"WILL THAT BE PERFORMANCE ... OR CASH?": *SEMELHAGO* V. *PARAMADEVAN* AND THE NOTION OF EQUIVALENCE

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This article discusses the manner in which the Supreme Court of Canada assessed damages in Semelhago *v.* Paramadevan, *a dispute arising from a breach of contract for sale of land. The author analyzes the decision as it affects established real estate law and principles governing judicial remedies available in contracts. Before* Semelhago, *specific performance was normally granted as all land was presumed to have no substitute and therefore, damages were considered to be inadequate. As a result of the decision in* Semelhago, *the plaintiff, whether vendor or purchaser, is now required to adduce evidence that the specific property in question is unique. The plaintiff retains the right to request specific performance or damages and can make her election any time up until the date of the trial. The author discusses when the value of the property should be assessed and the deductions that should be included in the final judgment. He also outlines the confusion and uncertainty this judgment has created and how the plaintiff is overcompensated by using this formula. A solution to this dilemma is presented.*

Le présent article examine la façon dont la Cour suprême du Canada a déterminé les dommages dans Semelhago *c.* Paramadevan, *une action intentée pour inexécution d'un contrat de vente d'un bien-fonds. L'auteur analyse la décision, qui touche le droit et les principes du droit immobilier régissant les recours possibles. Avant l'arrêt* Semelhago, *les biens immobiliers étant censés n'avoir aucun substitut, les dommages-intérêts étaient jugés insuffisants. Il incombe désormais au demandeur — vendeur ou acheteur — de prouver que le bien en cause est unique. Jusqu'à la date du procès, il conserve le droit d'exiger l'exécution intégrale ou des dommages-intérêts. L'auteur examine quand la valeur de la propriété devrait être évaluée et les montants à déduire dans la décision finale. Il souligne aussi la confusion et l'incertitude que l'arrêt a provoqués et il estime que cette formule se traduit par une indemnisation démesurée pour le demandeur. Il propose enfin une solution au dilemme.*

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I. INTRODUCTION

With a relatively short judgment in a case arising from very run-of-the-mill facts, the late Sopinka J. (with the concurrence of five other Supreme Court judges and no dissent from the remaining member of the Court) has unsettled not only established real estate law but also some of the basic principles governing contractual remedies in Canada.

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Through a critique of the judgment for the plurality in *Semelhago* v. *Paramadevan*,[1] account being taken of how the case has been interpreted in subsequent decisions, this essay explores the interrelationship of specific performance and contractual damages. A fundamentally flawed perception of that interrelationship will be argued to have informed the Supreme Court's retreat from specific enforcement, and to have provided added incentive for opportunistic remedial manipulation. To redress this mischief, a novel but principled solution will be put forward.

II. *SEMELHAGO*: THE DECISION AND THE DICTA

Semelhago [hereinafter P (purchaser)] agreed to purchase from Paramadevan [hereinafter V (vendor)] a house then under construction at a price of $205,000. The purchase was to be financed by a cash payment of $75,000, the remaining $130,000 to be raised by the mortgaging of P's existing house. The mortgage negotiated was a six-month open one, so that P could pay it off through the proceeds of sale of his "old" house within six months of closing on the new one. In an inflationary property market, V reneged on the deal. P sued for specific performance, with a claim for damages in the alternative. At trial, when the "new" house had a market value of $325,000, P dropped the claim for specific relief and sought damages instead. P continued to live in his "old" house, which by the date of trial had itself appreciated in value to $300,000 from $190,000. Both at trial and in the Ontario Court of Appeal damages were assessed as at the date of trial in lieu of specific performance, it being accepted that, as the contract was for land, the claim initially made for specific relief was appropriate. At first instance the award was $120,000, representing the difference between the contract price for the subject property and its market value at the date of trial. On appeal, there was deducted from that sum (a) the carrying costs of the mortgage that P had not had to incur, and (b) the notional interest on the $75,000 cash payment that P had not had to make on the date the transaction had been scheduled to close. The narrow but important issue for the Supreme Court concerned V's appeal on the ground that a further deduction should have been made from P's damages award: the $110,000 appreciation in the value of P's "old" house, in which P continued to reside. Unanimously, the Court held that there should be no such deduction.

Speaking for all but La Forest J., Sopinka J. went on to address other issues: the propriety of the "carrying charges" deduction, which P had not cross-appealed; the rationale behind trial-date assessment of damages; and, in weighty obiter, the approach to be taken in the future by Canadian courts towards claims for specific performance of contracts for land. In this paper I will argue that far from clarifying these issues, *Semelhago* has in all instances muddied the waters. I begin with the radical restatement of the role for specific relief to remedy breach of contracts for the sale of land.

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[1] [1996] 2 S.C.R. 415 [hereinafter *Semelhago*].

III. SPECIFIC PERFORMANCE AND REALTY

Because of its equitable nature, specific performance is a discretionary remedy, not available as of right as are common law damages. The writer has elsewhere[2] argued the case for *party* autonomy in remedy selection,[3] subject only to the constraint of practicability. In the Anglo-Canadian tradition, however, the primary prerequisite for granting specific relief has long been a determination that, in the circumstances of a particular case, damages would be — in the (necessarily objective) determination of the *court* — an inadequate remedy. The test for "inadequacy" is whether a substitute is available in the market for what the plaintiff contracted for, hence the need to demonstrate what is commonly termed "uniqueness," connoting most often, in economic parlance, a "consumer surplus" in the form of intangible and subjective benefits (operating at the emotional or aesthetic level) that money cannot buy. While in the case of personal property non-fungibility (and hence the inadequacy of damages) is highly exceptional and must be established on a case-by-case basis, every parcel of land has historically been *presumed* to have no substitute. Specific performance has thus hitherto been awarded virtually as of right in relation to real estate transactions.

In *Semelhago*, since the case had proceeded in both the lower courts on the above understanding, the Supreme Court expressly *assumed* that P had been justified in pursuing up to trial his claim for specific performance. However, in considered dicta that subsequent courts have treated as authoritative,[4] Sopinka J. went on to signal a radical change in approach for the future:

> 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. It is no longer appropriate, therefore, to maintain a distinction in the approach to specific performance as between realty and personalty.... *Specific performance should, therefore, not be granted as a matter of course absent evidence that the property is unique to the extent that its substitute would not be readily available.*[5]

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2 See D.H. Clark, "Rethinking the Role of Specific Relief in the Contractual Setting" in J. Berryman, ed., *Remedies: Issues and Perspectives* (Toronto: Carswell, 1991) 139.

3 As in Quebec since 1 January 1994 under the new Civil Code. In the words of Guthrie J. in *AVI Financial Corp.* v. *Novergaz Inc.* [1997] Q.J. No. 3287 (S.C.) (QL), para. 59:

> Following the coming into force of Arts 1590 and 1601 C.C.Q., it is the creditor that has the choice of remedy: either specific performance or damages.

In that case, a complex multi-year contract was specifically enforced.

4 See, for example, *Pepper-Weberg Management Co.* v. *Horosko*, [1997] O.J. No. 4333 (QL), para. 1, where the judgment of the Ontario Court of Appeal began:

> This is a specific performance case argued prior to the decision of the Supreme Court of Canada in [*Semelhago*]. The case was litigated and decided on the basis of *the law as it existed at the time of trial*. Granting specific performance was, therefore, not incorrect in law. [Emphasis added].

5 *Supra* note 1 at 428-29 [emphasis added].

This is an across-the-board change in approach, placing the burden on every claimant for specific performance the onus[6] of adducing evidence to the court's satisfaction that the property in question is not like one of Malvina Reynolds' "little boxes, all the same...."[7] It is true that inroads have been made in recent years to the tendency to "simply treat all real estate as being unique," but only in cases where the evidence revealed the plaintiff to be purchasing land as an economic unit, an investment vehicle for either income or capital appreciation. The cited decisions in *Chaulk* v. *Fairview Construction Ltd.*[8] and *McNabb* v. *Smith*[9] fall into that category. (In the latter, the plaintiff purchaser had actually already "flipped" the subject property before the date for closing, thus demonstrably retaining an interest only in the profit anticipated on completion of the resale.) *Semelhago* appears to be the first reported instance of its being suggested that the purchaser of a single house for residential occupation, with funds to be derived in part from the sale of an existing home, bears the burden of satisfying a court that the new house has incomparable features.

There is a neatness about assimilating real estate transactions of all kinds with personalty in this context. However, symmetry has to be weighed against the considerable downside for both litigants and their legal advisers: inevitable *uncertainty* as to what characteristics or combination of characteristics will qualify as "unique" (for example, size, shape, view, proximity to shops/park/schools/relatives/friends, "character"), with the resultant dilemma of how much evidence to call and of what kind; the equally inevitable *inconsistency* of decisions on something so intangible as the attraction of a particular property;[10] the *expense* of litigating the issue in every case; and the potentially severe financial penalty (in the rising market that often explains vendor default) that will be suffered if an assertion of uniqueness is rejected at trial. The whiplash effect of what would *ex post facto* be characterized as a failure to mitigate by purchasing an equivalent property within a reasonable time after the date of breach would be likely to constitute a major deterrent to attempting to keep such a contract alive. Certainly the plaintiff purchaser in *Domowicz* v. *Orsa Investments Ltd.*[11] would, with the benefit of hindsight, have an acute appreciation of this. In May 1987, P was *awarded* specific performance of its contract to purchase a property for $3.5 million. Two and one-half years later, by which time the property's value had increased to $6.4 million, the specific performance order was set aside. After another five and a half years P's common law damages were assessed as of April 1987, on the basis that the case had never been appropriate for specific relief.

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6 As Lax J. observed in *11 Suntract Holdings Ltd.* v. *Chassis Service & Hydraulics Ltd.* (1998), 36 O.R. (3d) 328 (Ont. Ct. (Gen. Div.)) at 349 [hereinafter *11 Suntract Holdings Ltd.*]: "Although not dealt with explicitly in *Semelhago*, it seems to be implicit in the judgment that uniqueness is a matter to be proved and not presumed. If this is so, the proof should lie with the party seeking the remedy." In (pre-*Semelhago*) *Landmark of Thornhill Ltd.* v. *Jacobsen* (1995), 25 O.R. (3d) 628 at 636, the Ontario Court of Appeal had placed on the defaulting party the onus of proving *lack* of uniqueness.

7 M. Reynolds, "Little Boxes" (1962) song.

8 (1977), 14 Nfld. & P.E.I.R. 13 (Nfld. C.A.).

9 (1981), 124 D.L.R. (3d) 547 (B.C.S.A.), aff'd (1982), 132 D.L.R. (3d) 523 (B.C.C.A.).

10 The critical determination, unless a finding of the plaintiff's sincerity were itself to be sufficient to discharge the onus, will have to be an objective judgment-call by the court.

11 (1996), 29 O.R. (3d) 722 (Ont. Ct. (Gen. Div.)).

If the present common law prerequisite for specific performance — inadequacy of damages ("uniqueness") — is to be retained, would it not be more efficient to make an initial differentiation between commercial transactions and private residential sales? To the former would be applicable a rebuttable presumption that the purchaser has no intangible "consumer surplus" interest in the subject property. Exceptional cases aside, the essentially economic nature of the loss would be reflected in the monetary remedy that alone would be available. For residential real estate transactions, however, the converse presumption — in favour of the presence of the purchaser's subjective, non-economic and irreplaceable interest in the specific property in issue — would apply.

The outcome in post-*Semelhago* cases could be taken as indicative of greater selectivity in remedy selection by commercial purchasers. However, the sample is too small for meaningful extrapolation. Of the five decisions found involving actions by purchasers of land for commercial purposes, in which uniqueness was put in issue, specific performance was awarded in three and denied (for want of uniqueness) in two. In all three cases in the former group, *Morsky* v. *Harris*[12] ("unquestionably some of the best [farm] land in Saskatchewan"), *Fossum* v. *Visual Developments Ltd.*[13] ("at the heart of some of the highest retail value of land in Edmonton") and *11 Suntract Holdings Ltd.* v. *Chassis Service & Hydraulics Ltd.*[14] (industrial land in North York to be redeveloped for retail use), location was a critical factor, the purchaser already owning property in the immediate vicinity. In contrast, the subject property in *McMurray Imperial Enterprises Ltd.* v. *Brimstone Acquisitions & Asset Management Inc.*,[15] a shopping centre and trailer park, was found to be a "revenue property...a business investment"[16] without materially distinctive characteristics. The only appellate decision in this series is *White Room Ltd.* v. *Calgary (City)*,[17] in which the Alberta Court of Appeal was divided. Conrad J. accepted the plaintiff's contention that the location and configuration of the property, located in a Performing Arts Centre and leased for a ten-year term for use as a Viennese-style restaurant, met the *Semelhago* test.[18] The majority observed that the force of that argument was "not as strong for a lessee as it might be for a purchaser"[19] in concluding that the Chambers judge's finding of a lack of uniqueness was not so aberrant as to warrant being upset. Strangely, in *Shearer* v. *Genesis North Investment Corp*,[20] involving a purchaser's claim for specific performance of a contract of purchase and sale of an apartment complex, no issue was taken as to the appropriateness of the equitable remedy.

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12 [1997] 6 W.W.R. 557 (Sask. Q.B.), rev'd (on a ground not here material) [1998] 8 W.W.R. 340 (Sask. C.A.).

13 [1997] A.J. No. 1255 (Q.B.) (QL).

14 *Supra* note 6.

15 (1997), 210 A.R. 97 (Q.B.).

16 *Ibid.* at 103.

17 [1999] 2 W.W.R. 502 (Alta. C.A.).

18 *Ibid.* at 518, para. 55:

> [T]his location is in close proximity to the Convention Centre. The ability to establish a clientele for a particular restaurant and type of food makes this property unique and would make a remedy of specific performance applicable.

19 *Ibid.* at 506, para. 10.

20 (1997), 14 R.P.R. (3d) 225 (B.C.S.C.).

Conversely, and still more strangely, in *Rostrum Development Corp.* v. *Wafler*[21] the purchaser sought specific performance while at the same time conceding that the property in question was "not in any way unique"!

A final commercial case deserving mention here is *110049 Ontario Ltd.* v. *Exclusive Diamonds Inc.*[22] Decided just before *Semelhago,* it underscores the unpredictability of application of the "uniqueness" test. The subject matter was the sale of an "upscale" jewelry business. P's particular interest in acquiring the business was that it was operated in a mall in which P already had a jewelry store serving a more general clientele. The motions judge granted specific performance on the ground that the acquisition gave P a unique opportunity to complement his existing store and substantially improve his competitive position. In the Ontario Court of Appeal, while it was recognized that the opportunity was unique in the sense that it might not arise again in the near future, damages were held to be an adequate remedy. Another aspect of the case clearly influenced the outcome. V's wife, who had been his partner in the business also, had recently been brutally murdered. Pleading deep depression at the time he agreed to sell, V had sought to have the agreement rescinded altogether for unconscionability. The Court of Appeal found the transaction not to be unconscionable. V had full legal advice, and the contract price represented fair market value. Nevertheless, exercising its residual discretion to deny specific relief, it held that substantial hardship would result from enforcing the sale of V's business which he now wished to continue operating. In the result, P was left to its remedy in damages, but given the finding that the sale was at fair market value, establishing compensable loss would seem to be extremely difficult.

Damages were held to be an adequate remedy in one of the two post-*Semelhago* cases found in which specific relief was sought in respect of realty purchased for residential purposes. The subject property in *Corse* v. *Ravenwood Homes Ltd.*[23] was a lot on which a house was to be built to the purchaser's specifications. Many vacant lots were available in the same subdivision at the relevant time. In stark contrast, not only in outcome but more significantly in judicial approach, is *Tropiano* v. *Stonevalley Estates Inc.*[24] Here also the contract was for the purchase of a lot on which the vendor was to build a house to agreed specifications. Sharpe J. took only two sentences to reach the conclusion that specific performance should be ordered:

> This is a residential property and there is evidence that *the applicant attached particular significance* to the fact that the property in question was a ravine lot and *the location of a lot was important to the applicant.* In my view, this evidence meets the test of uniqueness contemplated by *Semelhago.*[25]

[21] [1996] B.C.J. No. 2672 (S.C.) (QL).

[22] (1996), 25 O.R. (3d) 417 (C.A.).

[23] [1998] A.J. No. 509 (Q.B.) (QL).

[24] (1998), 36 O.R. (3d) 92 (Ont. Ct. (Gen. Div.)) [hereinafter *Tropiano*].

[25] *Ibid.* at 98 [emphasis added]. Whilst the lot was ordered to be conveyed, V's failure to construct the house was held to be adequately remedied by an award of damages.

It is interesting to note that i) the lot on which Mr. Semelhago's house was to have been built was also a ravine lot; ii) the availability of other lots was seemingly not considered material; and iii) P's *subjective* attachment to the particular lot in question is treated as determinative of the inadequacy of damages. In a note in the September 1998 issue of *Canadian Lawyer*, a Toronto real estate lawyer is recorded as lamenting the fact that in *Tropiano* "there was no hard analysis of whether the lot was unique, or in what ways — no appraisal or market study evidence."[26] As a postscript to *Tropiano*, it is worth pointing out that Sharpe J. is the author of the leading Canadian treatise[27] on specific performance.[28]

IV. VENDORS AND SPECIFIC PERFORMANCE

The foregoing discussion has been confined to actions against defaulting *vendors* of realty. The reason is evident from the primary rationale for specific relief: protection of non-economic interests for which no amount of monetary compensation can provide a substitute acceptable to the plaintiff. When the plaintiff is the *vendor*, it almost defies imagination to contemplate circumstances in which there could be any supplier's counterpart to a purchaser's consumer surplus. (The Nova Scotia Supreme Court, in *Taylor* v. *Sturgeon*,[29] appears to have simply assumed an identity in the interests of vendor and purchaser. Applying *Semelhago*, it denied specific performance to the plaintiff vendor on the ground that "no evidence was presented to establish that there was anything unique about the land that was the subject of the sale."[30] The relevance of such evidence in the instant context was not explained.) A vendor whose purchaser fails to complete is thereby deprived of the unpaid balance of the purchase price, representing at the date of the breach a profit if the market price has fallen below the contract price and a loss if it has risen above it. Specific performance for a vendor is in reality an action in debt for the contract price less any deposit received. Thus, while for a purchaser the distinction between the specific and substitutionary remedies is qualitative (land versus money), for a vendor the distinction is purely *quantitative* ($X or $X-Y, where X=the contract price and Y=the land's diminished market value at the relevant post-breach date. In the latter instance, of course, the vendor retains the subject land). Whereas it is not unrealistic to envisage a purchaser with an intangible attachment to a particular property pursuing specific performance even in a falling market, the converse (a vendor seeking the contract price from a defaulting purchaser in a market that had risen through that price at the date of completion and remained above it thereafter) is counter-intuitive in the absence of exceptional circumstances. Specific enforcement in favour of a vendor with a purely economic interest at stake can thus be justified only where the status quo as of the date of contract has subsequently

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26 "Specific Performance and the Metaphysics of Uniqueness" *Canadian Lawyer* (September 1998) 40.

27 R.J. Sharpe, *Injunctions and Specific Performance*, 3d ed. (Toronto: Canada Law Book, 1996).

28 For recent decisions involving *personalty*, see *Gleason* v. *Dawn Light (The)* (1997), 130 F.T.R. 284 (no evidence found that a ship was irreplaceable); *Baird* v. *Red Bluff Inn Ltd.* (1997), 32 B.L.R. (2d) 249 (B.C.S.C.) (purchase of shares of a closely held company under a "shot-gun" clause held appropriate for specific performance).

29 (1996), 156 N.S.R. (2d) 147 [hereinafter *Taylor*].

30 *Ibid.* at 152.

changed in such a way as to complicate the assessment of damages, with potential resultant injustice. Two post-*Semelhago* cases provide good illustrations. The respective vendors were both awarded specific performance against defaulting purchasers who had been allowed to take early possession. In *Westwood Plateau Partnership* v. *WSP Construction Ltd.*,[31] where the contract was partly executed, the purchaser in possession had made "substantial improvements" to the property. The concern in *Scully* v. *Cerney*,[32] on the other hand, was that, during the three years for which the purchaser had occupied a condominium unit, the condition of the property had been allowed to deteriorate. The British Columbia Court of Appeal upheld the trial judge's conclusion that it was "only fair that the risks of owning the property at this point should be visited on him rather than on the vendor,"[33] who, if left to pursue a claim in damages, would suffer further delay and the risk of under-compensation. But while the analysis in these decisions is in accord with the Supreme Court's new approach, that is certainly not true of the alternative rationale for awarding specific performance to vendors of realty put forward by the Ontario Court of Appeal in *Landmark of Thornhill* v. *Jacobsen*:

> In spite of the fact that a vendor of real property is getting nothing unique from his side of the bargain, specific performance has traditionally been awarded to vendors of real property as well as to purchasers, on the basis of mutuality of remedies.[34]

This rare pre-*Semelhago* recognition that the norm is that a vendor's interest is purely economic, is an inversion of the more frequently encountered use of the *absence* of mutuality as a ground for *refusing* specific relief.[35] Given the Supreme Court's signal in *Semelhago* that *purchasers* will in the future have to demonstrate uniqueness on a case by case basis, the "mutuality" rationale, always weak, has now had the ground completely cut away from under it. Such a test would necessitate a role reversal and a trial-within-a-trial in every instance.

To summarize: *Semelhago* proceeds from, and reinforces, the common law's premise that the courts know best when damages are an inadequate substitute for performance of a broken contractual obligation. The burden of proof is now squarely on each individual plaintiff, whether vendor or purchaser. In the writer's view, that onus should lie only on vendors and others (such as lessors and providers of services) whose claims, while formally for specific relief, are in substance monetary.[36] A case, albeit a weaker one, can be made for including in that category purchasers of realty for commercial purposes. The major losers from the Supreme Court's pursuit of symmetry are residential purchasers, who now face unjustifiable expense and uncertainty. However, had there been a contest over the uniqueness of Mr. Semelhago's putative new home, it would have been a proxy fight. Before the matter came to trial the plaintiff had opted

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31 (1997), 37 B.C.L.R. (3d) 82 (S.C.).
32 [1997] 2 W.W.R. 222 (B.C.C.A.).
33 *Ibid.* at 229, para. 15.
34 (1996), 25 O.R. (3d) 628 at 636, McKinley J.A.
35 See, for example, *Page One Records Ltd.* v. *Britton*, [1967] 3 All E.R. 822 at 826-27, Stamp J.
36 See further Clark, *supra* note 2 at 150ff.

for the monetary remedy. The case was actually about the assessment of damages. The real plot concerned the interrelationship of the legal rules as to i) the effect of a claim for specific performance on the so-called duty to mitigate; ii) the date for the crystallization of damages; and iii) election of remedies. These questions, to which we now turn, are in principle unaffected by the particular approach taken — whether liberal or restrictive — to the availability of specific performance.

V. SPECIFIC PERFORMANCE AND MITIGATION

On the termination of a contract by one party's acceptance of the other's repudiation, the principle of mitigation restricts the former's compensable losses to those that would still have been suffered had all reasonable steps been taken in a timely fashion to reduce (and possibly even eliminate) losses. In real estate transactions this means, in practical terms, for a vendor, re-listing the property (in a falling market, at a price reduced as conditions dictate) and for a purchaser, going back into the market for a substitute property (usually at a higher price). It is altogether different, however, if the plaintiff wishes to keep the breached contract alive by seeking specific performance. Pursuit of such a claim (assumed here to be legitimate) is by its very nature antithetical to a concurrent "duty" to mitigate in this primary sense: the two concepts are mutually exclusive. As was stated in *Kopec* v. *Pyret*:

> As a practical matter, the utility of the remedy of specific performance would be greatly impaired if the plaintiff could not rely on his right to seek specific performance as a justification for not purchasing alternate land in mitigation of the losses occasioned by the defendant's breach.[37]

Part of the potency of a claim for specific performance is that, so long as legitimately maintained, it operates to suspend the mitigation requirement[38] — and hence *postpone the date as of which damages would be assessed* if the ultimate award were to be the monetary remedy. A plaintiff's entitlement to drop a claim for specific performance at any point before judgment, and to maintain only her claim for damages,[39] facilitates

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37 (1983), 146 D.L.R. (3d) 242 (Sask. Q.B.) at 258.

38 See N. Siebrasse's questioning of this proposition in "Damages in Lieu of Specific Performance: *Semelhago* v. *Paramadevan*" (1997) 76 Can. Bar Rev. 551. The author reasons (at 560):

> If there is no duty to mitigate when an order of specific performance is sought, then a plaintiff [purchaser] who kept the purchase money in a shoe-box and so lost interest on it would be entitled to claim that loss.

Such "lost interest" is indeed not only irrecoverable but should properly be treated as a constructive *gain* for which the purchaser is accountable to the vendor either by an addition to the purchase price on completion following a decree of specific performance, or as a *deduction* from damages awarded in lieu (as in *Semelhago*). As is explained below, see text accompanying note 91, the relevant principle is not mitigation but rather the simulation — whether through the specific or the monetary remedy — of the position had there been no breach.

39 Technically, such an election is predicated on the inclusion in the statement of claim, in the alternative to specific performance, of a claim for *common law* damages: see *Dobson* v. *Winton & Robbins Ltd.*, [1959] S.C.R. 775. When a claim to specific relief is relinquished there disappears with it any entitlement to (equitable) damages in lieu. In recent times, however, the tendency has been to construe pleadings liberally in this respect. In *Semelhago*, Sopinka J. was totally unconcerned with such niceties: "The [respondent] sued for specific performance and, *in the alternative, damages in lieu thereof.* At the commencement of the trial, the respondent elected the

opportunism on the part of a purchaser in a rising market and by a vendor in a falling one. In *Semelhago*, the plaintiff purchaser maintained a specific performance claim until the beginning of the trial, watching the value of the subject property soar in the interim from the $200,000 purchase price to a market value of $325,000. At that point he elected to receive damages instead. The legitimacy of the specific relief claim being assumed, only at that eleventh hour did the mitigation principle enter the picture,[40] and thus only then did damages crystallize, locking in for the purchaser the post-completion capital appreciation.

Straightforward as this may appear, aberrant cases must be acknowledged. One is a 1993 decision of the British Columbia Court of Appeal, *Mavretic* v. *Bowman*.[41] The plaintiff vendor maintained a claim for specific performance until the eve of trial (and was assumed to be entitled to do so), yet it was held that damages should be assessed at the date of *breach*. (Unfathomably, in *Semelhago* Sopinka J. cited *Mavretic* with approval as an authority for *trial-date assessment* in favour of a *purchaser*!) A converse and equally odd post-*Semelhago* decision is that of *Taylor* v. *Sturgeon*. Here damages, rather than the specific performance sought by the plaintiff vendor, was held to be the appropriate remedy. Accordingly, the Court reasoned, the question became whether the mitigation requirement had been met. The answer reached on the facts was that the vendor's minimal efforts to resell fell well short of being reasonable. At the final and critical stage of assessment of damages, however, the evidence looked for (and found wanting) concerned the value of the subject property *at the date of trial*: "No evidence was presented as to the *present* value of the land.... [I]t is possible that the land may be worth more *now* than *previously*...."[42] In the event, the Court inferred from the vendor's preference for specific relief that the land had likely risen in value, and awarded $1,000 on top of the retained deposit.

Mystifying as is trial-date assessment following a failure to mitigate, confusion as to the principled approach to the crystallization of damages claimed as an alternative to specific performance is the less surprising when attention is turned to the Supreme Court's treatment of this issue.

VI. DATE FOR ASSESSMENT OF DAMAGES CLAIMED AS AN ALTERNATIVE TO SPECIFIC PERFORMANCE

Assessment as of the date of trial in *Semelhago* is unexceptionable on two premises that informed Sopinka J.'s judgment: i) the plaintiff purchaser was deemed to have a legitimate claim to specific performance, as such had been the parties' assumption throughout; and ii) notwithstanding the voluntary abandonment of that claim just prior to the trial, damages were to be assessed on the same basis as if specific relief had been

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latter," *supra* note 1 at 418 [emphasis added].

40 In a purely theoretical sense: the plaintiff, who had continued to reside in his "old" home — which had also shown a six-figure increase in value during the same inflationary period — understandably showed no intention of re-entering the market at that juncture as a buyer.

41 [1993] 4 W.W.R. 329 (B.C.C.A.) [hereinafter *Mavretic*].

42 *Supra* note 29 at 153 [emphasis added].

denied in the court's discretion. The latter premise, simply assumed by the learned judge, will be challenged in the next section of this paper. Sopinka J. put forward two rationales for trial-date assessment in the instant case. The first involved the following mind-boggling proposition:

> [A] claim for specific performance has the effect of *postponing the date of breach*. [In consequence] the defendant who has failed to perform can avoid a breach if, at any time up to the date of judgment, performance is tendered.[43]

This cannot possibly be right,[44] even when read down to apply only to those claims judicially accepted as appropriate for specific relief. *Semelhago* portends a significant reduction in the number of such instances. Mention was earlier made of the uncertain outcome to be anticipated for claims of irreplaceable combinations of attributes by purchasers of residential properties. It is difficult to make conceptual sense of the correlation of the presence or absence of a consumer surplus on the part of a purchaser (respectively vindicating or negating the claim for specific performance) with the absence or presence of a breach by the vendor. More strictly, the substantive issue imagined to be determined by the plaintiff's remedial entitlement would appear to be the *time* of the breach.[45] The thinking seemingly is that when a claim for specific performance is successful, the decree issues virtually contemporaneously with the breach. Yet when addressing the issue of quantifying damages in lieu of specific performance, Sopinka J. had emphasized the need to make allowance for the fact that "[t]he order for specific performance may issue many months or even years after the breach."[46] In *Semelhago* the interval between the date on which the sale should have closed and the trial was more than four years. It is not difficult to imagine circumstances in which over such a period the plaintiff will have incurred losses that will not be recouped even by a decree of specific performance, hence the statutory provision enabling damages to be awarded "in addition to" specific relief.[47] But if it were correct to say that "the defendant who has failed to perform can avoid a breach if, at anytime up to the date of judgment, performance is tendered,"[48] a tactical, last-minute pre-emptive tender of performance would enable the (putative) contract breaker to leave the plaintiff to bear such losses. The notion that a vendor can refuse to complete on the due date, and for years thereafter, and yet not be in breach, is bizarre in the extreme — and completely untenable. Authority for a proposition so basic as that a breach is a breach is not easily found. Lord Diplock in *Photo Production Ltd.* v. *Securicor* did, however, state: "Every failure to perform a primary obligation is a

43 *Supra* note 1 at 426 [emphasis added].

44 However, the proposition was recently cited with approval by a trial judge in Ontario: see *Presidential Management & Development Corp.* v. *Sugarman*, [1998] O.J. No. 382 (QL), para. 42, Kitely J. [hereinafter *Sugarman*].

45 "[A breach can be avoided] if, at any time up to the date of judgment, performance is tendered": *supra* note 43.

46 *Semelhago*, *supra* note 1 at 425.

47 See, for example, *The Queen's Bench Act*, R.S.S. 1978, c. Q-1, s. 45(9).

48 *Supra* note 43.

breach of contract."[49] A plaintiff's choice of remedy may be determinative of many things, but the fact and date of breach are not among them.

How could six members of the Supreme Court of Canada subscribe to a differentiation between "failure to perform" and "breach"? By misapplying the law concerning *anticipatory* breach, through the adoption of a simplistic syllogism! Sopinka J.'s analysis began with the observation that the vendor in *Semelhago* had reneged *before* the date for completion. He then reasoned as follows:

i) As an alternative to treating the agreement as at an end, the innocent purchaser "may [and in the instant case, did] decline to accept the repudiation and continue to insist on performance."[50]

ii) In that eventuality, quoting *McGregor on Damages*,[51] "there is still no breach of contract".

iii) Therefore, "the defendant who has failed to perform can avoid a breach if, at any time up to the date of judgment, performance is tendered."[52]

The error lies in conflating an election made in advance of the due date for performance with the election to pursue specific relief when performance is not rendered on the due date. That date must be seen as a watershed. Proposition (i) above is incomplete. There must be added, in qualification of the right to "continue to insist on performance," words to the effect "until the date when performance becomes due." This initial election *need not* signify the ultimate remedy selection[53] if the due date goes by without performance. Total passivity, the mere avoidance of any response that might reasonably be construed as acceptance of the repudiation, will suffice to keep the contract alive *until the due date*.[54] The statement in McGregor that if repudiation is not accepted "there is still no breach of contract" can in context only be read as referable to the period between repudiation and the date when performance is due. This is conclusively established by the very next sentence after that with which Sopinka J. ends his quotation: "These principles are illustrated by sale of goods cases...."[55] Such cases, concerning fungibles, involve archetypical contracts not amenable to specific relief in the common law world. Thus, on the due date, the innocent buyer's or seller's right to "insist on performance" must necessarily end. An election in an appropriate case to pursue specific performance keeps the contract alive and holds at bay the mitigation requirement, but once the date for performance has been missed, the defendant inexorably stands in breach. Concern about students absorbing the proposition that "a claim for specific performance has the effect of postponing the date

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49 [1980] 1 All E.R. 556 (H.L) at 566 g [emphasis added].

50 *Supra* note 1 at 425.

51 H. McGregor, *McGregor on Damages*, 13th ed. [*sic*] (London: Sweet & Maxwell, 1972) at 149.

52 *Semelhago*, *supra* note 1 at 426.

53 It will, of course, do so if the anticipatory repudiation is accepted, terminating the contract and leaving damages as the only available remedy.

54 The one election, open in anticipation of that date, that will keep the contract alive thereafter, is the (rare) launching of an immediate action for specific performance. If, still more exceptionally, a decree were to be awarded ahead of the due date, it would be worded to take effect only thereafter, *for then (but only then) the defendant would be in irreversible breach.*

55 McGregor, *supra* note 51 at 149.

of breach"[56] may be tempered by the hope that in this instance Homer went so much beyond nodding that they will be alerted by his snores.

The second rationale that is given for a trial-date assessment adopts Megarry J.'s reliance, in the English case of *Wroth* v. *Tyler*,[57] on the wording of the statutory provision empowering him to award equitable damages "*in substitution for* ... specific performance."[58] That narrow initial advance has, however, long been superseded by a broader principle assimilating the approach to the assessment of damages at common law and in equity. Since *Asamera Oil Corp.* v. *Sea Oil & General Corp.*[59] and *Johnson* v. *Agnew*,[60] Anglo-Canadian law has recognized a universal rule that damages crystallize at the date when the plaintiff *will be deemed to have mitigated.* The rule is universal in that it matters not whether it is the court's common law or equitable jurisdiction that is involved, and that its application may, depending on the circumstances, result in assessment at any point on the spectrum from breach to trial. Thus, in *Richter* v. *Simpson*,[61] where execution of the contract had become impossible even before the completion date, the plaintiff purchaser's obligation to take reasonable steps in loss avoidance arose immediately on breach. Damages accordingly fell to be assessed as of that date. By contrast, in *Wroth*, a legitimate claim to specific performance was maintained to the end. In consequence, mitigation never became an issue, and only on the discretionary denial of the specific remedy, out of judicial tenderness for the unfortunate position of the defendant, was the plaintiff obliged to accept that the contract was lost. Trial-date assessment of damages ensued.[62] Megarry J. rightly pointed out that in that instance (and whenever a claim for specific performance ultimately fails only because of the exercise of judicial discretion), "damages [in the statutory language] 'in substitution for' specific performance must be a substitute, giving as nearly as may be what specific performance would have given."[63] Nevertheless, it is the presence or absence of deemed mitigation that *in all cases* is determinative. If it is concluded that the contract was (in law) lost at some intermediate date between breach and trial, damages assessment as of that date is dictated by the same principle that best explains *Wroth*. A case in point is *Johnson*, where the critical date was that of foreclosure and sale of the subject property.

There is thus flexibility in relation to the crystallization date for damages, but it is a principled flexibility. This has not always been understood. The dissentient in *Mavretic* lost sight of the clear guiding principle in first concluding that "[t]he law permits the Court to pick the date which is most appropriate in the circumstances," and

56 *Supra* note 43 and accompanying text.

57 [1974] 1 Ch. 30 [hereinafter *Wroth*].

58 Chancery Amendment Act, 1858 (U.K.), 21 & 22 Vict., c. 27, s. 2 [emphasis added].

59 [1979] 1 S.C.R. 633 [hereinafter *Asamera Oil*].

60 [1980] A.C. 367 [hereinafter *Johnson*].

61 (1982), 37 B.C.L.R. 325 (S.C.).

62 As Sopinka J. noted in *Semelhago*: "Technically speaking, the date of assessment should be the date of judgment...For practical purposes, however, the evidence that is adduced which is relevant to enable damages to be assessed will be as of the date of trial. It is not usually possible to predict the date of judgment when the evidence is given," *supra*, note 1 at 427 para. 18.

63 *Wroth*, *supra* note 57 at 59.

then going on to hold that "the value of the property at the date of trial is a significant circumstance that militates against using the date of breach for the assessment of damages."[64] In the instant case, this enabled McEachern C.J.B.C. to deny the plaintiff vendor the windfall that he perceived to result from the majority's use of breach-date assessment.[65]

A further source of potential misunderstanding is the tendency to refer to the operative principle as crystallization at the date *when the duty to mitigate arises*. While this in turn, given the traditional approach to contracts for fungibles, is often equated prima facie with the date of breach, in appropriate circumstances it may be fixed at a point that lags the date of breach by a considerable margin. *Asamera Oil* was just such a case.[66] In the result, the assessment date adopted was that by which the court adjudged that the plaintiff *could* reasonably have mitigated. It would be manifestly unfair to leave a party uncompensated for all losses arising from the time when she came under a "duty" to mitigate that neither constitutes a duty nor contemplates more than the taking of reasonable and practicable measures. It is only at the point where and to the extent that the court concludes that such measures *would* have curtailed losses that in actuality continued to mount that the plaintiff will be *deemed* to have mitigated: hence the formulation used in this article. In extreme market conditions, such as those that saw real estate values in Vancouver plummet headlong in the early 1980's, vendors left with "unsaleable" properties have been held entitled to trial-date damages. While McEachern C.J.B.C. in *Fraser* used the term "non-existent market," the property there in question was given a valuation at trial of $500,000. Similarly in *Fraser Valley Title Search Ltd.* v. *Gallagher*,[67] the vendor, having initially re-listed at the contract price of $210,000 shortly after the breach, had failed to attract a buyer despite lowering the price by degrees to $77,000. A single offer of $60,000 had been rejected. Refusing to "weigh in nice scales"[68] the selling strategy that had been followed on professional advice, the court attributed to the property at trial the $77,000 valuation that appeared to be at minimum that placed on it by the vendor.[69] The tolerance shown to these

64 *Supra* note 41 at 334-35.

65 The learned judge had earlier, in *Fraser* v. *Van Nus* (1986), 2 B.C.L.R. (2d) 248 (S.C.) [hereinafter *Fraser*], used trial-date assessment to *protect* the plaintiff vendor in a market that fell between breach and trial.

66 Up to a year was allowed for the accumulation of a large quantity of shares on the open market, from the date - itself seven years after the breach - at which the plaintiff was held to be required to treat the contract (for the loan of shares) as lost.

67 (1983), 45 B.C.L.R. 381 (S.C.).

68 See *Banco de Portugal* v. *Waterlow & Sons Ltd.*, [1932] 452 at 506, per Lord Macmillan.

69 No information is given in *Landmark of Thornhill* v. *Jacobson* (1995), 47 R.P.R. (2d) 211 (Ont. C.A.) as to efforts made by a condominium developer to sell a unit on the purchase of which the defendant had reneged. The Ontario Court of Appeal observed (at 220) that by late 1991 "the condominium market in Toronto was in considerable difficulty, to the extent that the vendors, even up to the time of the appeal hearing [June 1995], had been unable to resell the unit." In this case, however, the vendor maintained throughout (and ultimately succeeded in) a claim for specific performance. It can thus be seen that a failed attempt to mitigate does not constitute acceptance of repudiation — nor, indeed, would a *successful* mitigating endeavour, such as entering into an interim tenancy at will, not inconsistent with the plaintiff's ability to perform its side of the bargain. Equally, however, as the vendor in *Landmark of Thornhill* had no "duty" even to attempt mitigation, it was immaterial whether its pricing of the condominium for resale was reasonable or

vendors who simply failed to adjust their expectations downward sufficiently to find their market comes of course at the expense of the respective defendants. The latter might have cause to reflect that had a sale been ensured earlier in the market's fall by an exaggerated slashing of the asking price, a defence that the reduction was excessive would have had scant prospect of success. It will be interesting to see how much latitude in mitigation is accorded to the residential *purchaser* as plaintiff post-*Semelhago*. Advised that establishing the "uniqueness" of the property contracted for, and hence entitlement to specific performance, will be at best uncertain, let us assume that he goes house-hunting again in search of an "equivalent." If, in a rising market, he takes, say, six months to find the "right" place, will he face the double whammy of a ruling that such fastidiousness (at the vendor's expense) constitutes an unreasonable failure to mitigate?

VII. ELECTION AND OPPORTUNISM

It is standard practice for a claimant for specific relief to include in the pleadings an alternative claim for damages. So long as an election between these mutually inconsistent remedies[70] is made before judgment, the plaintiff has an unfettered right to choose the time to abandon one or the other. No reason need be given for opting at a very late stage to "go for the money," a tactic adopted in a significant number of the reported cases. However, when this course is taken, damages crystallize as of the date on which the contract is electively lost. No differentiation is made between situations where performance *in specie* is precluded by circumstances beyond the plaintiff's control (judicial discretion, for example) and those where a tactical switch seems to involve market opportunism. In *Semelhago*, the plurality accept this as axiomatic, Sopinka J. offering the following explanation:

> [I]t would not be appropriate to insist on applying the date of breach as the assessment date when the purchaser of a unique asset has a legitimate claim to specific performance and *elects* to take damages instead.... [see *Wroth*, *Johnson* and *Mavretic*]. The rationale that the innocent purchaser is fully compensated, if provided with the amount of money that would purchase an asset of the same value on the date of the breach, no longer applies. This disposition would not be a substitute for an order of specific performance. The order for specific performance may issue many months or even years after the breach. The value of the asset may have changed.[71]

Notwithstanding the Supreme Court's imprimatur, the law's traditional and unchallenged stance on the consequences of remedial election is overdue for reappraisal. Key to the radical change proposed below is a recognition that both principle (a coherent remedial regime) and fairness require that a clear distinction be drawn, for the purpose of assessment of damages, between a party who *chooses* to drop a claim for specific performance and one whose loss of that preferred remedy is involuntary. The rationale given by Sopinka J., in the passage just quoted, can apply

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unreasonable.

70 It is unnecessary to claim damages in addition to specific performance, as the invocation of the court's equitable jurisdiction enables such an award to be made in an appropriate case.

71 *Supra* note 1 at 425.

only to the latter category of claimant. There is no justification for providing to a party who comes late to the decision that specific performance is not her preferred remedy (*i.e.* that damages are, on the ultimate reckoning, adequate) a quantum of damages calculated so as to provide a substitute for the no longer desired specific relief. The damages awarded in these circumstances are not "in lieu of" specific performance.[72] Following voluntary renunciation of specific performance, damages should be assessed as though the adequacy of the substitutionary remedy had been perceived by the plaintiff at the outset. From the conceptual standpoint, the argument here advanced is that suspension of the duty to mitigate on the launching of a legitimate claim for specific performance should be *conditional* on the plaintiff's maintaining the position that justice requires that the contract be kept alive and enforced *in specie*. The plaintiff's right to reassess at any time what form of relief is in her best interests is thus preserved. What the plaintiff loses is the ability (unfortunately affirmed by *Semelhago*) to speculate at the defendant's expense.

It must be acknowledged that the position advocated lacks a precedent, so far as the author has been able to determine, in the jurisprudence.[73] On the other hand, Sopinka J., as just seen, cited three authorities (two English and one Canadian) as confirmation of the appropriateness of permitting a "purchaser of a unique asset," who "elects" to drop a specific performance claim and take damages instead, to have the damages assessed as of the date of election (and thus, as in the instant case, to recover the capital appreciation of the asset from the date of breach). Remarkably, however, not one of these authorities supports the proposition for which it is put forward. Moreover, the only one that involved a plaintiff voluntarily jettisoning a claim for specific relief in favour of the monetary remedy — *Mavretic* — has been seen to have reached quite the contrary conclusion that *breach-date* assessment was appropriate. The plaintiffs in *Wroth* persisted to the end with a claim for specific performance that was recognized by the court as fully legitimate. At no point did they "elect to take damages instead." Solely because specific relief could have been efficacious only at the expense of inter-spousal litigation between the defendants were damages substituted in the reluctant exercise of the court's residual discretion. Such an award, truly "in lieu of" specific performance, was appropriately quantified by reference to the trial-date valuation of the subject property. In the absence of any element of opportunism by the plaintiff, *Wroth* provides no support for the proposition for which Sopinka J. cites it in *Semelhago*. The same must be said for *Johnson* v. *Agnew*, in which the House of Lords addressed the position of a contractual plaintiff who had not only sought but obtained an order of specific performance. The problem was that the defendant had refused to comply with the decree, and now contested the plaintiff's right, given such recalcitrance, to re-elect to receive damages. Whilst in a purely formal sense such enforced acquiescence in the loss of the contract might be described as "elective," it is the very opposite of

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72 Contrast the principle of equivalence that was rightly central to Megarry V.C.'s reasoning in *Wroth*, *supra* note 57.

73 See, however, *obiter* by Green J. in *Clancy* v. *Shanahan* (1977), 150 Nfld. & P.E.I.R. 340 (Nfld. S.C.), para. 34.

opportunistic.[74] Furthermore, neither in *Johnson* nor in *Mavretic* was the plaintiff a "purchaser of a unique asset." In each case the damages ultimately awarded were recovered by a *vendor* of real estate. As has been seen, it will require highly exceptional circumstances for such a plaintiff, having nothing but a monetary claim, to establish from the very outset a legitimate claim to specific performance.

It was seen earlier that "inadequacy of damages" as a prerequisite for specific performance means that a claimant for the equitable remedy must demonstrate a *non-economic* "consumer surplus" interest in keeping alive the particular contract in question. The time given to a plaintiff, between breach and trial, in which to make an election, is thus explicable as a "grace period" to declare/establish to the court's satisfaction the existence of such a non-quantifiable interest *beyond* the market valuation of the subject property. Therefore, election for the *money* remedy at some point between completion date and trial can normally be construed as a belated *negation of the existence* of any consumer surplus. This will not be so in all cases, however. The dropping of the claim for specific relief may, exceptionally, indicate that changed circumstances (for instance, a breakdown in health necessitating institutionalization) have now *eliminated what was to that point a legitimate consumer surplus*. Crystallization of damages at the date of such (constrained) election would not provide an incentive for opportunism and would be appropriate. The plaintiff should bear the onus of establishing a material change of circumstances.

A belated election for the money remedy is, however, *not* explicable as a judgment that the market price has now risen to the point where the plaintiff's consumer surplus has been factored in (for example, that the market has now recognized the value to the plaintiff of the view from the subject property or of its proximity to her relatives). By definition, this would be impossible.[75] *A fortiori*, it is not open to a plaintiff to justify the timing of "cashing out" by reference solely to the objective market factor (*i.e.*, belief that the market value is about to fall).

One might postulate the raising of an intermediate rationale for election-date assessment, combining objective and subjective elements. The notion of consumer surplus as cream riding on top of (objective) market value, whatever the latter's level, could be argued to be out of touch with the real world, where market behaviour can appear irrational and where "everything has its price." Might not our hypothetical purchaser, who places such a premium on location that she does not settle for damages in the immediate aftermath of the vendor's breach, nevertheless reach the point in a speculative market where the cash (the differential between the contract price and the frothy figure the property can now command) has a higher *subjective* value than the intangible "dream" location?

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74 Lord Wilberforce laid stress on the absence of remedial opportunism in stating that no such re-election would be permitted to a plaintiff who had herself thwarted completion following the issuance of a decree of specific performance: *Johnson*, *supra* note 60 at 399f.

75 Contrast proximity to schools or shops, which has sufficiently generalized "value" to be incorporated as an element in determining market price (as, to some extent, does "view").

To deal with this construct is necessary to focus on the essential character of a claim for specific relief in the contractual context. As an alternative to damages, it is by its very nature a *non-economic* remedy. It has no inherent relationship to market evaluation *at any time*, as it reflects the claimant's satisfaction to see adherence on both sides to the terms embodying the *parties' own* relative evaluation of the subject matter. The concept of "consumer surplus" and its relationship to "objective" market value enters the picture only because our legal system currently makes irreplaceability at any price ("uniqueness") a precondition of access to specific performance. Under the regime for which the writer has contended elsewhere,[76] plaintiff autonomy in remedy selection, practicability would be virtually the only prerequisite to this form of relief. To whatever extent a contractual plaintiff has a choice of performance *in specie* or a substitutionary award of money, however, the former is by its nature non-convertible. In a case like *Semelhago*, the choice (however long a period may be afforded for its making) is between the land and a sum of money (quantified according to the prevailing rules). An analogy (not intended to be exact in all respects) may be drawn with a regime under which a minister of the Crown is entitled, when travelling on official business, to fly first-class. The minister would be free to choose to travel economy class, or even (assuming no time constraints) to make a particular journey in her own car and recover expenses at the appropriate mileage rate. It would *not* be permissible, in the event of making one of the latter choices, to cash in the first-class ticket and pocket the monetary difference. The right to travel in style is *not* a right to its "value." It is equally fallacious to argue, as did Sopinka J., for damages quantification on a *substitutionary* basis relative to market value at the date of a belated election to abandon a claim for specific performance. We can return now to the hypothetical of a purchaser of land seeking to cash out when a speculative market went through her subjective valuation. Vitiating this rationalization is the same false premise, namely, the convertibility of a claim to specific relief. Assessment of damages as at the date that the right to performance of a contract for land is *involuntarily* lost (at the date of trial, as in *Wroth*, or at some earlier point as in *Johnson*) is not in conflict with the theory being advanced here. In such circumstances, where plaintiff opportunism is completely absent, any other valuation date would be unjust. Sopinka J.'s analysis is flawed by his failure to differentiate such necessitous cases from those involving plaintiff election.

There is one scenario, however, that poses a sterner test for the proposition that, following an elective relinquishment of a claim for specific performance in favour of pursuit of the remaining claim for damages, the date for assessment should be the same as had specific relief not initially been sought.

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76 See Clark, *supra* note 2.

FIGURE 1

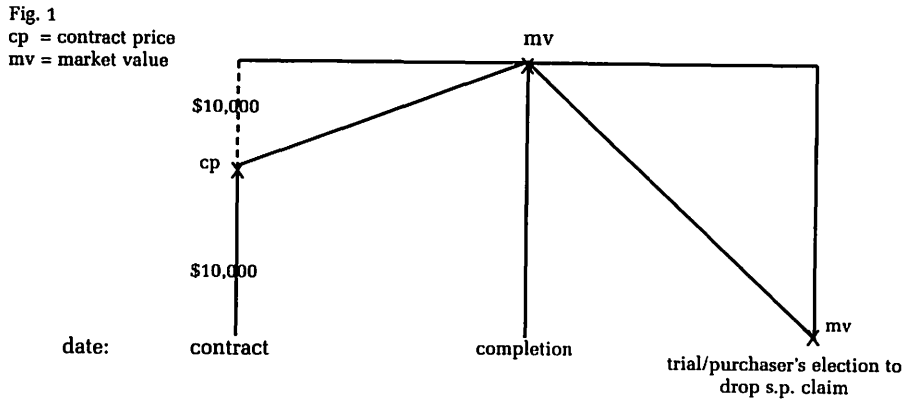


FIGURE 2

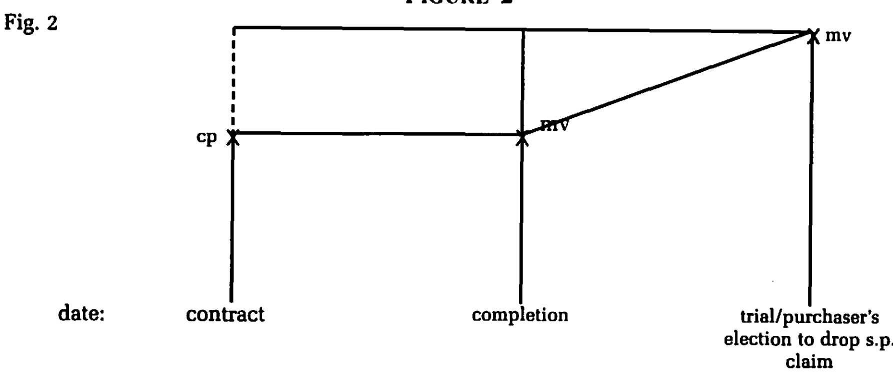


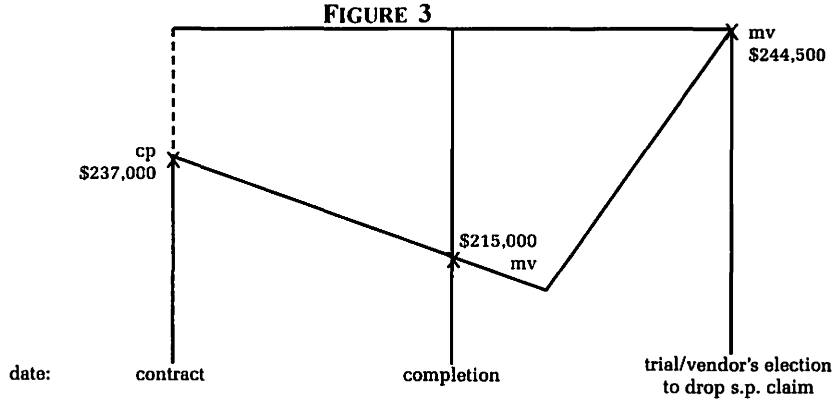
Figure 1 depicts a purchaser "going for the money" at trial when the market value of the subject property, at the completion date $10,000 *above* the contract price, has fallen *below* it by the same amount. Election-date assessment would yield only nominal damages, while application of the "relation back" approach would reward opportunism with recovery of $10,000. The traditional approach, reaffirmed in *Semelhago*, has much more appeal in these circumstances.[77] The question appears to be whether conceptual symmetry should be placed above removal of the incentive for plaintiff opportunism. From the *defendant's* standpoint, (pro-plaintiff) completion-date assessment in figure 1 is much more devastating than would be trial-date assessment in figure 2: in the latter, the higher quantum of damages would be completely offset by the commensurately-increased value of the property left in V'sownership, whereas in figure

[77] It should be noted that P's failure to drop the specific performance claim at the latest when the market value fell below the contract price is not necessarily counter-intuitive. It may well evidence the existence of a consumer surplus for which the purchaser was quite willing to pay a premium. Even the ultimate election for damages is not transparently opportunistic. P's circumstances may have changed at that point in such a way as to eliminate the consumer surplus. If P could discharge the onus of establishing this, election-date assessment would be appropriate on the reasoning set out above.

1 the vendor would suffer the double-whammy of a damages award against him together with continued depreciation of the value of land that could not be put on the market until P made his late election.[78] Whether or not influenced by that consideration, one could incorporate the mischief into the proposed rule by reformulating it into a more generalized preclusion of opportunism in the election of remedies, thus enabling nominal (election-date) damages to be awarded in the circumstances of figure 1. Such an approach would be congruent with the increasing resort to the concept of good faith in judicial policing of the substantive law of contracts.[79] It would, however, be equally susceptible to criticism on the ground of lack of definition.

Mavretic, represented in figure 3 below, mirrored the issue raised by figure 1, with a *vendor* making an eleventh-hour election for damages in a *rising* market.

FIGURE 3



The case is puzzling in more than one respect, not least in that V delayed election for damages until the rising market had taken the value of the subject property — which had fallen by the completion date almost 10 percent below the contract price — several thousand dollars *above* the latter level. On the prevailing remedial orthodoxy, V could have expected to recover only nominal damages as a result of this counter-intuitive tactic. In the event, only the dissenting member of the court reached that conclusion. McEachern C.J.B.C. reasoned, from the premise that "[t]he law permits the Court to pick the date [for crystallization of damages] which is most appropriate in the circumstances," that "the value of the property at the date of trial is a significant circumstance"[80] militating in favour of assessment as at the latter date (which was also the date of election). For the majority, the (higher) value at the date of trial served only

78 The hemorrhaging could, of course, have been staunched at any point by V's conveying the title to P. This, however, holds true in all circumstances and is not in itself an adequate answer to any objection that a particular remedial principle works undue hardship on the defendant.

79 See, for example, D. Clark, "Some Recent Developments in the Canadian Law of Contracts" (1993) 14 Advocates' Q. 435; S. O'Byrne, "Good Faith in Contractual Performance: Recent Developments" (1995) 74 Can. Bar Rev. 70; R. Brownsword, "Two Concepts of Good Faith" (1994) 7 J. Contract L. 197; R. Brownsword, "Good Faith in Contracts Revisited" (1996) 49 Curr. Legal Probs. 111.

80 *Mavretic*, *supra* note 41 at 334.

to confirm that trial-date assessment constituted an indefensible "luck of the draw approach."[81] Yet while professing to be following the "normal or usual approach" in adopting the date of breach as the appropriate point for assessment, it disassociated that perceived rule from its rationale: the principle of mitigation.[82] Had the court taken the opportunity to reconsider the legitimacy of a *vendor's* claim to specific performance,[83] it might well have arrived at the same result, but upon a principled rather than a pragmatic basis.

A final question might be posed in relation to the writer's proposed rule that no economic advantage should be derived from a tactical abandonment of a claim for specific relief. It concerns the potential impact on market behaviour. Would such a rule encourage opportunism by *vendors* in the form of efficient breach in a rising market? It might be objected that breach-date assessment would provide incentive for a vendor to absorb such damages en route to a cost-beneficial future sale to a third party at a higher price. The potency of this objection will be commensurate with the degree of confidence with which V can predict that her breach will still leave her with a property to sell — that is, that P will either not be recognized to have or will not pursue to the end a legitimate claim for specific performance. Even a monetary judgment on a trial-date assessment would make breach by V *in*efficient. While the capital appreciation of the property would match the damages payable, it would represent a lost opportunity for capital gain through reinvestment of the purchase price had the contract been honoured. The keys to V's cost-benefit calculation (apart from correctly calling the market) are the court's inclination to award the specific remedy and purchasers' persistence in pursuit of it. The rule here proposed might be expected to stiffen the latter's resolve — but only if the Supreme Court of Canada removes the roadblocks set by *Semelhago*.

For the purpose, however, of discussion of the two remaining issues of quantification raised by that decision, I will proceed on the Supreme Court's premise that trial-date assessment is appropriate. In question here are two benefits argued by V to have flowed between breach and trial as a result of V's breach, the value of which V contended should be deducted from the "loss of bargain" damages awarded to P: the increase in value during this period of P's existing home, and the "cost avoided" represented by the carrying charges on the "new" property. Each raises important questions of principle as to the nature of contractual damages — and (again) the relationship between

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81 *Ibid.* at 332, Proudfoot J.A., who went on to quote with approval the following passage from the judgment of Hinde J. in *Zalandek* v. *De Boer* (1981), 33 B.C.L.R. 57 (S.C.) at 67:

> ... the vagaries of the market, and the uncertainty of the date upon which a trial can be completed, have a substantial effect upon the measure of equitable damages. It is not an entirely satisfactory basis upon which to measure damages.

82 "[M]itigation has no relevancy to the case at bar. There is no evidence to support a finding that had the vendors re-listed the property and sold the property within a reasonable time, they would have reduced their loss": *Mavretic, supra* note 41 at 333. There is surely confusion here between the date at which the "duty" to mitigate *prima facie* arises, and that by which it is concluded that a plaintiff could reasonably be expected to have had success in taking mitigating action. For an example of there being a spread of more than a year between the two, see *Asamera Oil, supra* note 59.

83 See Section IV, above.

substitutionary and specific relief. The two deductions sought by V will be taken in sequence.

VIII. THE INCREASE IN VALUE OF P'S EXISTING HOME

Both the Ontario Court of Appeal and the Supreme Court of Canada (unanimous on this, the only issue decided authoritatively) dismissed, in what can only be described as perfunctory fashion, the defendant vendor's argument that the compensatory principle required, in the instant case, that there be brought into account the capital appreciation (between the dates of breach and trial) of the house in which P continued to reside. On first principles, it is submitted that their conclusion, that no such deduction should be made, is in error. Arnup J.A., in the Ontario Court of Appeal, reasoned as follows:

> What the vendor proposes is that Semelhago be awarded the difference between the increase in the value of the new house and the increase in value of the old house, namely $10,000.[84]
>
> The object of an award of damages for breach of contract is to "put the injured party into the position in which he would have been had the contract been performed, insofar as that is possible by the payment of money": *Rimes [306793 Ontario Ltd.* v. *Rimes* (1979), 25 O.R. (2d) 79], at 81 [hereinafter *Rimes*]. The vendor's proposal, in my view, would achieve little, if any, of this objective.

Sopinka J., though in agreement with Arnup J.A.'s conclusion, reached it by adopting a subtly different comparator:

> I would not deduct from [the $120,000 increase in value of the "new" property] the increase in value of the respondent's residence which he retained when the deal did not close. *If the respondent had received a decree of specific performance, he would have had the property contracted for and retained the amount of the rise in value of his own property.*[85]

The approach to the assessment of contractual damages set out in Arnup J.A.'s quotation[86] from *Rimes* is a natural touchstone for evaluating these respective explanations of why the quantum adopted at the appellate levels was not seen as embodying double recovery. Simply stated, the court's task is to calculate P's

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84 *Semelhago* v. *Paramadevan* (1994), 19 O.R. (3d) 479 at 482 a-b. The respective figures were accepted by the Court of Appeal as being $120,000 and $110,000. At trial, Corbett J. had calculated the differential to be $5,000, but felt constrained by precedent to award what she recognized to be "windfall" damages in the amount of the increase in value of the "new" house without any deduction. Her preferred solution, however, would have been to quantify damages by subtracting from the value of the "new" house at the date of trial that of the "old" (a differential of $25,000): quoted in 136 D.L.R. (4th) 1 at 4-5. It is difficult to see materiality in the *absolute* value of the "old" house at any time. If the "new" house had been a smaller (and hence less expensive) property better meeting P's changed needs, Corbett J.'s preferred method would deny *any* substantial damages at all, even if between breach and trial the capital appreciation of the "new" house had been double that of the "old."

85 *Semelhago*, *supra* note 1 at 427-28 [emphasis added].

86 In itself an application to contract of Lord Blackburn's classic unitary formulation of the compensatory principle, in *Livingstone* v. *Rawyards Coal Co.* (1880), 5 App. Cas. 25 at 39 (H.L. (S.C.)).

compensable loss by determining what *would have* happened had there been no breach and what actually *did*, and to award the extent of the shortfall (if any). The trial judge's unchallenged finding as to how P would have financed the new property was that for the most part the money would have come from the proceeds of sale of P's "old" house within six months of closing on the "new." Interim financing was to have been raised through the six-month open mortgage that P had placed on the property for this purpose. On the "what *would* have happened" side of the ledger, therefore, only that portion of the capital appreciation of the "old" property that occurred within six months of the date of V's breach (*i.e.* the completion date) should have stood to the credit of P. The ceiling for recovery under the compensatory principle is what, on the evidence, the plaintiff has actually lost as a result of the defendant's breach. To go beyond the claimant's actual loss (in the instant case to the extent of three and a half years' capital appreciation of the "old" house) is to put the plaintiff in a *better* position than if the contract had been properly performed. Having one's cake and eating it equals double recovery. P in *Semelhago* clearly appears to have been left with such a supra-compensatory windfall. Whether, absent V's breach, P *would* have enjoyed the benefit of the capital appreciation of both properties cannot be determined as a matter of fact. The inquiry, albeit one that has to be made, is by its very terms hypothetical. Cumulatively, however, the indicators against the likelihood of dual capital gains over the relevant four-year period, had there been no breach, appear very strong. Supervening possibilities can be conjectured that could conceivably have altered the anticipated course of events — an unexpected large inheritance or lottery win, for example. But as Megarry V.C. put it in declining to enter into such speculative inquiries in *Tito* v. *Waddell (No. 2)*, "the court ought to be ready to act on evidence which, without assuring certainty, nevertheless carries conviction."[87]

As has been noted, however, Sopinka J. (unlike Arnup J.A. in the court below) did not measure P's actual position at trial against what it would have been had there been no breach. Instead, he took as the comparator his surmise as to what P's position would have been if the latter's (successful) ultimate election had been for specific relief:

> *If the respondent had received a decree of specific performance*, he would have had the property contracted for and retained the amount of the rise in value of his own property.[88]

This approach is problematic from both the factual and legal standpoints. It could be read as implying as a matter of fact that P would have had the desire and financial capacity to end up with *both* properties. As has been seen, such a conclusion would fly in the face of the evidence.[89] It would seemingly have required a marked increase in P's resources between the completion date and the trial to have made this a practicable proposition. Even if such a development is posited, it is submitted that it would be immaterial. To see why requires us to address the conceptual problem with Sopinka J.'s hypothetical. It is a valid objective to ensure that an award of damages in lieu of

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87 *Tito* v. *Waddell*, [1977] Ch. 106 at 334.

88 *Semelhago*, *supra* note 1 at 427-28 [emphasis added].

89 Note that, by choosing to drop the claim for specific performance, P in reality *ensured* that he would not have the expense of both properties.

specific performance does not leave a plaintiff short of what her material economic position would have been had specific relief been awarded.[90] However, the learned judge here, in asserting that in the latter eventuality no account would have been taken of the capital appreciation of P's own property between the dates of breach and trial, proceeds from a false premise as to what the remedy of specific performance is designed to achieve. The implication is that such relief simply concerns itself with ordering the belated performance of the parties' respective obligations *as at the contractual date for completion*, namely the transfer of title in return for payment of the agreed price. Precisely this position was taken by MacKinnon A.C.J.O. in *Rimes* to justify non-deduction from an award of equitable damages of the carrying charges borne by the defaulting P between completion date and trial: "[I]f the plaintiff had opted for specific performance, the adjustments would have been calculated as of the closing, *i.e.*, the date of trial."[91] On such a view all gains (including losses avoided) and losses occurring between closing date and trial — however directly attributable to the breach — would be entirely disregarded on the making of a decree. The unseemly result would be the mechanistic use of an equitable remedy to secure a windfall for the plaintiff, and in the circumstances of *Rimes*, where P's mortgage and tax holiday came at V's expense, an unjust enrichment. The objective with specific performance, no less than with an award of damages (whether at law or in equity), must be to put the plaintiff, so far as practicable in economic terms, in the position she would have been in had the contract been properly performed.[92] In some instances, that will necessitate a monetary adjustment. This may take the form of an *abatement* of the purchase price, as where V has defaulted on an obligation to service a lot.[93] In contrast, in *Tanu* v. *Ray*,[94] which like *Rimes* concerned the incidence of carrying charges between breach and trial, it was held that an *augmentation* of the purchase price was required:

> The order will go that the [plaintiff P] will pay the defendant [V], as a term of the order for specific performance, [the agreed price] ... and *in addition* will pay the defendant a sum equal to the sums for interest and taxes which have been paid [by V] to the mortgagee to the date on which a conveyance to the plaintiffs is executed.[95]

The principle exemplified in *Tanu* seems incontrovertible. Regardless of whether the plaintiff purchaser opts for specific relief or the monetary substitute for the lost expectation interest, the sole question is whether she has since the date of breach enjoyed a material offsetting benefit. If so, the result will be the reduction of P's *actual loss*. Whether the offset takes the form of carrying charges avoided or a breach-enabled double capital appreciation (or as in *Semelhago*, both) should matter not. The total

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90 For the present purpose, the assumption is made that damages *in lieu* is an appropriate characterization of the award and its objective.

91 (1979), 25 O.R. (2d) 79 at 83 [hereinafter *Rimes*].

92 See also J. Swan, "Damages, Specific Performance, Inflation and Interest" (1979) 10 R.P.R. 267 at 283: "If the calculation of the price he must pay or the damages he could receive are made properly, the vendor should be indifferent to the remedy sought by the purchaser."

93 See, for example, *Great Georgian Realty* v. *Genesis Marketing Organization Ltd.* (1977), 76 D.L.R. (3d) 592 (Ont. H.C.).

94 (1982), 20 R.P.R. 22 (B.C.S.C.) [hereinafter *Tanu*].

95 *Ibid.* at 28-29 [emphasis added].

offsets may eliminate entirely P's loss on the failed transaction — or even leave her with a fortuitous net gain — resulting in the contract-breaker's liability for nominal damages only.[96] But as McLachlin J. aptly observed in her dissent in *Cunningham* v. *Wheeler* in the analogous context of the deductibility of collateral benefits:

> The ideal of compensation which is at the same time full and fair is met by awarding damages for all the plaintiff's actual losses, and no more.[97]

Yet by refusing even to countenance that the post-breach change in value of the purchaser's existing home might constitute a material offset, Sopinka J. necessarily moved away from "actual loss" as the touchstone for the damages award:

> I see no basis for deductions that are not related to the *value of the property which was the subject of the contract.*[98]

Inherent in such a blinkered view of the "what *would* have been" side of the damages equation is the real risk of overcompensation. Suppose, for example, that P had, at the time of the contract for the "new" property, already *contracted* to sell the "old" one to a third party, the sale being contingent only upon the other deal's going through. Irrefutable evidence would thus exist that the "new" house was contemplated as being a substitute or replacement for the "old." *Ex hypothesi*, absent a breach of this second contract, P *could not* have been in a position to take the benefit of the full[99] capital appreciation of both properties. Yet Sopinka J.'s focus exclusively on the increase in value of the "new" property would still yield an award leaving P with the double benefit — an outcome indefensible in principle.

The learned judge himself seems to have sensed the possibility of overcompensation in this aspect of the damages assessment:

> This approach may appear to be overly generous to [P] in this case and other like cases and may be seen as a windfall. In my opinion, this criticism is valid if the property agreed to be purchased is not unique.[100]

That he went on to incline to the view that in the instant case the subject property was *not* unique[101] merely serves to accentuate the lack of logic in the purported rationalization. Whether a plaintiff *could* have made out the case for specific relief (the "uniqueness" question) can have no rational bearing on the correct application of the compensatory principle, as of a particular date, to a purely monetary claim. I argued

96 See *Cockburn* v. *Trusts & Guarantee Co.* (1917), 55 S.C.R. 264 [hereinafter *Cockburn*].

97 *Cunningham* v. *Wheeler* (1994), 113 D.L.R. (4th) 1 at 25.

98 *Semelhago*, *supra* note 1 at 428, para. 19 [emphasis added].

99 For example, to the date of trial. It is possible that the respective properties might be in locations with very different economic climates. If the value of the "old" *fell* between breach and trial, the differential should *prime facie* constitute an *additional* component of P's damages.

100 *Semelhago*, *supra* note 1 at 428, para. 20.

101 *Ibid.* at 430, para. 23: "The trial judge was of the view in this case that the property was not unique.... I would be inclined to agree with the trial judge...."

earlier[102] that the tactical decision to *drop* an extant claim for specific relief *should* affect the determination of the particular date at which damages crystallize. The issue here, however, is not the identification of that date. Sopinka J. having concluded — on whatever basis, and whether rightly or wrongly — that in this instance trial date assessment was appropriate, nothing remained but to determine the differential between what would have been and what was as of that date.[103] The arithmetic of the first part of that equation in the instant case requires the court to assign a market value to the "new" and "old" properties regardless of whether either or both might be characterized in another context as "unique." But the source of P's windfall here — real, not apparent — was not the valuation of the subject ("new") property; rather, as has been seen, it was the failure to treat as an offset a gain on the "old" that in large measure narrowed the gap between what would have been and what was.

That gap was further narrowed by two other tangible benefits that accrued to P as a result of V's failure to complete. To this final facet of *Semelhago*, the deductibility of what Sopinka J. in his brief and ambivalent treatment of the issue compendiously described as the "carrying charges," I now turn.

IX. THE "CARRYING CHARGES"

P was to have financed the failed transaction by a cash payment of $75,000, and $130,000 raised through a six-month open mortgage on his current home. The plan had been for the mortgage to be paid out from the proceeds of the sale of the latter property within the six-month period. Because of V's breach, the $75,000 was not subtracted from P's disposable assets, while mortgage carrying costs calculated by the trial judge at just over $6,700 were obviated. Not surprisingly, V contended that the latter, constituting avoided loss, and the breach-enabled interest notionally earned on the former from the date of breach until crystallization of damages had to be brought into account in the computation of P's compensation. Even more directly than the sacrificing of the capital appreciation of the existing home from the date of its intended sale, these items represented the true cost[104] of P's capture of the rise in value of the subject property. The trial judge[105] recognized that there was "no question" but that leaving them out of account resulted in a "windfall" for P. Nevertheless, she felt obliged to award such overcompensation on the binding authority of *Rimes*. John Swan has convincingly demonstrated that the Ontario Court of Appeal's error in that case netted the plaintiff a windfall of no less than 800 percent.[106] In *Semelhago*, that Court averted further injustice to V by distinguishing its decision in *Rimes* on a narrow

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[102] See Section VII, above.

[103] Only the math, not the factors relevant to the compensation, would change if the date taken for crystallization had been that of breach or some intermediate date.

[104] Indeed they understate it. As part of the adjustments on completion, the incidence of property taxes on the "new" property would have fallen on P. Further, after the cessation of interest charges from the date of the mortgage payout, P's opportunity cost until trial would be increased to the notional investment value of the *entire* $205,000 purchase price. As they were seemingly not put in issue by V, these items will be excluded from the present discussion.

[105] Quoted in *Semelhago*, *supra* note 1 at 422, para. 7.

[106] Swan, *supra* note 92.

factual basis and deducting the carrying charges from P's award. As there was no cross-appeal by P to the Supreme Court on damages, no argument was presented on the issue.[107] Thus passed what could have been an opportunity for an authoritative reaffirmation that the compensatory principle requires deductibility. This is the more unfortunate in that Sopinka J., while ultimately reserving his position, introduced his brief allusion to the issue with the statement: "...I have some reservations about the propriety of these deductions."[108] Four arguments against deductibility have been put forward: two are stated in absolute terms, purportedly requiring non-deductibility of "carrying charges" in all factual circumstances; the remaining two would see deductibility revolve around respective determinations of fact. It is submitted that no extensive analysis is needed to show that none of them has validity when tested against the compensatory principle.

(a) Non-deductibility replicates the position V would have been in had there been no breach.

MacKinnon A.C.J.O. reasoned in *Rimes*:

> The defendant (vendor) for his part is still in possession of the land and able to sell it at the new valuation, *recouping his carrying charges plus the profit*. The defendant is in precisely the same position as if the deal had been closed on the date fixed in the agreement but has had the land for that extra period and for as much longer as he might wish to hold it.[109]

This argument that all's well that ends all square, when V ultimately sells the subject property, is baffling. It disregards entirely the fact that when damages are assessed as at the date of trial, the starting-point for P's expectation award is the *entire* capital appreciation between breach and the only material "new valuation date."[110] The "profit" thus being stripped away from V and transferred to P, the failure to deduct coincident carrying charges simply penalizes V while providing P with an adventitious gain. It must be further borne in mind that the central focus of the compensatory principle is on where the *plaintiff* would have been absent the breach. The breaching vendor may or may not have a mortgage to pay, and if so its terms may well be different from those arranged by the purchaser. The deductibility issue concerns solely the costs avoided by the latter. MacKinnon A.C.J.O.'s focus on the *defendant's* circumstances is perhaps more clearly seen to be unhelpful in relation to the second item that he disallowed on the above reasoning: the notional interest to be attributed to P from the unpaid cash component of the purchase price. In this respect, the differential effect on V's assets of performance or breach is nil, wherever in a given case that component be located between zero and 100 percent. For the critical compensatory

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107 Had it been, the case for deductibility could not have had a better advocate than V's counsel, none other than John Swan.

108 *Semelhago*, *supra* note 1 at 430, para. 24.

109 *Supra* note 91 at 83 [emphasis added].

110 Any change in value thereafter, whether up or down, is of course extraneous to the determination of P's actual loss between breach and trial.

purpose of arriving at P's true loss arising from V's breach, however, it is an indispensable element in the equation.

(b) Non-deductibility replicates the position P would have been in had he opted for specific performance.

This was MacKinnon A.C.J.O.'s complementary argument in *Rimes*:[111] "[I]f the plaintiff had opted for specific performance, the adjustments would have been calculated as of the closing, *i.e.*, the date of trial." Implicit here is the notion that when a plaintiff has an election between specific and substitutionary relief, there ought to be no economic advantage in choosing the one remedy over the other. The premise is sound. As was argued earlier in this paper,[112] the requisite congruence is achieved by ensuring that the terms on which specific performance is awarded and the assessment of damages are *equally* informed by the objective of putting the plaintiff, so far as practicable, in the same position as if there had been no breach. The flaw in MacKinnon A.C.J.O.'s analogical reasoning lies in the assertion that the specific remedy gives P a free ride between the dates of breach and trial. Although there is a notable dearth of reported authority to the contrary, *Tanu*[113] has been seen to be a case in point of relatively recent date.

(c) Deductibility depends on proof of particular matters of fact: whether *V* incurred carrying charges between breach and trial; whether P had cash to invest, and if so the return on any alternative investment actually made.

In *Rimes*, MacKinnon A.C.J.O. in relation to these questions respectively found "no evidence of any carrying charges incurred by the defendant,"[114] and concluded that "[i]t would be the purest speculation to consider that the plaintiff first of all had any investments [*sic*] moneys; and secondly, that it would be able to invest at an interest rate greater than that which it would be paying for the money."[115] None of these evidentiary questions is material to the issue of deductibility. It has already been shown that even if V did have carrying charges, it is those avoided by *P* that reduce the loss for which she requires compensation. Any such burden self-imposed by V's breach is of relevance only indirectly, to the extent that it represents a coincident saving to P. Property taxes for the period in question would be an example. As to inquiry into how much (if any) of the purchase price P would have been in a position to pay in cash and what amount would have had to be borrowed, this goes not to the *existence* of an offsetting indirect gain to P but to the calculation of quantum. The contract in *Rimes* contemplated a $140,000 cash payment at closing, the balance of $435,000 being covered by a first mortgage back to V at 9 percent. *Prima facie*, P's notional gain through retention of the former sum would be the yield sustainable from a conservative investment vehicle permitting conversion back into cash at short notice. If indeed P in

111 *Supra* note 91 at 83.

112 See *supra* note 89 and accompanying text.

113 *Supra* note 94 and accompanying text.

114 *Supra* note 91 at 83.

115 *Ibid.* at 86.

Rimes were a shell company that would have had to raise the $140,000 by, say, drawing on a line of credit, the only difference would have been to enlarge the offset — and thus further *reduce* P's damages — by the substitution of this (higher) borrowing rate. To penalize the defendant for the plaintiffs' impecuniosity, as does the *Rimes* approach, is particularly ironic given the propensity of Canadian courts to turn a deaf ear to plaintiffs' pleas of impecuniosity to explain a failure to mitigate.[116] MacKinnon A.C.J.O.'s concern with whether the evidence established that P would have been "able to invest at an interest rate greater than that which it would be paying for the money,"[117] can only be read as a failure to recognize that a cost avoided is just as much a gain as is an addition to the beneficiary's funds.

That brings us to the materiality of the state of the evidence in a particular case as to the return (positive or negative) obtained by a plaintiff purchaser on an actual alternative investment, using what would have been, absent breach, the cash component of the purchase price. This was in issue in *Tanu* where P had used the money to buy temporary alternative accommodation. While the court thought it likely that, in the prevailing rising market, the rate of appreciation would have been roughly commensurate with that of the subject property, it concluded that for lack of clear evidence "[t]he question of benefit to the plaintiffs on that heading is too vague to be dealt with."[118] It cannot be correct in principle to attribute *no* gain to P in such circumstances. *Prima facie*, P should be deemed to have mitigated her loss by making a conservative investment of the money freed up by V's breach. Evidence of the result of any *actual* alternative investment can in principle have the effect only of replacing the presumptive rate of return with a higher or a lower figure. The downside risk for P (in the sense of the likelihood of being credited with a larger offsetting gain and thus reduced damages) is the greater. This is because of the way the law treats the results of plaintiff action that is adjudged to go beyond the reasonable undertaking of mitigation, into the realm of speculation. Should the gamble pay off with an extraordinary profit, it must be brought into account in its entirety.[119] However, if the gamble fails, in that P's return is either negative or less than the presumptive figure, the latter will nevertheless be credited as a notional gain to P.[120] The only occasion for the *reduction* of that figure (with resultant enlargement of P's damages) will thus be the underperformance of P's chosen low-risk investment vehicle.

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116 See, for example, *Marigold Holdings Ltd.* v. *Norem Construction Ltd.* (1988), 31 C.L.R. 51 (Alta. Q.B.), Conrad J. at 51:

> The Canadian case law has consistently held that a plaintiff suing for breach of contract must mitigate damages even if the plaintiff cannot afford to do so.

117 *Rimes*, *supra* note 91 at 86.

118 *Tanu*, *supra* note 94 at 28.

119 *Cockburn*, *supra* note 96.

120 The authorities on the treatment of breach-related plaintiff speculation are not easily reconcilable. For cases favouring symmetry in the treatment of speculative gains and losses (leaving the plaintiff, at risk of being burdened with the latter, with the non-accountable benefits of the former), see *Jamal* v. *Moolla Dawood Sons & Co.*, [1916] 1 AC 175 (P.C.); *Campbell Mostyn (Provisions) Ltd.* v. *Barnett Trading Company*, [1954] 1 Lloyd's Rep. 65 (C.A.); *Slater* v. *Hoyle & Smith Ltd.*, [1920] 2 K.B. 11 (C.A.).

(d) "Fairness to [P] requires, where the subject property consists of a home in which the defendant vendor lives, that the economic value that [V] receives from her occupation ... be taken into account."[121]

The proponent of this argument, John Swan in his comment on *Rimes*, goes on to suggest that in such a case rough justice is probably achieved simply by making no deduction from P's damages for his notional investment gain, on the working hypothesis that:

> The notional rent that the vendor should be charged for the period from closing to trial might well be a close approximation to the return that the purchaser may be regarded as earning on the purchase price.[122]

Even if it be assumed that in a given instance the respective figures are identical, the argument is wrong in principle insofar as it purports to have a compensatory objective. It does not follow that a gain of $X by the defendant (in the instant context in the form of an incontrovertible cost avoided) constitutes *any loss at all* to the plaintiff. Were it otherwise, there would be no concept of efficient breach. I am not here concerned with whether contract remedies should encourage or discourage such breach. My point is that efficient breach has meaning only on the premise that the compensatory principle looks only to loss proved to have been *suffered by the plaintiff* as a result of the defendant's breach. If the contract in *Semelhago* had been performed, would P have received rent from V of which the latter's breach deprived him? Manifestly not. Suppose now that the subject property had been not a private residence but a bed-and-breakfast establishment. Would the income which (be it assumed) V continued to receive between closing and trial represent a loss to P? The answer will depend upon P's intentions. If, as would be the reasonable assumption, P would have continued the revenue-generating use, clearly yes. But if P had planned to convert the property immediately into a private residence, he could not claim as a loss income that he would not have received had there been no breach.

Free breach-to-trial accommodation for V in circumstances such as those in *Semelhago* represents a windfall when viewed in isolation. In monetary value, however, it will almost invariably bear no comparison to the sum payable *by* V for P's compensable expectation interest. The contract-breaker remains the big loser. A markedly different net outcome — a clear profit captured by the defendant's calculated breach — occasioned a recent invitation to the English Court of Appeal to depart from the compensatory principle by stripping away the ill-gotten gain in the interests of fairness. On grounds of both principle and policy, the Court in *Surrey County Council* v. *Bredero Homes Ltd.*[123] upheld the trial award of nominal damages only. Contract damages, it was reaffirmed,

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121 *Swan, supra* note 92 at 277.

122 *Ibid.* at 277.

123 [1993] 3 All E.R. 705 [hereinafter *Surrey County*].

> do not cover an award to a plaintiff who has himself suffered no loss, of the profit which the defendant has gained for himself by his breach of contract.[124]

While a very limited role in contract was conceded for *restitutionary* relief, aimed at depriving a defendant of an unjustly acquired gain, its ambit was stated to be restricted to instances in which a plaintiff's *proprietary* rights had been invaded and capitalized upon.[125] Any more extensive departure from the compensatory principle was rejected in utilitarian terms, which perhaps come closer than ever before in Anglo-Canadian jurisprudence to a judicial embrace of the concept of efficient breach:

> The introduction of restitutionary remedies to deprive cynical contract breakers of the fruits of their breaches of contract will lead to greater uncertainty in the assessment of damages in commercial and consumer disputes.... In any event ... *a widespread availability of restitutionary remedies will have a tendency to discourage economic activity in relevant situations.*[126]

These are provocative words indeed, which will fuel further debate as to how far a remedial regime should reward opportunistic breach. Issue will remain joined on whether the net gains of "cynical contract breakers" should be stripped away (and whether in the name of restitution or of punishment). But in the case of Mr. Paramadevan, liable for substantial damages in any event on the proper application of the principle of compensation, if in the result the wind be tempered to the shorn lamb to the extent of a period of "free" accommodation, so be it.

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124 *Ibid.* at 710g, Dillon L.J.

125 See *ibid.* at 714j-715a, Steyn L.J. *Wrotham Park Estate Co.* v. *Parkside Homes Ltd.*, [1974] 2 All E.R. 321 (Ch. D.) was rationalized and approved on this basis. For a comparable Canadian case, see *Arbutus Park Estates Ltd.* v. *Fuller* (1977), 74 D.L.R. (3d) 257 (B.C.S.C.).

126 *Surrey County*, *supra* note 123 at 715f-g [emphasis added].