPECIFIC PERFORMANCE AS THE DEFAULT REMEDY FOR LAND SALE CONTRACTS IN NEW ZEALAND

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The argument put forth in this article is that land sale contracts, unless proven to possess unique characteristics, are not inherently different from other types of contracts. The article proposes a shift from treating specific performance as the default remedy for enforcing land sale contracts. Instead, the remedy of specific performance should be considered applicable only in exceptional situations, as is the case for contracts generally. The article also addresses the nature of damages in lieu of specific performance and suggests a reconsideration of how that remedy applies to land sale contracts.

I INTRODUCTION: REPUDIATION IN THE INTERVAL BETWEEN FORMATION AND SETTLEMENT/COMPLETION OF LAND SALE CONTRACTS

Between the formation and settlement of contracts for the sale of land, there is usually an interval during which a party to the contract may repudiate. But the innocent party may yet insist on performance by pursuing an action for specific performance. However, the event may go beyond a mere repudiation where the wrongful party has created a situation whereby they are incapable of performing the contract. An excellent example is when the vendor (in breach of the contract) sells the subject property to another innocent person who has registered their title and commenced occupation or refurbishment of the property.[1] Where such is the case, the purchaser may seek a monetary remedy in lieu of specific performance. Thus, it becomes clear that discussions about specific performance

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1 See for example *Gitmans v Alexander* HC Auckland CIV-2001-404-1937, 9 December 2003; and *Ward v Metcalfe* (1990) 21 NZCPR 721 (HC).

ought not to be limited to the decree of that remedy but extend to monetary remedies awarded in place of specific performance, which serves as its financial equivalent.

Between formation and settlement, there are three situations where the vendor may renege on the contract. The first is where the purchaser has paid the entire purchase price, but completion is yet to happen. The second is where the purchaser has only paid a deposit or furnished part performance. The third is where the purchaser has agreed to buy the property but not made any form of payment or suffered substantial forbearance. It may as well be that it is the purchaser who reneges on the contract, and to this, there are two possibilities regarding the vendor's interests. One is that the vendor may have suffered an opportunity cost by forgoing actual or probable bargains with other purchasers. The other possibility is that the vendor is unable to demonstrate such forbearance. Given the property market's volatility, there are always propensities for vendors to renege in expectation of bargains perceived to be more lucrative to them, just as there are always tendencies for purchasers to breach, to enable them take up alternative cost-efficient deals. But the prevalence of such defaults is often more pronounced in changing economic conditions affecting purchasers' affordability and vendors' profitability.[2]

As is typical of property markets, that of New Zealand is time-variant. Since the property market gained a resurgence in 2013 following a crash due to the economic conditions of 2007–2009, it took on a "bullish" outlook.[3] From that time, an upward price trend caused the New Zealand real estate market to be described as one of the most unaffordable in the OECD.[4] From the beginning of 2022, however, there was a reversal in this trend due to a combination of economic factors that induced a gradual decline in property prices, occasioning a "bearish" property market.[5] Two salient economic factors were in play. One was that the forecast of increased bank interest rates dampened borrowing spirits, and the second was the surplus in the supply of property relative to "effective demand".

The prospects of an innocent party to a land sale contract to secure specific performance or damages in lieu thereof depends on two factors. The first concerns conditions that shape specific performance's availability to the innocent party. The second relates to the nature of the legal entitlement acquired by the innocent party in the interval between formation and settlement. These factors are intertwined as both affect the likelihood that specific performance will be decreed and whether damages in lieu of specific performance may be awarded.

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2 See *Titanic Quarter Ltd v Rowe* [2010] NICh 14 at [3]–[5]; and *Aranbel Ltd v Darcy* [2010] IEHC 272 at [1.1]–[1.2].

3 See Michael Funke, Robert Kirkby and Petar Mihaylovskic "House prices and macroprudential policy in an estimated DSGE model of New Zealand" (2018) 56 Journal of Macroeconomics 152.

4 See Yang Yang "Real estate price dynamics, property speculation and housing price volatility: A study of the Auckland housing market" (PhD Thesis, University of Auckland, 2020) at 2–4.

5 See Real Estate Institute of New Zealand (REINZ) *Monthly Property Report* (18 January 2023).

This article critically analyses these two factors as they pertain to New Zealand law and the remedial implications that follow from them. The article aims to prescribe a departure from the prevailing legal position. According to the prevailing legal approach, land is considered unique; therefore, contracts for the sale of land generally entitle the innocent party to specific performance. Connected to this legal position is the view that a purchaser acquires an equitable interest in the property based on an unconditional contract. At the same time, the vendor is entitled to receive the purchase price. Consequentially, contracts for the sale of land are not seen as ordinary contractual arrangements but are of a particular character for which there is no tolerance for repudiation. Although the doctrine/theory of efficient breach is acceptable in New Zealand jurisprudence, it is rarely condoned in land sale contracts.[6] In *Cowan v Cowan*, the Supreme Court of New Zealand recently asserted that:[7]

> Although there is never an absolute right to specific performance (or equivalent relief), the courts do not regard real property as fungible. In disputes concerning real property, damages will often not be an adequate remedy.

The Supreme Court added that the Māori principles of tikanga, regarding the importance of the "family home" (ie whenua and kāinga), accord with equity's reluctance to damages as an adequate remedy in land disputes.

In land sale contracts, the prevailing position is that specific performance is the default remedy for breaches, while damages are available in exceptional cases. This position rests on the premise that land is unique and makes money damages an insufficient substitute for performance. The idea that land is inherently unique is so embedded that courts will often not enquire about the adequacy (or otherwise) of damages to the innocent party. Several justifications have been advanced for this approach, chiefly the sanctity of contracts and transactional certainty. The arguments defending this traditional approach shall in Part V be highlighted and juxtaposed against those underpinning the alternative approach advanced in this article.

The core argument of this article is that the proposition that land is inherently unique is unsound for the modern conditions of the New Zealand property market. Therefore, this article proposes reconsidering the idea that specific performance is the default remedy of choice for breach of contract for the sale of land. The arrangement of this article is as follows. Part II lays the foundation for discussion by examining the prevailing legal position in New Zealand that land sale contracts entitle purchasers to an equitable interest in the subject land. Part III contests the legal assumption that land is an inherently unique subject matter, drawing on practical realities that shape the New Zealand property market. Part IV draws on insights from judicial developments in Canada and suggests that the prevailing approach in that jurisdiction is apposite to prevailing market realities in New Zealand.

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6 See *Forest Holdings (NZ) Ltd v Sheung* [2021] NZCA 608 at [32]–[35].

7 *Cowan v Cowan* [2022] NZSC 43 (footnotes omitted).

Parts V and VI discuss what the conditions for the award of specific performance and damages in lieu of specific performance should be, respectively. Part VII concludes the article.

II THE AVAILABILITY OF SPECIFIC PERFORMANCE AND THE NATURE OF THE LEGAL ENTITLEMENT RESULTING FROM CONTRACTS FOR THE SALE OF LAND

In common law tradition, the standard remedial response to a contractual breach is compensatory damages; specific performance applies where the contractual subject matter is exceptional.[8] Traditionally, land is considered unique, and for this reason specific performance is the remedy of choice.[9] But Canada has deviated from this tradition. Further, in New Zealand, as in most other common law jurisdictions, the governing position is that equity treats unconditional contracts for the sale of land as vesting (in a purchaser) equitable interest in the land.[10] While the first legal position (ie that land is unique) is sufficient to ease the decree of specific performance, the second (ie that unconditional contracts bestow equitable interests) reinforces that possibility. As this part shows, both legal positions make it highly likely that specific performance is awarded in such contracts (albeit not routinely). This part examines each position and analyses their interaction.

A Availability of Specific Performance in Land Sale Contracts

As rightly observed by McMorland, there are two broad bases for the award of specific performance, and these are jurisdictional and discretionary factors.[11] The first species of factors are those which seize or empower the court with the jurisdiction to decree specific performance of the contract. These fundamental factors include, as follows:

(i) that there is a validly formed[12] and unconditional[13] contract for the sale of land (which has been breached or is threatened to be breached);
(ii) that, at the time the remedy is sought, the party seeking the remedy is ready, willing and able to perform his part of the bargain; and
(iii) finally, that the contract is still capable of substantial performance.

Notwithstanding the satisfaction of these jurisdictional factors, the court may refuse to decree specific performance if discretionary factors weigh against it. Common discretionary factors include hardship to the breaching party, the adequacy (or otherwise) of damages, and laches/acquiescence. In

8 See *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1998] AC 1 (HL) at 11–16.

9 See *Buxton v Lister* (1746) 3 Atk 383, 26 ER 1020 (Ch); and *Scott v Alvarez* [1895] 2 Ch 603 (CA).

10 *Adderley v Dixon* (1824) 1 Sim & St 607, 57 ER 239 at 240.

11 DW McMorland *Sale of Land* (4th ed, Cathcart Trust, Auckland, 2022) at 369–370.

12 See for example *Ho Kok Sun v Peninsula Road Ltd (in rec) (in liq)* (2016) 18 NZCPR 319 at [149].

13 *Mangaroa 26N2 Trust v Huata* [2022] NZHC 113.

New Zealand, the courts consider additional (or complementary) discretionary factors. These include economic efficiency, respect for the plaintiff's autonomy, the balance of convenience, public/third-party interests, difficulties in the computation of damages, and the conduct of the parties.[14] I argue that the Māori principle of tikanga regarding the 'family base' should generally fall under discretionary factors. The principle should only count as a jurisdictional factor if it can be demonstrated to impact the uniqueness of land. One reason for this is that it would be strange and absurd if a vendor could raise the principle as a jurisdictional basis (or defence) for denying specific performance to a purchaser. Such would create a moral hazard for vendors who may deploy the principle to shield contractual obligations. Instead, the principle should be regarded as a discretionary factor that the court may consider for denying specific performance. As shown below, the principle may (yet) qualify as a jurisdictional factor only to support a purchaser's claim that a property is unique.

The discretionary factors essentially constitute secondary considerations while the jurisdictional factors are primary. Non-satisfaction of the jurisdictional factors will simply cause courts to treat contracts as not deserving equitable enforcement. Where the jurisdictional factors are satisfied, but specific performance is not granted for discretionary reasons, the innocent party may claim and receive equitable damages in lieu of specific performance.[15]

B The Nature of the Entitlement Accruing from Unconditional Contracts for the Sale of Land

The prevailing principle is that an unconditional land sale contract creates an equitable interest in a purchaser's favour.[16] But this principle is controversial and has evoked divergent judicial and academic opinions.[17] Three theories prevail regarding the analysis of the principle.[18]

The first theory is that a purchaser automatically secures an equitable interest in the subject property upon entering an unconditional contract for the sale of land. This theory renders the vendor

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14 *Overland Development Ltd v Dong* [2018] NZHC 2225; and *Butler v Countrywide Finance Ltd* [1993] 3 NZLR 623 (HC).

15 See *Hillam v Leduva Pty Ltd* [2010] NSWSC 1360; *Riverton City Ltd v Haddad* (1986) 40 WIR 236 (Court of Appeal of Jamaica); and *Perkins v Purea* (2009) 10 NZCPR 851 (CA).

16 *Oughtred v Inland Revenue Commissioners* [1960] AC 206 (HL) at 240–241; and *Lysaght v Edwards* (1876) 2 Ch D 499 (Ch) at 506–515.

17 See PG Turner "Understanding the Constructive Trust between Vendor and Purchaser" (2012) 128 LQR 582. See also Jacob J Meagher "(Re-defining) the trust of the specifically enforceable contract of sale – the vendor purchaser constructive trust" (2018) 24 T & T 266.

18 See the Canadian case of *Martin Commercial Fueling Inc v Virtanen* (1997) 144 DLR (4th) 290 (BCCA) at [8].

a constructive trustee for the purchaser's benefit.[19] An implication of this theory is that accretion in the property's capital value accrues to the purchaser from the time of formation.[20] Equally, the risk of damage or destruction to the property is from that moment transferred to the purchaser, except if there are contractual rules or terms stating otherwise.[21] This theory has its foundations in the doctrine of (equitable) conversion. The doctrine takes an agreement to convey an interest in the property as effectively conveying that interest even if other legal formalities are yet to be satisfied.[22] Where this theory applies, judges tend to be inclined to award specific performance, as it is assumed that the purchaser has already acquired an equitable interest in the subject property.[23]

The second and third theories appear similar in that they consider the said trust relationship between the vendor and purchaser to be a fiction of convenience only. According to both theories, a constructive trust comes into existence (in the purchaser's favour) the moment the purchaser has performed his side of the bargain (eg through part payment of the contract price). According to both theories, the mere formation of the contract does not create an equitable interest in the property. It is the performance on the part of the purchaser that effectuates the trust.

However, both theories differ on a crucial point. The second theory is also known as the "relation-back" theory.[24] It takes the view that although a constructive trust is perfected when the purchaser performs his side of the bargain, the trust relates (back) to the moment of contractual formation. On the other hand, the third theory holds that a trust relationship only takes effect prospectively.[25] Proponents of the third theory have criticised the other two for holding that the trust relationship relates to the moment of contractual formation, as that would mean that the purchaser is entitled to rent and other income earned on the land from the moment of formation.[26] Proponents of the third

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19 See for example *Lake v Bayliss* [1974] 1 WLR 1073 (Ch); and *Freevale Ltd v Metrostore (Holdings) Ltd* [1984] Ch 199 (Ch).

20 See Mark Pawlowski and James Brown "Sale of Land and Personal Property: The Purchaser as Beneficial Owner?" (2020) 34 TLI 63 at 66.

21 See for example *Planet Kids Ltd v Auckland Council* [2013] NZSC 147, [2014] 1 NZLR 149 at [142]–[144]; *Paine v Meller* (1801) 6 Ves Jun 349, 31 ER 1088 (Ch).

22 See Simon Gardner "Equity, Estate Contracts and the Judicature Acts: *Walsh v Lonsdale* Revisited" (1987) 7 OJLS 60.

23 See for example *Zhang v Zhai* [2014] NZHC 1026, [2014] 3 NZLR 69 at [52].

24 See the Canadian cases of *Terasen Gas Inc v Alpha Manufacturing Inc* 2012 BCCA 444, [2013] 2 WWR 215 at [28]; and *Clem v Hants-Kings Business Development Centre Ltd* 2004 NSSC 114, (2004) 224 NSR (2d) 265 at [10].

25 See for example *Rayner v Preston* (1881) 18 ChD 1 (CA) at 11–12; and *Carydis v Merrag Pty Ltd* [2007] NSWSC 1220, (2007) 13 BPR 24,773 at [41].

26 See *Jerome v Kelly (Inspector of Taxes)* [2004] UKHL 25, [2004] 1 WLR 1409 at [32].

theory hold that forming a contract for the sale of land creates no form of equitable interest in land – it only creates contractual rights and obligations until the purchaser performs his side of the bargain.[27]

The position is more complex in New Zealand as we find a cobbling of the first and second theories. The High Court appeared to have embraced and accepted the first theory in *Whiteleigh Holdings Ltd v Whiteleigh Pacific Resources Ltd*.[28] It was reasoned that so long as the contract remained specifically enforceable, then equity "treats the purchaser as owner of the land, subject to a condition that the purchase money is paid. The vendor no longer, in equity, is owner of the land".[29] The Court explained that the property only returns to the vendor if specific performance could not be awarded. For example, where the contract cannot be specifically performed, the vendor "will again become owner of that equitable estate".[30]

But in *Bevin v Smith*, while seemingly upholding *Whiteleigh*, the Court of Appeal expressed a more nuanced and broader view bearing elements of the first and second theories.[31] The Court reasoned that where there is a contract for the sale of land, the purchaser acquires an equitable interest in the land subject to the availability of specific performance. The Court reasoned that this was so even though the contract was not unconditional. The Court went on to explain that specific performance does not mean the decree of "performance of the contract" but the availability of all forms of equitable remedies upholding the transactional expectations of the purchaser – eg a negative injunction. In the Court's consideration, upon contract formation, a species of (conditional) institutional constructive trust came into existence in favour of the purchaser. Further, where the court grants specific performance, accretion in the property's capital value since contractual formation becomes the purchaser's entitlement. The Court ruled that the vendor became a fiduciary to the purchaser concerning the land and its capital value.

The Court made these broad-brush assertions, it appears, on account of the facts peculiar to that case and the need to provide adequate justice to the purchaser. I argue that the Court could have done so without following the rationales of the first and second theories. A contract for the sale of land is always a contract and only creates (substantive) equitable interests once the purchaser has done all that was necessary to complete the bargain, which would make it unlawful for the vendor to resile from the sale contract. Until performance, a purchaser at best secures "mere equities" in the property, which can be protected with remedies such as an injunction or the right to register a caveat against the

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27 See *Golden Mile Property Investments Pty Ltd (in liq) v Cudgegong Australia Pty Ltd* [2015] NSWCA 100, (2015) 89 NSWLR 237 at [98]–[112].

28 *Whiteleigh Holdings (New Zealand) Ltd (in rec) v Whiteleigh Pacific Resources Ltd* (1987) 8 NZCPR 598 (HC).

29 At [26].

30 At [26].

31 *Bevin v Smith* [1994] 3 NZLR 648 (CA).

vendor's title.[32] Such equities enable purchasers to onsell the subject property to a sub-buyer and vest in the purchaser a right to institute legal action to compel the vendor's estate to respect the bargain.[33] But, I argue that it would be wishful to claim that an "institutional" constructive trust exists in favour of the purchaser given that no substantive equitable interests accrue until jurisdictional factors are satisfied.

As rightly decided in *Batchelar Centre Ltd v Westpac New Zealand Ltd*, it is unusual to superimpose a constructive trust on parties to a land sale, except if there were imperative justice grounds for it.[34] The Court rejected the argument for a constructive trust, stating that the parties were "experienced commercial operators, contracting at arm's length for the sale and purchase of a commercial property".[35] Also, since the purchaser was not in a situation of vulnerability vis-à-vis the vendor, there was nothing to stop the vendor from advancing their commercial interest. The Court explained the approach taken in *Bevin* as necessitated by the need to avoid the vendor derogating from the quality of the grant expected to inure to the purchaser.[36] One can rationalise the *Bevin* decision on two probable grounds – either as a case of remedial constructive trust (as opposed to "institutional" constructive trust) or based on terms *implied by facts* to avoid unconscionability.

Construing a trust relationship has implications for an innocent party's entitlement to damages in lieu of specific performance, and cobbling the first and second theories bears doctrinal uncertainty in this regard. Is it that a purchaser, who is deemed to have equitable interest based on a contract, is entitled to damages in lieu and freed from the strictures of mitigation where jurisdictional factors are not satisfied? As this article argues, whenever a party satisfies the jurisdictional basis for specific performance, damages in lieu should be freed from the strictures of mitigation – but not so where the jurisdictional basis is not satisfied. In such situations, the innocent party must mitigate their losses, where reasonably possible. From the moment of a breach, in circumstances where the jurisdictional bases are satisfied, the innocent party can convert that entitlement into its financial equivalent. This article makes a case for adopting the third theory.

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32 See Jack Wells "What is a Mere Equity?: An Investigation of the Nature and Function of So-called 'Mere Equities'" (PhD Thesis, University of York, 2019) at 12–20.

33 McMorland, above n 11, at 373–377.

34 *Batchelar Centre Ltd v Westpac New Zealand Ltd* [2015] NZHC 272, (2015) 15 NZCPR 726.

35 At [142].

36 At [145].

III THE ANTIQUATED ASSUMPTION THAT LAND IS UNIQUE AND THE PRACTICAL REALITIES THAT SHAPE LAND SALE TRANSACTIONS IN NEW ZEALAND

Semelhego v Paramadevan marks Canada's departure from the tradition of treating land as unique.[37] The following statement by Sopinka J was pivotal:[38]

> While at one time the common law regarded every piece of real estate to be unique, with the progress of modern real estate development this is no longer the case. Residential, business and industrial properties are all mass produced much in the same way as other consumer products. If a deal falls through for one property, another is frequently, though not always, readily available.

Below, we discuss major criticisms observers have made against this approach. But at this stage, the concern is to side with the *Semelhego* reasoning, and demonstrate that it aligns with the realities of the New Zealand property market. The main objective is to show that the assumption that land, as a subject of exchange, is generally unique is antiquated and no longer sustainable. To this end, two main themes shall be pursued here. The first is to closely examine the term "land" and assess whether the presumed uniqueness of land remains a general truism. The second theme is to show that land's uniqueness (or otherwise) is contingent upon the interactions of demand and supply conditions.

A A Functional Definition of Land in the Modern Society

When discussing land in common parlance, we tend to think of a (considerably) defined parcel of the fixed earth crust, which persons may use for social or economic purposes. This view considers that so long as land is fixed, each parcel of land is unique and difficult to substitute. This viewpoint strongly influences the judicial conception of land, particularly concerning the award of specific performance. Barwick J expressed this sentiment in his dissenting judgment in *Loan Investment Corporation of Australasia v Bonner* when he said:[39]

> 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.

The use value of a piece of land based on physical features informs such a perception. That perception reflects the worldview of pre-industrial times, where land was desired primarily for characteristics such as soil quality or mineral deposits.[40]

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37 *Semelhago v Paramadevan* [1996] 2 SCR 415 at [20].

38 At [20]. See also *Watkins v Paul* 511 P 2d 781 (Idaho 1973) at 783.

39 *Loan Investment Corporation of Australasia v Bonner* [1970] NZLR 724 (PC) at 745.

40 See the Canadian cases of *Inmet Mining Corp v Homestake Canada Inc* 2003 BCCA 610, (2003) 24 BCLR (4th) 1; and *Lac Minerals Ltd v International Corona Resources Ltd* [1989] 2 SCR 574.

Even in the "industrial economy", land was not perceived with such simplicity, given that land can be put to different uses, especially with the aid of science, techniques, and technology. With the aid of these resources, deficiencies in land can be improved. If one ends up with a less desirable piece of land on account of physical properties, there are measures to compensate for such defects.[41] An agricultural parcel that turned out to be less fertile could be improved using proper treatments and methods. A parcel (whether for residential, agricultural, or industrial purposes) with physical disadvantages such as topography or gradient issues can be corrected using techniques to the extent that such techniques are economically affordable. With high-rise structures, we can make up for spatial inadequacies.

In our post-industrial society, land use is further detached from physical properties. In this age, where service provision accounts for the most significant share of human socioeconomic engagements, land is mostly about locational space.[42] In other words, land is primarily a physical setting for pursuing socioeconomic activities and is desired and valued for the activities or outcomes it can support.[43] As rightly observed, this reality explains why there is:[44]

> … often [a] huge discrepancy between the 'replacement cost' of a home calculated for insurance purposes and the actual market price it commands: the difference between the two is essentially the value of the land in that particular place.

This reality does not eliminate the relevance of physical attributes in conceiving what land is. It simply means that the uniqueness or otherwise of land depends on its utility to users. But the uniqueness or otherwise of land is not limited to the preferences of land users. The factors that influence vendors of land to make them available for sale are also important because they impact the transaction costs confronting purchasers when seeking alternatives. Thus, we now examine the implications of factors of demand and supply of land for the uniqueness of land.

B The Factors of Demand and Supply

The functioning of market regimes depends on the interaction of demand and supply factors.[45] The demand side of the property market encompasses all those factors that account for the desire to

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41 See Tschangho John Kim and others "Technology and Cities: Processes of Technology-Land Substitution in the Twentieth Century" (2009) 16 Journal of Urban Technology 63.

42 Josh Ryan-Collins, Toby Lloyd and Laurie Macfarlane *Rethinking the Economics of Land and Housing* (Zed Books, London, 2017) at 4.

43 At 4–5.

44 At 6.

45 See Peter Nunns "The causes and economic consequences of rising regional housing prices in New Zealand" (2021) 55 New Zealand Economic Papers 66.

own or occupy land.[46] The supply side comprises all those factors determining the "effective" availability of land for the various purposes users may demand land for.[47]

The major factors affecting land demand are financial costs and the user's taste or preferences. Financial costs concern the monetary sacrifice purchasers of land are willing to pay or give up to secure ownership of a space.[48] On the other hand, when we talk about the user's tastes, we are concerned about the subjective assessment of value attached to land by a user, given their scale of preference. But these two factors are often intertwined, creating what is known as the "substitution effect" – the degree to which the demand for a piece of land will change in response to the prices of other substitute pieces of land.

Given that the demand side of the property market is characterised by competition amongst purchasers, those spaces that possess the most desirable features (for specific uses) will tend to command high prices. Thus, the uniqueness or non-substitutability of a given parcel or space will depend on the interaction of these two factors. For example, suppose a farmer desires a parcel of land with water rights, for which he is willing to pay $1.5 million but is unsuccessful in his bid for the land. He may find an alternative piece of land valued at $1 million, without water rights but with a sound water storage system, to be a substitute.[49]

Two factors primarily shape the supply side of the market. The first is regulatory restrictions, such as restrictive covenant agreements, zoning laws, council consent requirements, and resource management laws that determine what (or how) land may be deployed for specific purposes.[50] The second relate to the expectations of landowners' economic returns over land investments.[51] Where landowners have lukewarm investment spirits because they fear the economic climate is not promising, there will be a land supply shortage relative to demand. Where these two factors take

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46 See Michael Ball, Colin Lizieri and Bryan D MacGregor *The Economics of Commercial Property Markets* (Routledge, London, 1998) at 41–75.

47 Alan W Evans *Economics, Real Estate and the Supply of Land* (Blackwell Publishing, Oxford, 2004) at 11–28.

48 See Song Shi, Jyh-Bang Jou and David Tripe *Policy Rate, Mortgage Rate and Housing Prices: Evidence from New Zealand* (May 2013). See also Meltem Chadwick and Aynaz Nahavandi *How Does Monetary Policy Affect the New Zealand Housing Market Through the Credit Channel?* (Reserve Bank of New Zealand, AN2022/09, June 2022).

49 This is analogous to the concept of "functional equivalence" discussed in *Marlborough District Council v Altimarloch Joint Venture Ltd* [2012] NZSC 11, [2012] 2 NZLR 726. See also the Canadian cases of *Canamed (Stamford) Ltd v Masterwood Doors Ltd* (2006) 41 RPR (4th) 90 (ONSC) at [98]; and *Parsonage v Operations North (1999) Ltd* 2014 ABQB 675 at [38].

50 New Zealand Productivity Commission *Using land for housing* (September 2015) at 93–202.

51 See Elizabeth Watson *A closer look at some of the supply and demand factors influencing residential property markets* (Reserve Bank of New Zealand, AN 2013/11, December 2013).

negative manifestations, the response of the supply side in making land available to those who could otherwise afford them would be inauspicious. Such a situation may be described as "negative land supply elasticity".[52]

The focus now turns to the interaction between demand and supply, drawing on insights from the dynamics of selling and purchasing residential property. As an aspect of the property market, residential property sales provide significant insights into the general workings and stakes influencing the property market. Matters of residential property sales occupy high levels of importance to government and policymakers and the generality of private citizens. Policymakers are primarily concerned about correcting the market failure problems that affect the market, particularly the affordability of homes, which is vital for positive socioeconomic outcomes. On the other hand, private actors engage heavily with residential property as it is considered the safest investment asset in New Zealand.[53] This reflects the tying of much of bank lending to residential property development or purchase.[54]

The demand side for property is mostly characterised by three types of actors:

(i) Those who buy as owner-occupiers with the primary intention of using the property as a residence while hoping secondarily for accretion in its capital value.[55]
(ii) Those who buy as investors with the hope to commercialise the property through renting or redevelopment.[56]
(iii) Those purchasers who buy as speculators hoping to engage in a profitable resale.[57]

It is often difficult to distinguish between the second and third types of purchasers because some of the second class may easily switch from their intention to commercialise property through renting to actualising returns through reselling.

The first class of purchasers (ie owner-occupiers) are primarily concerned with the residential value of property to themselves. Apart from financial factors (eg access to finance, income, market price), their preference and demand substitutability conditions are determined mainly by:

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52 See New Zealand Infrastructure Commission *The decline of housing supply in New Zealand: Why it happened and how to reverse it* (March 2022).

53 Fennee Chong "Does Reit Offer a Better Risk and Return Contour to the New Zealand Residential Property Investors?" (2018) 13 Studies in Business and Economics 61.

54 See Patrick Aguiar Carvalho, Ben Baker and Ashley Farquharson *Housing as an Investment Asset in New Zealand: Looking at risk-adjusted portfolio choices* (Reserve Bank of New Zealand, AN2022/07, June 2022) at 5–9.

55 See Yang, above n 4, at 22–29.

56 At 25–27.

57 At 25–27.

(i) locational desirability or suitability (eg proximity to shops, parks, and schools for children);[58] and

(ii) features of the property (eg, size, defects, access to light and the number of rooms).[59]

The second class of purchasers (ie investors who seek rental income) are confronted with the same factors that affect the first class of purchasers. This is because they seek to attract and satisfy tenants' expectations with the same considerations as the first class of purchasers. As the third class of purchasers (ie land speculators) are driven by resale profit expectations, the residential use of the property is not of immediate or direct relevance to them, except to the extent that such features may impact resale profitability.

As evident, supply elasticity has implications for how purchasers can exercise their options in the market. If Seller X refuses to sell to Buyer, Buyer may switch to Seller Y, Z or other vendors. For this reason, the extent to which purchasers may switch to alternatives will depend on the preferences that shape their demand. For example, in situations of vendor default, the first class of purchasers (ie owner-occupiers) would appear more likely to be confronted with difficulties in a market of supply insufficiency to find substitutes that satisfy their demand conditions. Similarly, the second class of purchasers (ie investors who seek rental income) will have the same issues as the first class of purchasers. Under the same supply conditions, the third class of purchasers are less likely to be affected by substitutional constraints. Residential conditions are not vital to their considerations, given that their concern is to make resale profits. Thus, a land supply deficiency in a specified location would significantly hamper substitutability to the first and second class of purchasers but not the third.

We can use insights gained from the dynamics of the residential property market to explain the other aspects of the property market, such as buying for the location of businesses (eg industrial plants or farmlands). Farmers may want to buy for proximity to water and water rights. Manufacturers or industrial plants may consider it vital to acquire locational space close to inefficient competitors, providers of services complementary to theirs, or their commercial network(s).

IV HOW JUDICIAL OUTCOMES ON SPECIFIC PERFORMANCE MEASURE UP TO PROPERTY MARKET REALITIES

Having highlighted the practical realities that shape property market dynamics, it becomes pertinent to analyse how the judicial attitude towards specific performance measures up to such realities. This part is divided into two sections. The first section assesses how courts have dealt with

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58 See Mario A Fernandez *A Review of Applications of Hedonic Pricing Models in the New Zealand Housing Market* (Auckland Council, Discussion Paper 2019/002, February 2019).

59 See for example Michael Rehm "Judging a house by its cover: Leaky building stigma and house prices in New Zealand" (2009) 2 International Journal of Housing Markets and Analysis 57; and Olga Filippova "The influence of submarkets on water view house price premiums in New Zealand" (2009) 2 International Journal of Housing Markets and Analysis 91.

applications for specific performance by innocent purchasers, and the second section examines general judicial attitude towards those by innocent vendors.

A Innocent Purchasers Seeking Specific Performance

Between formation and the time settlement is expected, it is common for purchasers to have paid a deposit. Deposits primarily serve as earnest or commitment payments pending full payment and the fulfilment of other formalities. Deposits serve a dual purpose. On the one hand, they are like a price purchasers pay to secure the completion of the contract by a vendor, entitling the purchaser to obtain an injunction against the vendor should he consider selling to another party. On the other hand, they serve as compensatory security against a purchaser's default.[60] This explains why in situations where a vendor's loss exceeds the value of the deposit paid, the vendor may obtain damages with an account given for the value of the deposit received.[61] I argue that even though it is agreeable that steps taken by a vendor to sell to another party (despite having received a purchaser's deposit) would usually qualify as improper, it is not illegal for the vendor to take such steps.

The prevailing judicial attitude in New Zealand is that specific performance would generally be awarded in favour of purchasers. In *Foreman v Hazard*, Richardson J in the New Zealand High Court said:[62]

> Land is always treated as being of unique value in respect of which the common law remedy of damages is inadequate so that the remedy of specific performance is available to the purchaser as a matter of course unless, following settled principles, the Court refuses the remedy.

Judicial outcomes of a selection of recently decided cases confirm this attitude. But as will be demonstrated, these are cases where damages could otherwise have provided a sufficient remedy to the purchaser. The presumption of uniqueness prevents an enquiry about damages' adequacy (or otherwise) to the purchaser. By so doing, the presumption of uniqueness excludes the need for judicial assessment of whether the contractual conditions between the parties truly deserve the application of an exceptional remedy like specific performance.

In *Mao v Singh*, the Court of Appeal decided in favour of a purchaser.[63] The purchaser had agreed to buy the defendant vendor's property for about $1.6 million, and the purchaser paid a deposit of 10 per cent of the purchase price. But the vendor sought to cancel the contract based on a technical ground, which the Court did not permit. The Court surmised that one of the primary motivations for

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60 *Property Sales Direct Ltd v Hawken Lane Development LP* [2022] NZHC 1735, (2022) 23 NZCPR 440; and *Garratt v Ikeda* [2002] 1 NZLR 577 (CA).

61 See *Ng v Ashley King (Developments) Ltd* [2010] EWHC 456 (Ch), [2011] Ch 115.

62 *Foreman v Hazard* [1984] 1 NZLR 586 (CA) at 594. See also *McLean Tower Ltd v Ash Road Investments Ltd* [2007] NZCA 307 at [27].

63 *Mao v Singh* [2022] NZCA 390, (2022) 23 NZCPR 477.

the vendor wanting to rescind was to enable her to exploit the market potentials of the property through sale to another party as that property's sale value was rising. However, the purchaser sought the property for redevelopment. The Court of Appeal upheld the decision of the High Court to enforce the contract specifically. This was so even though there was no judicial enquiry as to the uniqueness or non-substitutability of the land to the purchaser's commercial interest. It appeared that the buyer could find alternative land but at a higher price. Such a price differential was something compensatory damages would adequately address.

In *Meates v Topliss*, the vendor agreed to sell her farm block to the buyers for $400,000, and the purchasers paid a deposit towards the execution of the contract.[64] But before settlement, the vendor repudiated, arguing that the purchasers had unduly pressurised her to agree to the sale. The Court rejected the vendor's claim of duress and held that the contract was valid and enforceable, and specific performance was decreed. The facts of the case do not indicate that damages would not have provided an adequate remedy to the purchaser.

We find a similar outcome in *Nguyen v SM & T Homes Ltd*.[65] The vendors sought to frustrate the successful auction bid of the purchaser. They did so by denying that they had signed the post-auction contract of sale and that they had directly received the purchaser's deposit payment – when, in fact, their sales agent had signed the contract and received the deposit on their behalf. The Court decreed specific performance of the contract without assessing the remedial adequacy, or otherwise, of damages.

In *Shand v Gardner Hotels Ltd*, the purchaser had agreed to purchase the vendor's hotel (and business) and had paid the deposit towards the contract's execution.[66] However, the purchaser had sought some extension of the settlement date, causing the date to pass without the purchaser settling. The Court found the contract still in existence as neither of the parties had cancelled it. The vendor entered agreements to sell to someone else, and the purchaser sought specific performance. Awarding specific performance, the Court considered that damages would not appear to be an adequate remedy without justifying that position. Ironically, however, the Court considered that the effect of specific performance in depriving the other person of the possibility of buying the property would not cause them an exposure to misfortune as they had "sought to invest in the hotel business as a commercial investment"[67] – the very same motivation the claimant had for purchasing the property!

A primary mischief of the approach is that it does not encourage mitigation (ie the purchaser's search for substitute property on the market). Instead, it encourages purchasers to insist on a vendor's

64 *Meates v Topliss* [2021] NZHC 2717, (2021) 22 NZCPR 590.

65 *Nguyen v SM & T Homes Ltd* [2016] NZCA 581, [2017] 3 NZLR 281.

66 *Shand v Gardner Hotels Ltd* (2004) 5 NZCPR 467 (HC).

67 At [42].

performance when they could have sought an alternative property suitable to their needs, cancelled the contract and demanded deserved reparations.

A case which exposes the unreasonableness of this approach is *Zhang v Zhai*.[68] In *Zhang*, contractual execution occurred in 2003, and the purchaser paid the deposit. The only matter left was that the vendor needed to secure a code of compliance certificate for the property. Although the purchaser had, against the property, lodged caveats (which eventually lapsed) in 2003 and 2008 and had issued a settlement notice against the vendor in 2012, it was only about 10 years after the contract of sale was formed that the purchaser proceeded with an application for specific performance. In 2003 (when the agreement was formed), the house price was $348,000. By the time of application for specific performance (in 2012), the property's market value was about $540,000. The purchaser claimed that only $65,000 remained due to the vendor as the balance of the purchase price, per the terms of the 2003 contract.

The vendor raised some arguments against the purchaser's application. One was that the contract had lapsed over time – an argument the Court rejected on the reasoning that the contract was very much enforceable since the parties had not mutually terminated it, nor had it become frustrated or impossible to perform. The second argument was that laches disfavoured the grant of the application. Still, the Court refused this argument since the purchaser had not given the vendor any impression that they had abandoned the contract. The Court further reasoned that laches could hardly apply against the purchaser given that he had acquired equitable title in the property by dint of the contract of sale.

In a follow-on determination of the matter, this time regarding the computation of compensatory interest for the vendor's delay in settlement, the vendor argued that the purchaser should have mitigated by seeking a substitute property on the market.[69] The Court rejected this argument saying:[70]

> … there is no support for the defendants' submission that the plaintiff was required to mitigate his losses. This principle is relevant to assessing the level of damages, not in the context of an order for specific performance, in which case the claim is not for any "loss". Reference to the Canadian decisions is misguided as that jurisdiction has taken a different approach in terms of the presumption of specific performance as the appropriate remedy in sale of land cases. *In New Zealand law, specific performance is still the primary remedy for breaches of contracts for the sale of land, and issues of mitigating loss do not come in to the equation.*

In other words, the Court reasoned that the mitigation criterion only applies when compensatory damages are sought. It does not apply where there is a risk of losing the property bargained for or

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68 *Zhang v Zhai*, above n 23.

69 *Zhang v Zhai* [2014] NZHC 2156.

70 At [27] (footnote omitted) (emphasis added).

where the purchaser continues to insist on performance or has applied for specific performance. Such a distinction is only technical and lacking in substance. As rightly reasoned by the Canadian Supreme Court in *Asamera Oil Corp Ltd v Sea Oil & General Corp*:[71]

> Before a plaintiff can rely on a claim to specific performance so as to insulate himself from the consequences of failing to procure alternate property in mitigation of his losses, some fair, real, and substantial justification for his claim to performance must be found.

Therefore, a purchaser only has legitimate justification for not seeking mitigation where the subject property is demonstrably unique or non-substitutable to them.

In other cases, New Zealand courts have considered the uniqueness factor in determining whether to award or reject an application for the remedy. An example of a case where the court reasoned that lack of uniqueness could justify the decline of specific performance is *Landco Albany Ltd v Fu Hao Construction Ltd*. The Court reasoned that:[72]

> In any event, the respondent's interest in the land is plainly commercial rather than private or sentimental. It must have entered into the transaction in order to make a profit, and in those circumstances damages would be an adequate remedy.

In other cases, the uniqueness of the land to the purchaser was the basis for the remedy's decree. A good example is seen in the case of *Melco Property Holdings (NZ) Ltd v Hall*.[73] In this case, the Court awarded specific performance because of the uniqueness of the subject land to the purchaser. The uniqueness lay in the subject land being the only one available and most conducive to the purchaser's business expansion plans. Also, in *Solomon v Johnson*, the Court took the land's uniqueness to the purchaser as a decisive factor warranting the award of specific performance.[74] The Court reasoned that the land was non-substitutable to the purchaser, as they had their house on the land – a house which was impossible to transplant to another location. Finally, another noteworthy case which involved examining the uniqueness factor is *McCaw v Owen.*[75] In that case, the Court considered the land unique to the purchaser because of the purchaser's sentimental attachment to the land. The purchaser had moved onto it and started working on it, and they considered it their ancestral home.[76] This confirms the assertion that tikanga relating to 'family base' may affect the uniqueness of land to a purchaser.

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71 *Asamera Oil Corp Ltd v Sea Oil & General Corp* [1979] 1 SCR 633 at 668.

72 *Landco Albany Ltd v Fu Hao Construction Ltd* [2006] 2 NZLR 174 (CA) at [43].

73 *Melco Property Holdings (NZ) Ltd v Hall* [2022] NZHC 1180, (2022) 23 NZCPR 354.

74 *Solomon v Johnson – Te Mata E3 Block* (2017) 139 Waikato Maniapoto MB 240 (139 WMN 240).

75 *McCaw v Owen* [2021] NZHC 1686, (2021) 22 NZCPR 399.

76 See *Raymond v Raymond Estate* 2011 SKCA 58, (2011) 371 Sask R 260.

Having discussed the prevailing judicial approach in New Zealand concerning applications by purchasers for specific performance, we now shift to examining the attitude of courts towards applications for the remedy by vendors against purchasers.

B Innocent Vendors Seeking Specific Performance

Sometimes, when a purchaser wants to back out of a contract for the sale of land, the vendor will be happy to see them go and may be able to retain the deposit. Our concern is when the vendor wants the purchaser to perform their side of the bargain. The Canadian case of *Dick v Dennis* exemplifies one of the direst situations where the question of whether specific enforcement of a land sale contract can be overly critical to both vendors and purchasers.[77] The situation was such that the determination of the case could provide an escape from economic straits to the vendor but throw a purchaser whose conditions have changed into financial misery. The vendor was trying to sell a house in a fallen market. But to make matters worse for the vendor, the property was of a peculiar kind for which there was no demand.

However, the purchaser (despite having paid the deposit) had ceased needing it. He had reconciled with his wife, returned to their marital home, and lost his employment. The vendor wanted specific enforcement, while the purchaser wanted freedom from the transaction. Although the Court decided the case in favour of the vendor, the Court recognised that specific performance is a remedy more suited to protecting a purchaser's interest than a vendor's. A vendor's interest is essentially monetary, and damages can generally address that. Yet, the Court decided to favour the vendor because of the inauspicious market conditions, which made resale difficult, making damages an inadequate remedy. In the circumstances, it appears the Court thought it proper to transfer the burden of reselling the property to the purchaser.

Generally, vendors have a weaker case for specific performance. But in New Zealand, just as the judicial outlook favours purchasers seeking the remedy, it also favours vendors.[78] The chief consideration favouring vendors is not the presumption of land's uniqueness. Instead, it is the perceived imperative to uphold the sanctity of contracts.[79] Judging from the prevailing body of case law, a purchaser usually must perform his contract to buy land unless the purchaser can demonstrate economic hardship or impecuniosity.[80] Such economic hardship must be one that had already existed at the time of contractual formation, not a subsequent one.[81] A subsequent hardship may, however,

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77 *Dick v Dennis* (1991) 20 RPR (2d) 264 (ONCJ).

78 See *Sanderson v Neutze* [2019] NZHC 2471 at [16].

79 See *D'Arcy-Smith v Stace* (2003) 10 TCLR 788 (HC) at [30]; and *Sudbrook Trading Estate Ltd v Eggleton* [1983] 1 AC 444 (HL) at 478.

80 *Great Northern Land Co Ltd v Crowley* (2010) 13 NZCPR 38 (HC).

81 *Baker v McLaughlin* [1967] NZLR 405 (SC) at 414.

be considered by courts. The main reason why hardship works to excuse performance is that equity will not act in vain by ordering performance that would be impossible.[82] Whenever a purchaser desires to be freed from a sales contract, the court would require the purchaser to provide substantial proof of their economic difficulties.[83] This would usually be either that the purchaser cannot raise finance or that the mandated purchase would seriously complicate the purchaser's situation of indebtedness.[84]

In *Waitarere Rise Ltd v Rangi,* apart from the Court categorically reiterating that purchasers who claim hardship must prove it substantially, the Court stated that the vendor's interest becomes essential in a fallen market.[85] While it is agreeable that the purchaser's default may have caused the vendor to lose an opportunity to sell in a more auspicious market, the vendor could still have sold in the fallen market and claimed damages for the difference. Such a loss is not one that damages could not make up for. The Court did not identify any factor rendering a resale by the vendor impossible. I argue that this accentuates the often-ignored centrality of mitigation to the uniqueness criterion.

V LESSONS FROM CANADIAN LAW

Based on the foregoing analysis, particularly the discussions presented in Parts III and IV of this article, it is discernible that the prevailing approach towards the specific enforcement of land sale contracts needs to be in tune with the realities that characterise the New Zealand property market. In this regard, I argue that we should look to Canadian law for lessons, as the law of that jurisdiction aligns more with the realities of the New Zealand market.

As noted in Part III, Canadian law does away with the presumption of uniqueness. The starting point seems to be "whether the plaintiff has shown that the land rather than its monetary equivalent better serves justice between the parties".[86] At the heart of that enquiry is the factor of substitutability of the land to the purchaser. However, the enquiry is slightly different in cases where the vendor seeks the remedy. The question is whether the vendor had tailored the property to the purchaser's specifications or rearranged their affairs, making it difficult for the vendor to find alternative purchasers on the market.[87] That enquiry centres on the non-substitutability of the purchaser to the vendor – which, expressed differently, means that the vendor would have significant difficulties finding alternative purchasers to whom the property is suitable. As shown below, the rationale behind

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82 *Matarangi Beach Estates Ltd v Dawson* (2008) 6 NZ ConvC 194,667 (HC).

83 *Ngai Tahu Property Ltd v Dykstra* (2009) 10 NZCPR 734 (HC); and *Northwest Developments Ltd v Xue* [2019] NZHC 1042.

84 *Millbrook Country Club Ltd v SFM Investments Ltd* (2009) 11 NZCPR 139 (HC); and *Verano Properties Ltd v De Luen* (2010) 11 NZCPR 859 (HC).

85 *Waitarere Rise Ltd v Rangi* (2010) 11 NZCPR 224 (HC) at [32].

86 *John E Dodge Holdings Ltd v 805062 Ontario Ltd* (2001) 56 OR (3d) 341 (ONCJ) at [55].

87 *Comet Investments Ltd v Northwind Logging Ltd* (1998) 22 RPR (3d) 294 (BCSC).

both standards is the criterion of mitigation, which plays a "disciplinary" role on innocent parties. It ensures that they do not insist on the performance of a contract where there is substitute land (in applications by purchasers) or alternative purchasers (in applications by vendors).[88]

It is essential to parse each standard and then assess criticisms against them. Then only will the pertinence of both standards to New Zealand law and the realities of the property market become more apparent.

A The Standard that Applies to Purchasers

To establish non-substitutability, a purchaser must show that there is no readily available replacement for the subject property in the desired location.[89] The price factors and the property's locational (or socio-physical) features often play a role in determining non-substitutability. In other cases, the price factor and other locational features will determine non-substitutability. In such situations, since the formation of the contract, there has been a general increase in the price of properties. And it will be difficult for the purchaser to afford an alternative property in the location of choice.[90] In other cases, there may or may not be an accompanying price increase, but what is fundamental to non-substitutability are the locational features of the property.

There are two aspects of non-substitutability: subjective and objective. The subjective aspects relate to the time of contracting, while the objective aspects relate to the time of the breach.[91] The subjective aspects are those locational features personal to the purchaser, while the objective aspects are verifiable or observable to other persons. Suppose Mr Ali is a Muslim who wants to buy a three-bedroom house in a suburb. A subjective element that informed his decision may have been the property's proximity to the only mosque in the suburb. That consideration must exist during contracting but need not be expressly brought to the vendor's knowledge. The objective element will chiefly include whether three-bedroom properties near the mosque were available for sale around the time the vendor defaults.

Subjective elements mainly apply to purchasers of residential properties.[92] This is because such purchasers have peculiar needs. They may expect their homes to possess salient features such as proximity to work, prestigious schools, places of worship, and family and friends or to keep out

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88 Scott R Gordon, Howard A Gorman and Gunnar Benediktsson "May You Litigate in Interesting Times: Specific Performance, Mitigation, and Valuation Issues in a Rising (Or Falling) Market" (2018) 56 Alta L Rev 367 at 392–396.

89 *Beier v Proper Cat Construction Ltd* 2013 ABQB 351, (2013) 564 AR 357 at [75].

90 *Randhawa v Legendary Developments Ltd* 2006 BCSC 2006.

91 *Johnson v Benjamin* 2012 NLTD(G) 51, 322 Nfld & PEIR 312 at [89]–[94]; and *904060 Ontario Ltd v 529566 Ontario Ltd* ONCJ 98-CV-145731, 12 February 1999 at [57].

92 *Ali v 656527 BC Ltd* 2004 BCCA 350, (2004) 29 BCLR (4th) 206.

unwanted neighbours. But objective elements would only apply to residential property purchasers at the time of breach when the purchaser is expected to seek mitigation.[93]

However, in commercial purchases, objective elements alone shape substitutability.[94] That is, where a person buys property for commercial purposes, replaceability depends on whether the features sought by the purchaser are ones that prudent observers would consider difficult for the purchaser to find a replacement for. For example, in *Kaur v Moore Estate*, the purchaser claimed that the following features motivated her desire to purchase the subject farm property:[95]

> … it was near the Town of Lindsay, it was bounded by roads on 3 sides, it was capable of growing vegetables which she wished to do, it had a horse track.

The Court found those features to be generic and not unique. Also, the purchaser failed to prove that no substitute farmlands could be bought. Commercial property may be difficult to substitute if the features or locational characteristics desired by the purchaser are essential to the purchaser's business, making the property difficult to find a replacement for.[96] A person who buys property for redevelopment purposes may qualify as buying for commercial purposes and, as such, would be required to show that the land sought to be bought was vital to the redevelopment plans the purchaser had in mind.[97] However, the situation will be different in cases of purchasers who buy a property simply intending to resell on the market (ie speculators).[98] For such purchasers, non-substitutability cannot be maintained to secure specific performance because the purchaser's loss of bargain can be easily expressed or translated into the profits lost owing to the breach.[99] That is an interest which damages will adequately address.

I argue that this standard aligns with the realities of the New Zealand property market and provides a relevant standard for assessing the strength of a purchaser's application for specific performance. As can be gleaned, a contract to buy land remains no different from any other contract. It is only with the

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93 *Beauchamp v DeMan* 2019 ONSC 356.

94 *Canamed (Stamford) Ltd v Masterwood Doors Ltd*, above n 49, at [104].

95 *Kaur v Moore Estate* ONSC Peterborough 1419/98, 23 April 2003 at [69].

96 *Paterson Veterinary Professional Corp v Stilton Corp Ltd* 2019 ONCA 746, (2019) 438 DLR (4th) 374 at [23]–[28].

97 *Global West Development Ltd v 16380 Jane Street Inc* 2021 ONSC 4284 at [38]–[42].

98 *Mondino v Mondino* (2004) 18 RPR (4th) 200 (ONSC).

99 See Hanoch Dagan and Michael Heller "Specific Performance: On Freedom and Commitment in Contract Law" (2023) 98 Notre Dame L Rev 1323 at 1360–1361.

element of uniqueness or non-substitutability that such a contract becomes special and thus deserving of exceptional measures for enforcement.[100]

B The Standard that Applies to Vendors

In the case of vendors wanting purchasers to perform their bargains specifically, they must demonstrate the non-substitutability of the purchaser. There are two main ways to achieve this. One way is for the vendor to establish that they have modified or arranged the property to the purchaser's specification such that it would be difficult for them to find another purchaser interested in the property as it is, particularly at the price the parties had contracted for.[101] This basis will primarily, but not necessarily, apply to commercial vendors. The second way is for the vendor to demonstrate that upon entering a sale contract with the purchaser, they have modified their affairs to a degree such that the purchaser's renegation would expose them to the risk of economic detriment. For example, on the faith of the sale contract, they have unconditionally agreed to buy another property or irretrievably lost sales momentum. This basis will generally apply, but not certainly, to residential homeowners.

Both bases, I argue, would ensure that the vendor secures protection against what in economics is called "asset specificity". Asset specificity is when an asset, the subject of a transaction between a set of parties, acquires more value in that transaction than outside it.[102] In such situations, it is difficult for a party who has invested in that relationship to reverse their investment in the assets and redirect the asset towards alternative uses without significant difficulties or losses.

These proposed bases align with the standard expected of Canadian vendors seeking specific performance. The standard required of vendors is challenging as it requires them to demonstrate a risk of loss beyond a simple reduction in profitability or economic returns. In *Rock Developments Inc v Khalid Alenazi Real Estate Ltd*, the rationale for the standard was explained as follows:[103]

> If specific performance were available in this instance, it would be available in every instance in which a purchaser that walked away from a transaction had, for its own reasons, valued a property more highly than other prospective purchasers, and the vendor had [difficulty] selling at that price.

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100 See Orlando V Da Silva "The Supreme Court of Canada's Lost Opportunity: *Semelhago v Paramadevan*" (1998) 23 QLJ 475 at 490–498.

101 See *Matthew Brady Self Storage Corp v InStorage Ltd Partnership* 2014 ONCA 858, (2014) 125 OR (3d) 121. This extends to situations where the purchaser's use of the property has caused it to suffer deterioration, making resale to another purchaser difficult – for example *Westwood Plateau Partnership v WSP Construction Ltd* (1997) 37 BCLR (3d) 82 (BCSC).

102 See Oliver E Williamson "The Economics of Organization: The Transaction Cost Approach" (1981) 87 American Journal of Sociology 548 at 555–556.

103 *Rock Developments Inc v Khalid Alenazi Real Estate Ltd* 2015 ONSC 5261, (2015) 57 RPR (5th) 311. See also *Comet Investments Ltd v Northwind Logging Ltd*, above n 87, at [39].

If the rule were otherwise, vendors could establish non-substitutability (of the purchaser) if the market has fallen since the purchaser had agreed to pay a higher price. But such a situation is one which compensatory damages can adequately address. This contrasts with the position in New Zealand, as seen in *Waitarere Rise Ltd v Rangi*, where the Court considered that the vendor's entitlement to specific performance was established because the property market had fallen.

C Criticisms of the Canadian Approach

Several academic and policy writings have considered the prevailing Canadian approach, and it is not surprising that many such writings have doubted the propriety of the approach. Much of such criticisms is based on respecting the sanctity of contracts.[104] However, others have based their criticisms on other salient concerns. A few of such other criticisms shall be highlighted and examined.

Davies is one of such commentators who advances two main arguments against the Canadian approach.[105] First, it could complicate the conveyancing process by injecting uncertainty into whether specific performance will be granted to innocent parties. The second is that computation of damages for an innocent party inherently comes with difficulties, which specific performance would otherwise avoid. He opines that incorporating the mitigation principle would add another layer of complication. Ziff has expressed similar concerns, asserting that damages, as a default remedy, is suboptimal because it deviates from the innocent party's preference – the performance of the thing contracted for.[106] Further, the damages quantification exercise, including determining the innocent party's mitigation possibilities, imposes a tax on judicial resources.

Another is Eisenberg, who questions the wisdom of the approach.[107] He argues that (even in modern times) land remains heterogeneous by nature as each locational space bears its individuality. He opines that the homogeneity of land is the exception rather than the norm.[108] Therefore, he argues that the rule(s) for determining the award of specific performance in land sales should start on the basis that each space is unique unless otherwise proven to lack uniqueness.

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104 See Angela Swan and Jakub Adamski "Specific Performance, Mitigation and Corporate Groups: A Comment on *Southcott Estates Inc v Toronto Catholic District School Board*" (2014) 56 CBLJ 104.

105 Paul S Davies "Being Specific about Specific Performance" (2018) 82 Conv 324. See also Mitchell McInnes "Specific Performance and Mitigation in the Supreme Court of Canada" (2013) 129 LQR 165.

106 Bruce Ziff "Death to *Semelhago*!" (2016) 39 Dalhousie Law Journal 1 at 22–25.

107 Melvin Eisenberg "Actual and Virtual Specific Performance, the Theory of Efficient Breach, and the Indifference Principle in Contract Law" (2005) 93 CLR 975.

108 At 1035.

Brenner considers a rather interesting angle in the matter, which other critics do not seem to explore in detail (if at all).[109] Brenner reasons that apart from the fact that damages can be challenging to quantify appropriately, taking damages as the standard remedy for land transactions will often place the innocent party at a remedial disadvantage. He argues that this is primarily because of the remoteness principle (as shaped by the rules established in *Hadley v Baxendale*).[110] He reasons that a purchaser who is an investor who enters a contract with the intention of reselling is exposed to the risk of inadequate compensation because, unless such purchasers disclose that they are investors, they are unlikely to get more than the difference between the contract price and the market price.[111] Where such a purchaser loses an opportunity to improve the value of the subject property to enable the actualisation of higher market returns, they will remain limited to the standard remedial differential (ie the difference between the contract price and the market price).[112] He posits that such a purchaser may incur a loss in a different situation. One such situation is where the purchaser had entered the contract with a view to a sub-sale. Suppose the owner refuses to carry on with the contract, and the sub-purchaser is one to whom the property is non-substitutable (eg a residential purchaser). In that case, the purchaser's damages from the owner may not be able to cover the remedial costs that the purchaser may incur to compensate the sub-purchaser.[113]

Despite the appeal of these criticisms, I argue that they do not hold firm in the face of market realities. The most popular criticism is the need to respect the sanctity of contracts. But contracts are amoral and voluntary obligations that can be broken so long as the loss exposures of innocent parties are duly remedied or remediable, except if there are exceptional factors warranting the prohibition of the breach.[114] Therefore, our concern should primarily be determining the civil remedy most pertinent to preventing or correcting the loss exposures of innocent parties in the relevant context. Also, the argument that the conveyancing system will be adversely affected by the permission of transacting parties to opt out before the stages of settlement and completion is indefensible. There is no empirical evidence that the Canadian land law or conveyancing system has been negatively affected by the line of jurisprudence that has followed from *Semelhago*.

I argue that Brenner's argument that the principle of remoteness can put a transacting party at a remedial disadvantage needs to be reconsidered. What the remoteness principle does in that situation is to require parties with unusual remedial needs to disclose the motivations and expectations behind

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109 Paul J Brenner "Specific Performance of Contracts for the Sale of Land Purchased for Resale or Investment" (1978) 24 McGill LJ 513.

110 At 545–546.

111 At 546.

112 At 546–547.

113 At 555.

114 See Richard A Posner "Let Us Never Blame a Contract Breaker" (2009) 107 Mich L Rev 1349.

their entering into contracts. This way, counterparties are better equipped with information concerning whom they decide to transact with.[115] Therefore, they would be better informed about the remedial liabilities they expose themselves to when contracting with such parties. Thus, if a vendor knows that a purchaser is a reselling investor, they become aware that should they renege on the sale, they risk compensating the purchaser for broader economic losses connected to the breach.[116] It becomes clear that the remoteness principle does not necessarily place parties at a remedial disadvantage; instead, it imposes a disclosure requirement on them. If purchasers risk unusual losses, they should inform the vendors of their idiosyncratic loss exposures.

Finally, we come to Eisenberg's argument that land is inherently unique. As already discussed in Part III, arguments of this nature are unconvincing because, with advancements in science, technology and techniques, the physical features of land matter less in modern times. The locational value of land to people trumps, and such locational peculiarity cannot be assumed or broadly asserted but must be proved case by case.

As already expressed above, thorough discussions about specific performance would technically be incomplete without the treatment of damages in lieu of specific performance. Therefore, the focus now shifts to discussing that remedy, which is a fallback to the issuance of specific performance. Coincidentally, the other line of criticisms heaped at the Canadian approach is connected to the issuance of damages in lieu of specific performance.

VI DAMAGES IN LIEU OF SPECIFIC PERFORMANCE (AND OTHER CRITICISMS OF THE CANADIAN APPROACH)

Instead of specifically enforcing a contract, the courts may reward an innocent party with the monetary value of what specific performance would otherwise have earned them[117] – ie the property's capital value. In such cases, the innocent party would rank damages in lieu above common law compensatory damages. Yet, a defaulting party may request the remedy as a cheaper alternative to performing the contract in unusual situations.[118] By so doing, the defaulting party prefers to pay the property's capital value to the purchaser instead of performing the contract. The standard formula for the remedy is based on the difference in value between the contract price and the prevailing value of

115 See Ian Ayres and Robert Gertner "Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules" (1989) 99 Yale LJ 87 at 101–104; and Omri Ben-Shahar and Lisa Bernstein "The Secrecy Interest in Contract Law" (2000) 109 Yale LJ 1885.

116 Robert L Birmingham "Breach of Contract, Damage Measures, and Economic Efficiency" (1970) 24 Rutgers L Rev 273; and Melvin Aron Eisenberg "The Principle of *Hadley v Baxendale*" (1992) 80 CLR 563.

117 Avery Katz "Reflections on Fuller and Perdue's *The Reliance Interest in Contract Damages*: A Positive Economic Framework" (1988) 21 U Mich J L Reform 541 at 547.

118 See *Leggett v Crowley* [2020] IECA 3.

the property, usually at the time of trial or judgment.[119] The court would assess the property's market potential in determining its resale value.[120] The primary reason is that there may have been a rise or fall in the property's value between the time of the breach and the time of the suit. In the case of purchasers seeking damages in lieu, the claim would often be that since the time of the breach and suit, there has been an increase in the market value of the subject property. Thus, they claim the monetary value of that capital accretion as theirs. In the case of vendors, it will usually be that since the purchaser's breach, there has been a fall in the property's value.

However, courts are not circumscribed to the "time of trial/judgment" differential. The courts may apply a different standard. They may go by the difference in price between the time of the breach and another intermediate period, or they may limit the focus to the measure of capital value that crystalised at the time of the breach.[121] The justice needs of each case inform the deployment of these other standards.[122] For example, if the innocent party unreasonably delays the application for damages in lieu, possibly with the strategic hope that the property's capital value will increase further, the court will assess the capital value based on an earlier date when a remedial application could have been made.[123] In New Zealand, there remains a dearth of legal authority concerning whether a party must mitigate their loss once specific performance is unavailable for discretionary (as opposed to jurisdictional) reasons.[124] I argue that a party who has satisfied the jurisdictional conditions for specific performance should not be subjected to the mitigation criterion, even though their application is eventually refused on discretionary grounds. We now set out our rationale for this argument.

In unusual cases, the value of the property has increased (in the case of a plaintiff-vendor) or fallen (in the case of a plaintiff-purchaser) since the breach. Yet, the innocent party seeks damages in lieu based on the measure of capital value that would have accrued to them at the time of the breach. The New Zealand case of *Turner v Superannuation & Mutual Savings Ltd* provides an excellent example.[125] In that case, after the purchaser failed to comply with the specific performance order, the market value of the subject property increased by 75 per cent between the expected settlement date

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119 For cases of purchasers, see *Souster v Epsom Plumbing Contractors Ltd* [1974] 2 NZLR 515 (SC); and *Grocott v Ayson* [1975] 2 NZLR 586 (SC); for cases of vendors, see *Park East South East Construction Ltd v Benesch* [2013] IEHC 464; and *Joyce v O'Shea* [2009] IEHC 415.

120 See *Duffy v Ridley Properties Ltd* [2005] IEHC 315. See also *Blackley Investments Pty Ltd v Burnie City Council (No 3)* [2013] TASFC 12, (2013) 24 Tas R 424.

121 *Gitmans v Alexander*, above n 1, at [65]; and *Hickey v Bruhns* [1977] 2 NZLR 71 (SC).

122 *New Zealand Land Development Co Ltd v Porter* [1992] 2 NZLR 462 (HC) at 470.

123 *Hickey v Bruhns*, above n 121.

124 Unfortunately, *Zhang v Zhai*, above n 23, does not address this question. Compare the Australian case of *Mills v Ruthol Pty Ltd* [2004] NSWSC 547, (2004) 61 NSWLR 1.

125 *Turner v Superannuation & Mutual Savings Ltd* [1987] 1 NZLR 218 (HC).

and the date of the suit. The purchaser argued that the astronomical accretion in value gained eliminated the vendor's purported loss. Also, they argued that the vendor could have mitigated their loss at the time of the breach by selling to another purchaser. Although the Court rightly decided that the capital value of the subject property should be assessed at the date of the breach, I argue that the Court applied flawed rationales by using considerations that apply to compensatory damages. Based on the mitigation principle, the Court reasoned that the post-breach accretion in value to the subject property arose fortuitously and not due to the vendor's efforts towards mitigation. Therefore, the purchaser could not gain liability-reducing credit for the accretion. The Court also reasoned that the vendor was not bound to resell to another purchaser in mitigation because the purchaser knew from the outset that the vendor was a reluctant vendor who had bought the subject property for their use.

I argue that the Judge could still have awarded the date of breach value using considerations more compatible with the equitable origins of damages in lieu – a remedy not reconcilable to mitigation. I argue that the Judge should have rationalised that differential value as the baseline of the price the purchaser would otherwise have paid the vendor in a hypothetical bargain to be freed from performing the contract. The same reasoning should apply in favour of a purchaser where the value of the subject property has declined since the breach. The purchaser should be able to claim reparation based on the difference between the contract price and market value at the time of the breach.[126]

The justification for this argument can best be understood upon parsing the major criticism(s) made against *Semelhago* – a case pursued by a purchaser where the value of the subject property increased post-breach. In that case, the agreed price for the subject property was $205,000. But at the time of trial, the value of the subject property had risen to $325,000. The purchaser sued for specific performance or (in the alternative, for) damages in lieu but eventually elected for damages in lieu even though the performance of the contract was still possible. The Court granted the election of damages in lieu based on the time of trial/judgment differential, awarding the purchaser the net sum of $80,810.21 after accounting for other expenses the purchaser would otherwise have incurred had specific performance been granted. Was the Court right in reaching this outcome? This brings us to critiques of the decision.

Many of the criticisms hinge on combining the right to (remedial) election with mitigation. The essence of the objection is twofold. The first basis is that a purchaser's right to demand damages in lieu should only arise when the contract becomes difficult to specifically enforce at the time of trial. The second basis is that specific performance is not reconcilable with mitigation.[127] In other words, where a party is entitled to specific performance, they are not required to seek mitigation, but if the remedy is unavailable (for discretionary reasons), they must seek mitigation. Contrarily, *Semelhego*

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126 See Eyal Zamir "The Missing Interest: Restoration of the Contractual Equivalence" (2007) 93 Va L Rev 59.

127 *Southcott Estates Inc v Toronto Catholic District School Board* 2012 SCC 51, [2012] 2 SCR 675. See also a similar, but cautiously expressed, statement in this regard by Edelman J (as he was then) in *Primewest (Mandurah) Pty Ltd v Ryom Pty Ltd as Trustee for Golden Asset Pty Ltd* [2012] WASC 443 at [245].

ruled that the right to specific performance and, alternatively, to damages in lieu arises whenever the subject property is unique. Thus, uniqueness prima facie entitles the purchaser to specific performance, consequentially absolving them of the need to mitigate even if the contract is not specifically enforced for discretionary reasons.[128]

Critics have argued that *Semelhago* enables opportunism for allowing purchasers to elect damages in lieu of specific performance. It has been argued that it would enable purchasers to strategically pursue an application for specific performance by speculating on an increase in the value of the subject property.[129] In essence, a purchaser should only be allowed damages in lieu where insistence on specific performance would be impracticable. They also argue that where the contract is still performable, but the purchaser decides against continuing to purchase the subject property or has found an alternative property, the claim that the property was non-substitutable to the purchaser is weakened.[130]

The critics' arguments are appealing. But these arguments do not seem to appreciate that when a purchaser satisfies jurisdictional requirements for specific performance, the purchaser's interest transforms from that of a mere (prospective) purchaser to that of an equitable owner.[131] Although specific performance may not, in the end (for discretionary reasons), be granted to make the purchaser a substantive owner, such a purchaser's interest is not a "mere equity". At that stage, the purchaser is entitled to treat the vendor as a constructive trustee for benefits or gains derived from the exploitation of the property. It is enough that such a purchaser's entitlement is limited to the "right to capital". Thus, a purchaser satisfies jurisdictional requirements where:

(i) the purchaser has furnished consideration towards the contract (eg paid a deposit); and
(ii) the subject property is unique or non-substitutable at the time of the breach.

Where the jurisdictional requirements are met, it should not matter that the purchaser had mitigation possibilities open to them (post-breach). Also, it should make no difference whether the property's value has risen or declined since the breach. All that matters is that the vendor became a constructive trustee at the time of breach; for it is at that time that the "right to capital" takes effect.

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128 See David Winterton "The relationship between specific performance and mitigation and the distinction between substitution and compensation in contract law" (2013) 7 J Eq 287.

129 See Jonathan Levy "Against Supercompensation: A Proposed Limitation on the Land Buyer's Right to Elect Between Damages and Specific Performance as a Remedy for Breach of Contract" (2004) 35 Loy U Chi LJ 555; and Donald H Clark "'Will That Be Performance ... or Cash?': *Semelhago v Paramadevan* and the Notion of Equivalence" (1999) 37 Alta L Rev 589.

130 David McLauchlan "Expectation Damages: Avoided Loss, Offsetting Gains and Subsequent Events" in Djakhongir Saidov and Ralph Cunnington (eds) *Contract Damages: Domestic and International Perspectives* (Hart Publishing, Oxford, 2008) 349 at 355–356.

131 See James Edelman "Money awards of the cost of performance" (2010) 4 J Eq 122 at 123.

Of course, there is the likelihood that a purchaser may, in such circumstances, be overcompensated, but it is a risk that the vendor brought upon themselves as a constructive trustee.

In the case of the vendor, the right to the financial equivalence of specific performance should accrue from the moment of a purchaser's breach. However, the vendor must satisfy the relevant jurisdictional basis for such entitlement to arise. This would require the vendor to be exposed to the asset specificity condition at the date of breach. That is, the subject property is of such a nature that it has been modified to the peculiar needs of the defaulting purchaser such that finding an alternative purchaser would generally be challenging. If difficulties in finding an alternative purchaser subsequently disappeared, the vendor's entitlement to damages in lieu should be preserved – so long as it existed at the breach date.

Finally, it is vital to touch on the implication(s) that the proposed removal of a presumption in favour of specific performance may have on a purchaser's registration of caveats. There should be a separation of entitlement to specific performance from the consequence of a purchaser's caveat registration, given that the two matters have different foundations and purposes. The remedy of specific performance enforces a contractual expectation concerning a subject land. As I have argued above, it should be (prima facie) available whenever jurisdictional factors are satisfied. However, the statutory purpose of a caveat is to avoid an informational impasse by providing notice to other persons who may want to acquire an interest in the subject property. In effect, caveats provide notice of defeasible interests in a property but do not create such rights. Therefore, registering a caveat should not alone determine whether specific performance is the remedy appropriate in a given case. Still, it may be a factor in considering the suitability of specific performance in a dispute.

VII CONCLUSION AND RECOMMENDATIONS

In summary, this article postulates that the judicial attitude towards the award of specific performance in contracts for the sale of land should bear parallel with the prevailing approach in Canada. This postulation is justified by the realities that shape the New Zealand property market, making it proper to consider that land is not a unique subject matter unless jurisdictional factors for specific performance (ie furnished consideration and uniqueness of land) are satisfied. Thus, only when jurisdictional factors are satisfied can we say damages may be insufficient to remedy the loss of the bargain to be suffered by an innocent party, because the subject land is unique. Where these factors are met, the innocent party should be deemed entitled to elect between specific performance and its monetary equivalent.

It is recommended that parties to a sale of land contract should incorporate, in their contract, remedial clauses or liability limitation clauses that anticipate and address default in the interval between formation and settlement.[132] A vendor who apprehends that they are likely to withdraw from

132 This possibility was addressed in *McLean Tower Ltd v Ash Road Investments Ltd*, above n 62, at [26].

the contract before settlement may stipulate a remedial sum (or a formula thereof) that they are willing to pay to a purchaser should they (the vendor) withdraw from the contract. A purchaser may equally commit to a remedial sum (or a formula thereof) that they are willing to pay the vendor should they opt out of the contract. Depending on how they are classified or identified, such terms would be subject to the doctrine of penalties or the regulation of unfair terms. Also, how such terms are drafted will affect whether they are construed as electable alternatives to default (equitable and common law) remedies or serve to exclude such default remedies.