MAY YOU LITIGATE IN INTERESTING TIMES: SPECIFIC PERFORMANCE, MITIGATION, AND VALUATION ISSUES IN A RISING (OR FALLING) MARKET

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This article provides practical insight and strategic guidance regarding how to properly structure the prosecution or defence of a claim in a rising and falling market, and what expert and fact evidence is necessary. First, the article discusses the threshold required to be awarded specific performance and how courts have interpreted Semelhago*'s "uniqueness" test, especially in the context of property purchased for commercial investment purposes. Next, if specific performance is not awarded, the valuation date must be chosen. The authors propose a new "hybrid approach" for assessing damages whereby the loss based on actual cash follow up to the date of trial is measured (and a risk adjustment applied to reflect that revenues are never earned risk-free). The net present value of remaining cash flow is then calculated on the basis of the most recent data available at the date of trial. The proposed hybrid approach allows the plaintiff to receive the value of land less the cost to acquire it, plus in every claim month the plaintiff receives the cash it would have earned, but also assumes the risk of operating the land as of that time. Finally, in considering* Southcott *the authors address some strategic and practical considerations regarding mitigation and the needed evidentiary burden to consider.*

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I. INTRODUCTION

Valuation of damages in breach of contract cases is frequently a judicial after-thought, relegated to the final few paragraphs of an otherwise well-reasoned decision. In other cases, seemingly straightforward questions like the proper measure of damages, the date of assessment, or the availability of equitable relief, can prove deceptively complex. In a rising or falling market, one such question is particularly relevant: should a plaintiff's damages award include or account for market effects beyond the control of the parties occurring between the date of breach and the date of trial?

This question, simple enough on its face, gives rise to complex valuation and remedy issues, particularly pronounced in matters involving preferential rights, or in disputes related to commodities whose price is subject to a fluctuating market. In such cases, questions such as the appropriate remedy, how to address multi-party preferential rights, the proper date of assessment, and how (or whether) to address mitigation, can significantly impact the measure and quantum of damages in a given case.

This article focuses on issues of valuation and judicial remedies arising in litigation involving a rising or falling market. In addition to examining jurisprudence and academic authority considering valuation and judicial remedies questions, this article provides practical insights and strategic guidance regarding how to properly structure the prosecution or defence of a claim in a rising or falling market, and what expert and fact evidence is necessary to support (or refute) a claim.

Part II of this article discusses the threshold question of the appropriate remedy, with a focus on the implications of that question on market-dependent claims. Part III considers issues relating to the proper date of assessment. Part IV addresses mitigation, and related theoretical contingencies. Throughout, the authors provide insight into several legal and strategic questions relating to pre-emptive rights, expert evidence on damages, and financial and valuation theories.

In addition, this article identifies a conceptual problem with the quantification of damages in cases where the value of a loss is in part a function of market forces beyond the parties' control: depending on the date of assessment, the plaintiff may wind up being compensated for losses that are not proximate to the breach, or (conversely) may be penalized for bringing suit during a down market. The authors suggest a potential solution to this issue that appropriately allocates market risk as between plaintiffs and defendants.

Ultimately, the goal of this article is to provide a comprehensive analysis of legal, valuation, and strategic issues relevant to litigation in a rising or falling market, in the hope that this summary will serve as a tool for litigants to prosecute, or defend against, claims in a fluctuating market, and assist industry participants to assess risk associated with litigation over market-dependent claims.

II. THE THRESHOLD QUESTION: SPECIFIC PERFORMANCE OR DAMAGES

A. *SEMELHAGO* AND UNIQUENESS

In breach of contract litigation involving oil and gas properties, plaintiffs frequently pursue equitable claims for specific performance. The reason is simple: claimants often have a specific and identifiable interest in acquiring a particular property or asset.[1] If a plaintiff is wrongly deprived of obtaining an interest in a specific property (whether it be commercial, industrial or residential real estate, oil and gas, or energy), the most desirable remedy is often an order compelling the transfer of the property itself, not damages intended to equal the value of a similar, but not identical, property.

Courts have traditionally granted equitable relief to plaintiffs who can establish a legal right to an interest in real property. Until recently, the default judicial assumption was that real property was "unique" and irreplaceable, similar to a work of art. In the words of Justice Sopinka, the common law assumed that: "Blackacre had no readily available equivalent."[2] Given this assumption, damages were not considered an adequate remedy in claims involving real property; as such, the preferred remedy was specific performance.

In *Semelhago*, the Supreme Court of Canada criticized the judicial tendency to treat all real estate as unique, and to award specific performance as the default remedy. Justice Sopinka rejected the long-held judicial belief that real estate is unique, based on the progress of modern real estate development, observing that: "[i]f a deal falls through for one property, another is frequently, though not always, readily available."[3]

Having concluded that the traditional policy rationale for specific performance was outdated, *Semelhago* focused on "uniqueness" as the key consideration in whether to grant specific performance over real property. In that regard, Justice Sopinka directed that specific performance should "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."[4]

1 As discussed below, there are also several other legal and strategic reasons for claiming specific performance, most notably as they relate to the duty to mitigate.
2 *Semelhago v Paramadevan*, [1996] 2 SCR 415 at para 14 [*Semelhago*].
3 *Ibid* at para 20.
4 *Ibid* at para 22.

Semelhago has been criticized as replacing a centuries old presumption regarding the interchangeability of interests in land with an imprecisely defined "uniqueness analysis." Professor Waddams argued that the approach employed by the Supreme Court adopted an unduly narrow focus:

> The case for change was based on the supposition that the only argument in favour of specific performance was that every piece of land was presumed to be unique, and that, since many pieces of land in modern times were very similar, the rule rested on a kind of factual falsity, and that a change in the traditional rule was required by principle.
>
> But this approach does not do justice to the arguments in favour of the traditional rule, which may be supported on several grounds other than that every piece of land is unique. Specific performance of land sale contracts, in contrast to many other kinds of contract, is usually very practicable, and for two principal reasons: (1) the court itself can implement the decree directly, if necessary, very cheaply and effectively, by the stroke of a pen (*i.e.*, there are no supervision problems); and (2) performance is unlikely in most cases to be unduly oppressive to the promisor.… The traditional rule did not give an absolute right to specific performance: specific performance was available *as of course*, (not "as of right"), *i.e.*, under the traditional rule the remedy remained "discretionary" in the sense in which equity understands this concept, and this supplied a built-in protection against oppressive or unfair use of the remedy.[5]

In a similar vein, Orlando Da Silva characterizes Justice Sopinka's reasoning in *Semelhago* as fundamentally circular, remarking acerbically that: "[a]part from using the word 'readily,' the Supreme Court of Canada merely held that the land is unique when it is unique. There ends the analysis — and with it three centuries of legal jurisprudence."[6] Similarly, in the inventively titled article, "Death to Semelhago!," while Bruce Ziff acknowledges that Semelhago has its supporters, he makes the argument that: "the *Semelhago dictum* is bad law and should be rejected."[7]

Subsequent case law clarified that the inquiry *Semelhago* urges is actually not (exclusively) into the uniqueness of a particular property, but requires the Court to answer the broader question of whether in a given case damages are an adequate remedy.

B. BEYOND UNIQUENESS: TOWARDS A "CRITICAL INQUIRY" APPROACH

In *John E. Dodge Holdings Ltd. v. 805062 Ontario Ltd.*, Justice Lax cautioned that there is a "danger in framing the issue as one of uniqueness (a term that carries with it a pre-*Semelhago* antediluvian aroma)."[8] Instead, Justice Lax held that while uniqueness is an

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5 Stephen Waddams, "The Contribution to Private Law of Justice La Forest" (2013) 54:2 Can Bus LJ 205 at 217–18 [emphasis in original].

6 Orlando V Da Silva, "The Supreme Court of Canada's Lost Opportunity: *Semelhago v. Paramadevan*" (1998) 23:2 Queen's LJ 475 at 477, cited in Joseph G LoPresti, "The Evolution of Specific Performance: A Discussion of Specific Performance and Equitable Damages before and after *Semelhago v. Paramadevan*" (2002) 49 RPR (3d) 88 at 98.

7 Bruce Ziff, "Death to Semelhago!" (2016) 39:1 Dal LJ 1 at 3.

8 (2001), 56 OR (3d) 341 at para 55 (Sup Ct J) [*Dodge Holdings*].

important consideration, the "fundamental question is whether the plaintiff has shown that the land rather than its monetary equivalent better serves justice between the parties."[9]

In *Southcott Estates Inc. v. Toronto Catholic District School Board*, a case primarily dealing with the interaction between specific performance and the duty to mitigate, the Supreme Court of Canada revisited *Semelhago*, and clarified that although "uniqueness" was *an* important element in determining whether to award specific performance, the real question is whether money can adequately compensate a plaintiff for its loss. Justice Karakatsanis stated: "[s]pecific performance will be available only where money cannot compensate fully for the loss, because of some 'peculiar and special value' of the land to the plaintiff."[10]

In *Death to Semelhago!*, Ziff observes that while uniqueness is the "most important factor" in the test for specific performance, there are several other relevant considerations, and "[t]he primary question is whether damages will suffice to meet the ends of justice."[11]

In considering the factor of uniqueness, Ziff poetically notes that: "[l]ike snowflakes and fingerprints, all properties can be described as unique. No two parcels can occupy the same physical space on the globe."[12] Ziff explains, however, that "uniqueness" has a special meaning in the context of specific performance, and although a plaintiff is not required to demonstrate that the property is "one of a kind" or "incomparable," the relevant inquiry is whether the property "possesses such qualities that finding a suitable substitute is rendered difficult (though not necessarily impossible)."[13]

In *Harle v. 101090442 Saskatchewan Ltd.*, the Saskatchewan Court of Appeal nicely illustrated the interplay between "uniqueness" and the suitability of specific performance.[14] The decision in *Harle* considered the sale of farmland west of Regina. The trial judge described the property as "a once in a lifetime opportunity"[15] and the Appeal Court found that the property had "no counterpart near the City in terms of proximity, size, and single ownership."[16]

Notwithstanding these findings, Justice Jackson set aside the trial judge's order of specific performance because the plaintiff acquired the property for commercial investment purposes and the property's uniqueness (size, single ownership, and proximity to Regina) only enhanced "the land's use with a view to maximizing revenues and, in turn, profits."[17] In other

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9 *Ibid*.

10 *Southcott Estates Inc v Toronto Catholic District School Board*, 2012 SCC 51 at para 38 [*Southcott*].

11 Ziff, *supra* note 7 at 12. Ziff provides examples where non-uniqueness related considerations may be relevant to a decision to grant specific performance, including where: (1) damages are difficult to compute; (2) the defendant is guilty of inappropriate conduct (given that specific performance is an equitable remedy); or (3) damages are not of practical value if the defendant cannot satisfy a judgment (for example, when insolvent) (*ibid* at 10–11).

12 *Ibid* at 12.

13 *Ibid*.

14 2014 SKCA 6 [*Harle* CA].

15 *Ibid* at para 122, citing *101090442 Saskatchewan Ltd v Harle*, 2012 SKQB 112 at para 84.

16 *Harle* CA, *ibid* at para 121.

17 *Ibid* at para 96.

words, money was an adequate remedy even though the property was, in many respects, "unique." The following passage is instructive:

> [T]he trial judge misapprehended the extent to which *Semelhago* changed the law of specific performance. He did not give sufficient weight to the nature of this property, and he started with the wrong question, *i.e.*, whether the property is unique, rather than whether damages are an adequate remedy.[18]

In *Raymond v. Raymond Estate*, Justice Caldwell confirmed that the judicial inquiry into determining the appropriateness of specific performance is not a search for uniqueness, but rather an assessment of whether damages would be an inadequate remedy. In practical terms, this means a plaintiff must demonstrate "that the subject property is specially suited to the purchaser and that a comparable substitute property is not readily available."[19] The court, in turn, must determine "whether the justice of the matter calls for an award of specific performance because damages would be inadequate."[20]

In *Damages and Specific Performance: A Tale of Two Remedies,* Marguerite Moore posits that factors such as "uniqueness, adequacy of damages, and the requirement of a fair, real and substantial claim to specific performance are intertwined" in the calculus of determining whether to grant specific performance.[21] In *904060 Ontario Ltd. v. 529566 Ontario Ltd.*, Justice Low framed the relevant inquiry as follows:

> [T]he presumption of uniqueness has not (yet) been replaced by a presumption of replaceability, and that what the Supreme Court did in *Semelhago* was to open the door to a critical inquiry as to the nature and function of the property in relation to the prospective purchaser.[22]

C. RELEVANT CONSIDERATIONS IN THE "CRITICAL INQUIRY" APPROACH

The "critical inquiry" approach to specific performance, contemplated in *904060 Ontario Ltd.*, has been endorsed in subsequent decisions.[23] While the "critical inquiry" approach provides an overarching test and principled basis to consider the appropriateness of awarding specific performance, it does not provide specific criteria to guide this inquiry. Subsequent case law has provided the following key points and guidance to assist in determining whether money can adequately compensate a plaintiff fully for a loss, considering the peculiar and special value of the property in question:

- Specific performance is a matter of judicial discretion.[24]

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18 *Ibid* at para 101.
19 *Raymond v Raymond Estate*, 2011 SKCA 58 at para 15 [*Raymond Estate*].
20 *Ibid*.
21 Marguerite Moore, "Damages and Specific Performance: A Tale of Two Remedies" (2011) 2 RPR (5th) 175 at 202–203.
22 *904060 Ontario Ltd v 529566 Ontario Ltd* (1999), 89 OTC 112 at para 14 (Gen Div) [*904060 Ontario Ltd*].
23 *Dodge Holdings*, *supra* note 8 at paras 54–55; *1244034 Alberta Ltd v Walton International Group Inc*, 2007 ABCA 372 at para 3 [*Walton*]; *Raymond Estate*, *supra* note 19 at para 15.
24 *Walton*, *ibid* at para 2.

- Given the equitable nature of the remedy, coupled with the fact that specific performance is a matter of judicial discretion, considerations such as clean hands, delay, and potential for a windfall to either the plaintiff or defendant, are relevant to the inquiry and may impact a plaintiff's entitlement to specific performance.

- A plaintiff may claim specific performance and damages, and make an election at trial.[25]

- The claimant has the onus to establish that damages would be an inadequate remedy.[26]

- A plaintiff is not required to prove a negative and demonstrate the complete absence of comparable properties.[27]

- A prospective purchaser bears the burden of adducing evidence that the subject property is specially suited to the purchaser and that a comparable substitute is not readily available.[28]

- While at trial the plaintiff bears the onus of demonstrating damages would be an inadequate remedy, in an application under applicable land titles legislation to discharge a caveat or certificate of pending litigation, the moving party (defendant) bears the onus.[29]

- "[U]niqueness does not mean singularity. It means that the property has a quality (or qualities) that makes it especially suitable for the proposed use that cannot be reasonably duplicated elsewhere.… The plaintiff need not show that the property is incomparable."[30]

- "[T]he Court must determine the true intentions of the plaintiff so as to avoid a speculative lawsuit for profit."[31]

- If an accurate assessment of damages is not possible, or if the exercise of assessing damages is "speculative and conjectural," specific performance may be appropriate.[32]

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25 *Dodge Holdings*, *supra* note 8 at para 58.

26 Moore, *supra* note 21 at 179, citing amongst other decisions, *Canamed (Stamford) Ltd v Masterwood Doors Ltd* (2006), 41 RPR (4th) 90 at paras 102–103 (Ont Sup Ct J) [*Canamed*].

27 *Dodge Holdings*, *supra* note 8 at para 57.

28 *Raymond Estate*, *supra* note 19 at para 15.

29 *Youyi Group Holdings (Canada) Ltd v Brentwood Lanes Canada Ltd*, 2014 BCCA 388 at para 39 [*Youyi Group Holdings*].

30 *Dodge Holdings*, *supra* note 8 at para 60.

31 *Walton*, *supra* note 23 at para 6.

32 *Youyi Group Holdings*, *supra* note 29 at para 44, citing *United Gulf Developments Ltd v Iskandar*, 2004 NSCA 35 at para 19.

- The proper inquiry is not a mere consideration of the nature and function of the land. The relevant inquiry with respect to whether or not the property is "unique" is whether the evidence of replaceability for the purchasers' purposes is sufficient.[33]

- Where "performance of the defendant's obligation would require a complex series of acts or the maintenance of an ongoing relationship, the remedy of specific performance will ordinarily be refused [however,] such orders will be made where justice requires."[34]

While the outcome of any critical inquiry hinges on the facts of each particular case, it is clear that "specific performance has become the same kind of extraordinary remedy as an injunction; [and that] damages are the usual remedy."[35]

For example, in *Gillespie v. 1766998 Ontario Inc.*, Justice Myers acknowledged that *Semelhago* "severely limited the availability of the remedy of specific performance."[36] Justice Myers went further, suggesting that, when *Semelhago* was read in conjunction with the *Southcott*, there only remained "the narrowness of the sliver of room left for true cases of specific performance."[37] Nevertheless, Justice Myers ultimately awarded specific performance in that case; however, *Gillespie* was a case involving residential real estate.

Courts have been less willing to entertain specific performance as a remedy in commercial matters (whether it be commercial real estate, or energy related interests in land), particularly those involving investment properties.[38]

In *Dodge Holdings*, Justice Lax addressed the difference between pursuing a claim for specific performance in residential cases, as opposed to commercial matters. Justice Lax noted that there is a "subjective and objective aspect to uniqueness," and that generally, "the subjective aspect will be less significant in commercial transactions and more significant in residential purchases."[39] Although uniqueness does not equate to "singularity," it does require that "the property has a quality (or qualities) that makes it especially suitable for the proposed use that cannot be reasonably duplicated elsewhere."[40] Given overarching profit motives and the fungible nature of most, but not all, commercial assets (whether it be commercial real estate or oil and gas interests), Justice Lax suggested, perhaps a little too definitively, that: "[o]bviously, investment properties are candidates for damages and not specific performance."[41]

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33 *Walton*, *supra* note 23 at para 4.
34 *Fuhr Estate v Husky Oil Marketing Company*, 2010 ABQB 495 at para 120 [*Fuhr Estate*], citing Robert J Sharpe, *Injunctions and Specific Performance* (Toronto: Thompson Reuters, 2017) (loose-leaf 2017) at paras 7.340–7.350.
35 Moore, *supra* note 21 at 178.
36 2014 ONSC 6952 at para 26 [*Gillespie*].
37 *Ibid* at para 31.
38 *2144688 Ontario Ltd v 1482241 Ontario Ltd*, 2016 ONSC 1475 at para 31; *Strategic Acquisition Corp v Starke Capital Corp*, 2017 ABCA 250 at para 47 [*Strategic Acquisition*].
39 *Supra* note 8 at para 59.
40 *Ibid* at para 60.
41 *Ibid* at para 59.

In *Domowicz v. Orsa Investments Ltd.*, Justice Adams declined to award specific performance in a case involving a commercial real estate opportunity, reasoning that:

> A commercial purchaser usually seeks to profit from his investment. If the vendor refuses to complete the sale of (say) this apartment building, other buildings or other investments are readily available: if the only available investments are less attractive, damages can be awarded to "compensate" the plaintiff for the diminished quality of his investment. The argument that all land is somehow "unique" should not be allowed to obscure the fact that it is not "unique" in any contract-remedial sense to a commercial purchaser, in respect of whom the land is little more unique than fungible chattels. Its only "uniqueness" to him rests in its unique market value, but market value assessment of real estate is usually available.[42]

One commentator noted that following *Semelhago*, "[p]roperties purchased as an investment or for capital appreciation are now unlikely to ever qualify for specific performance."[43] According to the authors of the *Law of Real Property*, a purchaser acquiring lands for investment purposes would find it "exceedingly difficult" to satisfy the "onus of establishing that damages would be an inadequate remedy in the particular circumstances."[44] Finally, Marguerite Moore suggests that "recent legal developments reflect an erosion of the availability of specific performance in general and a preference for damage awards, particularly in the context of commercial transactions."[45]

This is not to say that specific performance is never available in claims pertaining to commercial property, or where an asset or interest is acquired for investment purposes.[46] Courts regularly state as much when summarizing the law on specific performance in this context.[47] For example, in *Walton,* the Alberta Court of Appeal commented that

> [t]he Court [in *Semelhago*] did not conclude that specific performance will never be available in the case of property acquired for investment purposes. Rather, the relevant inquiry will be whether the property is "unique" or whether damages are an adequate remedy. It follows that specific performance remains a matter of discretion for the trial judge.[48]

The British Columbia Court of Appeal also recently stated that "the Supreme Court [in *Semelhago* and *Southcott*] has not signalled that specific performance is 'on the way out' or that contracting parties should no longer expect to be held to their bargains."[49] There is a

42 *Domowicz v Orsa Investments Ltd* (1993), 15 OR (3d) 661 (Gen Div), citing Barry J Reiter & Robert J Sharpe, "Wroth v. Tyler: Must Equity Remedy Contract Damages?" (1979) 3:2 Can Bus LJ 146 at 154–55.

43 Theodore Rotenberg, "*Dodge*, on *Semelhago*: Another Guide for the Continually Perplexed," Case Annotation on *Dodge Holdings*, *supra* note 8.

44 Anne Warner La Forest, *Anger & Honsberger Law of Real Property*, 3rd ed, vol 3 (Toronto: Thomson Reuters, 2017) (loose-leaf 2017), § 23:30.2(b)(i), cited by *Walton*, *supra* note 23 at para 5.

45 Moore, *supra* note 21 at 202.

46 *Ibid*.

47 *Walton*, *supra* note 23 at para 2; *Strategic Acquisition*, *supra* note 38 at paras 34–35; *Covlin v Minhas*, 2009 ABQB 42 at paras 43–35, aff'd 2009 ABCA 404 [*Covlin*].

48 *Walton*, *ibid*.

49 *Youyi Group Holdings*, *supra* note 29 at para 52.

significant body of case law where courts have awarded specific performance in the commercial and investment contexts.[50]

One of the identifiable themes in cases where the courts award (or refuse to award) specific performance in the commercial and investment contexts, is an examination of the nexus between the property or interest, and the plaintiff's wider asset mix and business plans. In *Walton*, Justice Berger, writing for the majority, endorsed a "business rationale" approach to considering specific performance in the commercial context:

> What is emerging is a "business rationale" test for which the (subjective) business case for desiring the particular commercial property is examined through a due diligence (objective) appraisal by the court. Thus, the court will examine the nexus between the plaintiff's business plan and the amenities of the subject property. Specific performance may be granted if those amenities cannot readily be found elsewhere.[51]

Similarly, in *Harle*, the Saskatchewan Court of Appeal overturned a trial decision that awarded specific performance based, in part, on the "critical" finding that the plaintiff (a development corporation) did not have a specific plan to develop the land. Rather, the plaintiff was prepared to take a "wait and see" approach concerning the property.[52] The Court of Appeal reasoned that the plaintiff's failure to adduce evidence regarding a business plan or proposed development "removed from the table the consideration of methods of calculating damages other than the increase in value of the land."[53] As such, the plaintiff could not establish that money could not compensate for its loss.

In *Covlin*, a case involving a residential real estate transaction, Justice Lutz granted specific performance based on a plaintiff's plans to develop a residential property as part of a wider development strategy involving several adjacent commercial lots, which she directly or indirectly controlled. In granting the order, Justice Lutz observed that courts have granted specific performance in cases "where the plaintiff has a longer-term development plan for the subject property, or where the subject property makes a significant addition to other properties already owned by the plaintiff."[54] Justice Lutz ultimately determined that

> whether or not the Plaintiff's business plan can ultimately be realized is not the relevant inquiry. Instead, the question is whether a substitute property is readily available. I have concluded that this particular parcel of land is unique for the Plaintiff's purposes, and that a substitute property is not readily available. Furthermore,

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50 *Covlin*, *supra* note 47 (a purchaser was awarded specific performance on a contract for the purchase of a development property, because the purchaser had long-term development plans); *Dodge Holdings*, *supra* note 8 (a hotelier that exercised business judgment to build a new structure adjacent to a tourist attraction was awarded specific performance); *532782 BC Inc v Republic Financial Ltd*, 2001 ABQB 581 at para 27 (the Court granted specific performance relating to an apartment building that was, along with other properties, part of a developer's wider development plans); *2475813 Nova Scotia Ltd v Lundrigan*, 2003 NSSC 48 (specific performance was awarded because the purchaser already owned 80 percent of the units in the condominium and the unit being purchased was a crucial component of intended development); *11 Suntract Holdings Ltd v Chassis Service & Hydraulics Ltd* (1997), 36 OR (3d) 328 (Gen Div) (specific performance was awarded because the piece of land was unique to the purchaser, in that it was necessary in order to move forward with development plans).

51 *Walton*, *supra* note 23 at para 6, citing La Forest, *supra* note 44, § 23:30.20(b)(i).

52 *Harle* CA, *supra* note 14 at para 86.

53 *Ibid* at para 92.

54 *Covlin*, *supra* note 47 at para 50.

> damages would not be a complete or adequate remedy to the purchaser in this case. I conclude that the Plaintiff is entitled to an order for specific performance of the RREPC.[55]

The above cases, and others, suggest that courts are more likely to entertain a claim for specific performance in the commercial context where a plaintiff can adduce evidence demonstrating that the contested property interest is unique to, ideally integrated into, and an important part of, a plaintiff's wider business interests or asset mix; or, at minimum, that the plaintiff has a development plan or strong business rationale (that cannot be easily duplicated elsewhere) for pursuing a particular property.

D. SPECIFIC PERFORMANCE IN THE OIL AND GAS CONTEXT

In the oil and gas context it will be difficult, if not impossible, to justify a claim for specific performance based solely on the attributes of a particular lease or asset. No matter how prodigious the asset, when viewed as a stand-alone proposition, the property is still only a revenue generating asset producing a highly fungible resource that is freely traded in a global market. As such, almost without exception, money can compensate a plaintiff for its loss.

Therefore, in order to credibly pursue a claim for specific performance in energy related litigation, it is necessary for the plaintiff to enlarge the aperture and capture a wider and more nuanced picture of the claim. A plaintiff may bolster its claim to specific performance by providing evidence relating to the distinctiveness of the particular interest (why a specific lease or opportunity is desirable, compared to other similar assets) and, more importantly, explaining how and why the plaintiff is uniquely situated to exploit the interest as part of its wider business strategy.

Depending on the facts of the case, a plaintiff may be able to argue that some or all of the circumstances below create a compelling business rationale for why a particular property has special value to the plaintiff such that damages cannot adequately compensate for its loss:

- If the property is adjacent to other assets owned or controlled by the plaintiff (or if the plaintiff already has a working interest in the asset but is looking to expand that working interest), this may provide an opportunity for the plaintiff to expand its holdings in a key development area thereby creating synergies at no, or little, additional cost, or allow the plaintiff to gain or exploit market share in a particular area.

- A plaintiff may be able to argue that the asset in question can be linked to other assets or infrastructure owned by the plaintiff (such as a pipeline, facility, or processing facility) thereby forming a supply or distribution chain that adds strategic value and creates a competitive advantage.

- The contested interest may increase the plaintiff's interest in a property or area beyond the threshold to exercise majority control, and put the plaintiff in a positon

55 *Ibid* at para 57.

to assume operatorship of the asset. This may be particularly relevant where the plaintiff has business or develop plans relating to the asset that differ from the existing operator.[56]

- The plaintiff may have a particular technical, operational, or geological understanding of an area or asset based on its nearby or adjacent interests that provides unique opportunities to exploit or develop the asset. Conversely, acquiring the asset may provide insights into technical, operational, or geological matters that could benefit the plaintiff elsewhere. Depending on the availability of other, similar assets in the vicinity or jurisdiction, this could support a scarcity argument, particularly when coupled with evidence of how the asset fits within the plaintiff's larger asset mix.

- The working interest partners in the asset, or even the operator of the asset, may allow for the plaintiff to capture synergies in its wider business relationships, or provide other relationship based competitive advantages to the plaintiff.

The decision of the Alberta Court of Queen's Bench in *Canlin Resources* is a recent example of the array of arguments that a plaintiff can marshal in support of a claim for specific performance. In *Canlin Resources*, Justice Romaine considered an application by Canlin for a declaration that it was entitled to a right of first refusal (ROFR) with respect to the sale of a gas facility owned as joint venture partners by Canlin, Husky (the respondent), and a third party. Canlin also sought an order for specific performance of the right of refusal provisions in the contract.

Husky, as operator, had shut down and decommissioned part of the facility, which prevented Canlin from processing gas in the facility. Other parts of the facility remained operational. Since decommissioning, Canlin consistently advocated that Husky operationalize the facility (at a cost of approximately $1.5M). Canlin also expressed interest in assuming ownership and operatorship of the facility.

Justice Romaine ultimately held that the ROFR had been triggered. In awarding specific performance, Justice Romaine held that Canlin established that the facility was "critically important" to its operations, as it provided "a critical link between Canlin's wells and infrastructure owned partly or wholly by Canlin."[57]

Justice Romaine also noted that: (1) Canlin asserted its claim for specific performance "early and repeatedly";[58] (2) Canlin lead evidence about third party transportation and processing fees incurred in processing its gas elsewhere, and that would be avoided if specific performance was granted; (3) Canlin asserted, and lead evidence that, "without being able to purchase a majority interest in the Facility through the exercise of its ROFR, it will be at the mercy of whoever acts as operator of the Facility";[59] and (4) although the third party

56 *Canlin Resources Partnership v Husky Oil Operations Limited*, 2018 ABQB 24 at para 50 [*Canlin Resources*].
57 *Ibid* at para 50.
58 *Ibid* at para 54. The authors understand that *Canlin Resources* is currently under appeal.
59 *Ibid* at para 50.

purchaser, Ikkuma, would be prejudiced by the order for specific performance, "Ikkuma cannot be said to have been unaware of Canlin's claim before closing the balance of the transaction."[60]

Awards of specific performance in the oil and gas context are rare;[61] however, the decision in *Canlin Resources* demonstrates that, given the appropriate facts, the courts will entertain equitable relief in a commercial context, even if this involves and impacts third party rights.

E. THE NEED TO ACT QUICKLY — SPECIFIC PERFORMANCE AS FRONT-END LOADED LITIGATION

As is evident from *Canlin Resources*, the need to assert, and act upon, a claim for specific performance "early and repeatedly" is fundamentally important. Technically, a plaintiff can claim specific performance and damages, and make an election at trial.[62] However, commentators have noted that specific performance litigation is "front-end loaded," meaning that early notice and quick action becomes a de facto requirement to credibly pursue specific performance remedy.[63] Quick action is important for a few reasons.

First, a claim for specific performance frequently impacts third party rights. This creates a positive obligation, in practice if not technically, for a claimant to provide notice of the claim and seek immediate legal action. If a plaintiff fails to provide notice, or litigates at a leisurely pace, the risk is that events (strategic decisions, investments, changing business climate, further transfers) outpace litigation and it becomes exceedingly difficult, if not impossible, to "unscramble the egg."[64]

In cases involving unrelated third parties (even third parties with knowledge of a claim), the equities will increasingly weigh against the plaintiff the longer it takes to prosecute a matter. In *Canlin*, Justice Romaine gave significant consideration to the impact on third party rights in granting specific performance, ultimately finding that some degree of prejudice to third party rights was acceptable given that Canlin "asserted its right to a ROFR early and repeatedly" and that the third party was aware of the claim before the transaction closed.[65]

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60 *Ibid* at para 54.

61 *Masai Minerals Ltd v Heritage Resources Ltd* (1979), 95 DLR (3d) 488 (Sask QB), aff'd (1981), 119 DLR (3d) 393, leave to appeal to SCC refused (1981), 37 NR 289 (equity will not provide specific performance where the common law remedy is adequate; the common law could provide a remedy protecting the plaintiff's royalty rights which would put the plaintiff in its original position so specific performance was denied); *Blaze Energy Ltd v Imperial Oil Resources*, 2014 ABQB 326 (when the plaintiff did not strictly comply with time periods set out in the ROFR, specific performance was not available to revive the plaintiff's rights); *Baton Rouge Holdings Ltd v Platte River Resources Ltd* (1996), 181 AR 172 (CA) (the appellants were not entitled to a right of first refusal and as such could not be entitled to the remedy of specific performance); *Amoco Canada Petroleum Co v Alberta & Southern Gas Co*, [1992] 5 WWR 431 (Alta QB) (specific performance can be sought as an interim remedy, however a particularly clear case must be demonstrated and where the complexity of operations will cause significant inconvenience, it will not be appropriate to order pre-trial contractual enforcement).

62 *Dodge Holdings, supra* note 8 at para 58.

63 Moore, *supra* note 21 at 176, citing Arnie Herschorn, "The Availability of Specific Performance," in *Six Minute Real Estate Lawyer 2007* (Toronto: Continuing Legal Education, Law Society of Upper Canada, 14 November 2007) at 20-5.

64 The phrase "unscramble the egg" is frequently used in cases involving a related judicial remedies issue — injunctions, particularly at the "balance of convenience" stage of the analysis (see *MD Management Limited v Dhut*, 2004 BCSC 513 at para 42) but it is equally relevant in the specific performance context.

65 *Canlin Resources*, *supra* note 56 at para 54.

Second, the fundamental assertion informing any specific performance claim is that damages cannot compensate a plaintiff fully for its loss, because of some "peculiar and special value" of the property, interest, or asset to the plaintiff.[66] It is antithetical for a plaintiff to assert that an interest is unique and (at least in the commercial context) important for pressing business purposes, and to then fail to take expeditious steps to seek legal recourse. In *Harle*, the uniqueness of the land in question was undermined by the plaintiff's willingness to "take a wait and see approach";[67] clearly, business rationales quickly become stale-dated if quick and decisive action is not taken. In most cases, failure to act quickly significantly detracts from the credibility of a claim of uniqueness.

Third, and related to the above point, specific performance is an equitable remedy. The courts will determine the true intentions of the plaintiff so as to avoid a speculative lawsuit for profit.[68] If a plaintiff takes a "wait and see" approach to determine how well a particular property or asset performs, or how the wider market performs, before commencing an action, a court will likely refuse to exercise its discretion to award specific performance.[69] Perhaps a more common example is when a plaintiff commences litigation, but then prosecutes the action at a slow pace.[70]

Fourth, as discussed below, there may be land titles issues and registrations against title that require a prompt resolution so as not to unduly tie up lands.[71]

In a practical sense, the requirement to assert a claim for specific performance "early and repeatedly" means commencing litigation immediately, preferably before the transaction in question closes. The plaintiff should consider bringing an immediate application for a declaration and specific performance, or seek injunctive relief. In *Canlin*, the plaintiff acted quickly to seek judicial intervention. In September 2017, Husky gave notice of its intention to sell the facility. Canlin commenced litigation. The closing of the facility sale was placed in escrow pending the outcome of the application. A decision was issued on 11 January 2018.[72]

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66 *Southcott*, *supra* note 10 at para 38.

67 *Harle* CA, *supra* note 14 at para 86.

68 *Walton*, *supra* note 23 at para 6.

69 Specific performance, being an equitable remedy, can be lost due to delay (*Pitblado & Hoskin v Swerid*, 2003 MBCA 134 at para 23).

70 Specific performance is often inappropriate simply because of temporal considerations: by the time the case comes to trial or is otherwise resolved, it is very often too late for performance (Sharpe, *supra* note 34 at para 7.150). The most cited statement of the law regarding specific performance is that a party cannot call upon a Court of Equity for specific performance unless he has shown himself ready, desirous, prompt, and eager (*Mills v Haywood* (1877), 6 Ch D 196 at 202). See also *Inmet Mining Corp v Homestake Canada Inc*, 2002 BCSC 61 at 405, aff'd 2003 BCCA 610 (the plaintiff vendor was entitled to specific performance, but the plaintiff had also been mining the property for over four years awaiting resolution of the litigation. The judge held that ordering specific performance would just lead to further litigation and damages in lieu were more appropriate); *UBS Securities Canada Inc v Sands Brothers Canada Ltd*, 2009 ONCA 328 at para 106, citing *Asamera Oil Corp Ltd v Sea Oil & General Corp*, [1979] 1 SCR 633 at 667–68 [*Asamera*] (where there is a prompt claim for specific performance (and a fair, real, and substantial justification for the claim), the plaintiff may not be required to acquire replacement property).

71 See e.g. Justice Slatter's comments (in dissent) on quickly progressing a claim: *Walton*, *supra* note 23 at para 43.

72 *Canlin Resources*, *supra* note 56 at paras 3, 5.

F. REGISTRATIONS AND LAND TITLES CONSIDERATIONS

At minimum, a plaintiff who intends to pursue a claim for specific performance (or damages in lieu of specific performance) should consider taking steps to register a caveat and file a certificate of *lis pendens* (CLP) against title. Land titles legislation generally permits any party "claiming" an interest in land to file a caveat to protect that interest.[73] A purchaser relying on a purchase and sale agreement for land is generally treated as having an "interest in land" that would support a caveat, subject to an examination of the appropriate remedy.[74] A registered notice on title prevents a defendant from freely dealing with the property, and addresses some of the concerns around advance notice and third party prejudice raised in *Canlin*.

There are several factors to consider when registering a claim against title, and potentially significant consequences and ramifications if the claim is determined to be invalid.[75] In fact, both the lawyer and the client may be liable for slander of title or abuse of process if it is later found that no reasonable claim existed, and a CLP was registered.[76] There is also some ambiguity, at least in Alberta, regarding the interaction between the Torrens system, registration and discharge of caveats, and the remedy of specific performance.[77]

Irrespective of the procedural mechanism, a registration against title will almost certainly be challenged. As such, as part of the registration process, it may be necessary to demonstrate that there is a triable issue, which will necessarily involve evidence and argument regarding why the property is unique and why damages are inadequate.[78] The onus at this preliminary stage of the litigation is on the party moving to discharge the certificate.[79]

For example, in *Youyi Group Holdings*, the claimant filed a CLP against title relating to a disputed purchase and sale agreement. The respondent brought an application, pursuant to the BC *LTA*, to cancel the CLP. Justice Newburry set out the following standard for discharging a CLP:

> [W]here specific performance is being sought and the court is considering an application to order the cancellation of a CLP … it is for the applicant (here, the Vendor) to satisfy the court that it is *plain and obvious* the person seeking specific performance *would not succeed on that claim at trial*. If there is a triable

73 *Walton*, *supra* note 23 at para 30; see also *Land Titles Act*, RSA 2000, c L-4, s 130; *Land Title Act*, RSBC 1996, c 250, s 282 [BC *LTA*]; *Land Titles Act*, SNB 1981, c L-1.1, s 30(1).

74 *Walton*, *ibid* at paras 16–17, 36.

75 See Moore, *supra* note 21.

76 *First Canadian Land Corp Ltd v Rosinante Holdings Ltd* (1985), 62 BCLR 262 at 265 (CA) (it is possible for a wrongful filing of a CPL to give rise to a cause of action for slander of title as well as abuse of process); *Western Surety Co v Hancon Holdings Ltd*, 2007 BCSC 180 at para 50 (slander of title is actionable where a lien, CPL, or other notices against title, operate as a cloud upon the plaintiff's rights to the property and make third parties avoid the property); *O'Neill v Edmanson*, 2017 NBCA 33 at para 46 (there must be evidence of a dishonest or improper motive which goes beyond mere carelessness. Careless filing of erroneous information did not raise to the level of "malice" required for slander of title).

77 *Walton*, *supra* note 23 at paras 16–18, but see Justice Slatter's dissenting opinion, specifically at paras 16–17, 32–43.

78 Moore, *supra* note 21.

79 *Youyi Group Holdings*, *supra* note 29 at para 39. See also *Kansun Homes (Toronto) Ltd v Transnation Plaza Corp*, 2003 CarswellOnt 2815 (WL Can) at para 11 (Sup Ct J); *Dynacorp Canada Inc v Curic*, 2010 ONSC 2603 at para 17.

> issue as to whether damages would provide an adequate (or appropriate) remedy, the application should be dismissed and the matter proceed to trial.[80]

In *Walton*, the Alberta Court of Appeal considered whether a putative purchaser of land is entitled to maintain a caveat against the land. The putative purchaser, 1244034 Alberta Ltd. (124), entered into a purchase and sale agreement with a vendor, Walton, relating to development lands. Under a separate contract, Walton provided a ROFR to certain investors. One of the investors, Bailey, exercised the ROFR. When Walton refused to close the deal with 124 based on the exercised ROFR, 124 filed a caveat and CLP to protect its interest, and brought an application for an interim injunction restraining the conveyance of the land to Bailey. Walton applied to discharge the caveat and CLP. The hearing judge discharged the caveat and CLP, and refused to grant 124's interim injunction.

In dismissing the appeal, and thereby upholding the hearing judge's decision to discharge the caveat on the basis that damages would be a sufficient remedy should liability be established, Justice Berger (for the majority), held:

> Alberta law is well settled that on an application to discharge a caveat based on an agreement for the purchase and sale of land, a finding that damages would be an adequate remedy is sufficient to discharge the caveat. The determination of the chambers judge was thus correct in law and is supported by sound policy considerations. Once it has been determined that damages are an adequate remedy, there is no "interest in land" capable of protection by caveat. With no interest in the land required to be protected, there is no basis to tie up development of the land pending resolution of the litigation.[81]

The above authorities suggest that a key challenge for litigants claiming specific performance will be to act quickly, and to provide an evidentiary basis to support a persuasive "business rationale" for why a particular asset or property is unique, and why damages cannot compensate for the loss.

III. DATES OF ASSESSMENT: LAW, POLICY, AND THEORY

A. DATES OF ASSESSMENT AND THE ALLOCATION OF MARKET RISK

The valuation of damages in commercial contract cases is often the subject of expert evidence; it is thus easy to forget that the concerns that animate valuation questions arise chiefly from legal, and not accounting, considerations. One such example is the selection of an appropriate valuation date, normally dealt with by accounting experts by calculating contractual loss on a discounted cash flow basis from the time of the breach up to the date of trial.[82] In other instances, a date-of-trial valuation date is selected, perhaps to account for

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80 *Youyi Group Holdings*, *ibid* [emphasis in original].

81 *Walton, supra* note 23 at para 17.

82 Valuation dates are of importance to valuators and economic loss experts, mostly due to the principle that value is measured at a point in time. Losses incurred after the breach are measured on the same principle, using an approach described by Jonathan Levy as an "estimation … made by starting with the 'market or use value' of the performance at the time of the breach, and then capitalizing that amount from the time of breach until the judgment, according to a predetermined interest rate" (Jonathan Levy, "Against Supercompensation: A Proposed Limitation on the Land Buyer's Right to Elect Between Damages and Specific Performance as a Remedy for Breach of Contract" (2004) 35:2 Loy U Chicago

a foregone right to specific performance[83] or damages in equity, or to include empirical facts arising after the date of breach on the argument (variously put forward by either plaintiffs or defendants depending on the circumstances) that the Court should avoid speculating and have regard for the actual facts. The result is often a dizzying battle-of-the-experts in which competing valuation theories are tested against one another together with competing calculations of discount rates, cost of capital, and competing sets of comparable entities for valuation purposes.

Yet the legal principle that underlies this bedeviling complexity appears straightforward and simple on its face: the proposition is that contractual damages are to be measured in such a way as to place the innocent party, "so far as money can do so, *in the same position as if the contract had been performed*."[84] These words serve as a helpful reminder that the sometimes complex question of "what damages," should generally turn on the nature of the original bargain between the litigants, and the reasonable expectations around performance at the time of contract formation.

The date of assessment of damages is vital. As the saying goes, time and tide wait for no man; the conditions, circumstances, commodity prices, and market circumstances that existed at the date of breach are often distant memories by the time of trial, at which time the Court bears the unenviable task of fashioning a remedy for the parties that appropriately accounts for the benefit of hindsight and appropriately allocates the risk of a fluctuating market in accordance with the parties' original bargain.

This concept of allocation of risk is central to the issue of selecting an appropriate date of assessment, when damages are pegged (in whole or in part) to the fluctuating value of a commodity. Our courts have long looked askance at quantification of damages in a way that unfairly allocates market risk to a litigant. In *Asamera*[85] (though in an admittedly different context), the Supreme Court of Canada reasoned that post-breach fluctuations in a rising and falling market should not be included in a claim for damages:

> It is inappropriate in my view simply to extend the old principles applied in the detinue and conversion authorities to the non-return of shares *with the result that a party whose property has not been returned to him, could sit by and await an opportune moment to institute legal proceedings, all the while imposing on a defendant the substantial risk of market fluctuations between breach and trial* which might very well drive him into bankruptcy.[86]

Asamera dealt with a claim in conversion and detinue; the Supreme Court had to grapple with substantial prior authority that provided for assessment of damages in such a case at the

LJ 555 at 556 [footnotes omitted]). The approach suggested by the authors herein for measurement of lost cash flows from production in a volatile market is similar in principle.

83 Note, however, that this approach has not received universal approbation from our courts. In *Strategic Acquisition*, *supra* note 38 at para 58, the Alberta Court of Appeal in no uncertain terms stated that the failure to consider the "basic legal proposition" that damages are assessed at the date of breach and the impact of departing from it are errors in principle.

84 *Johnson v Agnew*, [1980] AC 367 at 400 (HL) [*Johnson*] [emphasis added].

85 *Supra* note 70.

86 *Ibid* at 660, Estey J [emphasis added].

date of trial.[87] The Supreme Court rejected these authorities for four reasons, one of which is particularly germane: that such a rigid approach would produce "an arbitrary … result because it lacks the flexibility needed to take into account the infinite range of possible circumstances in which the parties may find themselves at the time of the breach and before a trial can in practice take place."[88] The Supreme Court observed that the "accepted" rule provided for damages "in an amount representing what the purchaser would have had to pay for the goods in the market, less the contract price, *at the time of the breach*,"[89] but fashioned a flexible approach of its own based on the view that the plaintiff "ought to have crystallized" its damages by the acquisition of replacement shares within a reasonable period of the date of breach.[90]

The Supreme Court's admonition that the effects of a fluctuating market should be considered and accounted for is well enough; its application in practice can be somewhat complex. Too often the date of breach and the date of trial are presented as inflexible binary alternatives to the assessment of damages, despite the fact that both can lead to counterintuitive and arbitrary results.

A common example occurs in disputes over the ownership of producing oil and gas rights, such as where two parties jointly own interests in oil and gas producing assets under a joint operating agreement, and have granted one another preferential purchase rights over the subject interests.

Such preferential purchase rights may or may not attract specific performance as a remedy; however, as is set out above, it is likelier than not that where the parties owned the interests for the sole purpose of trading in a fungible commodity in order to make money, damages are likely adequate, and specific performance will accordingly be unavailable. This leads to a thorny question: what damages, and as of what date?

It is well to recall that at the outset the parties held interests in a fluctuating asset, and each of them shared equally in the risk that the value of that asset might change. This fact is fundamental to the bargain of joint ownership: both parties knew that benchmark commodity prices would partly determine the profitability of the interests they held. Implicitly, the parties agreed that each would benefit from increases in those benchmark prices, and each would bear its own risk of the market value of the asset dropping. In the oil and gas industry, parties normally do not ask for market hedges or indemnities against market fluctuations under joint ownership contracts. The allocation of market risk as between joint owners of a producing asset is simply a function of each joint owner's relative interest in the property.

In theory, damages for the breach of a preferential right should therefore maintain, not alter, that allocation of market risk as between the contracting parties. The purpose of

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87 See e.g. *ibid* at 651 (the Court noted a number of English authorities which excused a party from the duty to mitigate in cases involving a loss of shares, but commented that "a proper analysis of these cases is made difficult by reason of their antiquity," and concluded that they "ought not to be followed").
88 *Ibid* at 652.
89 *Ibid* at 647 [emphasis added]. That rule, per the Supreme Court's reasoning, reflected the necessary consequence of the combined principles of mitigation and remoteness (*ibid* at 647–48, citing *Red Deer College v Michaels*, [1976] 2 SCR 324 at 330–31).
90 *Asamera*, *ibid* at 674.

damages is to put the innocent party in the same position as it would have been in had the contract been performed. Unfortunately, traditional approaches to valuing damages, in particular with regard to the date of assessment of damages, are almost certain to change the fundamental terms of the original bargain.

B. AN ILLUSTRATIVE EXAMPLE

The two most common valuation dates are the date of contractual breach,[91] and the date of trial. Both approaches often have the unfortunate result of allocating market risk between the parties in a way that the original contracting parties could never have envisioned and almost certainly did not intend. To understand why, it is helpful to consider a hypothetical scenario:

> Party A and Party B jointly own an interest in certain unitized oil and gas leases. Party B is the operator of the leases under the terms of a CAPL-form Joint Operating Agreement and Operating Procedure; the latter provides for an obligation to give a ROFR notice in respect of any disposition of a party's entire working interest in the joint lands.
>
> On 1 January 2016, Party B entered into a series of transactions, the end result of which was that Party B's entire interest in the joint lands was transferred to Party C. After a trial, the Court found that Party A's preferential rights were breached, but declined to award specific performance on the basis that damages would be an adequate remedy, and because Party C, a bona fide purchaser, would be prejudiced as a result.
>
> The trial concluded in January of 2018. The parties had led evidence through an agreed expert regarding the value of remaining reserves attributable to the joint lands, based on an effective date of September 2017. In addition, each party retained its own expert to lead evidence on the measure and calculation of damages attributable to the breach.
>
> Meanwhile, benchmark crude oil prices fluctuated heavily. On the date of the breach, the benchmark price of West Texas Intermediate crude oil (WTI) was slightly less than $30 USD a barrel. On the effective date of the reserves report, the benchmark WTI price was $49.64 USD. As at the conclusion of the trial, the benchmark WTI price was $64.73 USD.
>
> Party A's expert suggested that an adequate measure of damages would be the value of the asset less the exercise price that would have been spent on the acquisition. She calculated those losses by aggregating the net cash flows earned from the joint lands in each of 2016 and 2017 and dividing that number by Party B's net interest. Then, she calculated the net present value of future revenue attributable to those lands using discount rates equivalent to those from the reserves report, and applying that discount rate as of the date of the trial.

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91 The date of the breach is the most common valuation date for damages assessment purposes. A Irvin Schein described this as "a general rule of contract law," which he notes has key exceptions, including specific performance, equitable damages, or damages where the plaintiff is unable to mitigate (A Irvin Schein, "Why Hypothesis Should not Replace History: Admissibility of Hindsight in Damage Claims" [1997] J Bus Valuation 62 at 63).

Party B's expert agreed that the damages should be the value of the asset less the exercise price. However, he ignored the evidence of net cash flows in 2016 and 2017 as "hindsight evidence," which in his view ought not to be considered in calculating damages. Party B's expert argued that under normal market conditions the net present value of future cash flows from an asset and its fair market value to an arm's length purchaser should be equal. On that basis, he opined that the value of the disputed assets as at the date of breach and the exercise price were the same, and concluded that there were no damages.

In principle, the approaches of these experts are equally defensible; Party A's expert assesses damages as at the date of the trial, while Party B assesses them as at the date of breach.[92] Either expert arguably provides the Court with a ready-made inference on damages depending on the outcome of the legal question of when damages should be assessed. However, their approaches will lead to vastly different damages outcomes, and raise a further issue when they are compared to the terms of the original bargain between the parties.

Recall that at the outset Party A and Party B did not agree to any special allocation of market risk; under the Joint Operating Agreement, each party bears the risk and reaps the benefits of market cycles in accordance with its working interest. Arguably, this is part of the implied understanding behind every such contract: the parties always know that the price of commodities is cyclical and that the value of their working interests will inevitably fluctuate over time.

Both experts based their damages on the same notional calculation of the difference between the value of the joint lands and the exercise price that Party A would have had to pay if it had exercised its preferential right. This principle is defensible, and (it is submitted) correct in law with respect to the calculation of damages for contractual breach of a right to purchase property.[93] Despite that commonality of approach, the two valuators will inevitably reach vastly divergent conclusions on the resulting damages calculation. In legal terms, we might crudely characterize the two damages calculations as representing (on the one hand) damages in lieu of specific performance,[94] and (on the other) expectation damages in contract measured at the date of the breach.[95] As is set out in our analysis above, the availability of damages "in lieu" of specific performance depends on a finding that specific performance would be available and that damages are inadequate; they are not automatically available simply because the complaint involves a preferential right.[96]

In either case, the objective of the analysis should be to choose a measure of damages that most accurately captures the expectations of the contracting parties at formation, given the

92 Naturally, with hindsight, the parties' positions would be reversed in a falling, rather than rising, market.

93 A holder of a preferential right to purchase real property is conceptually analogous to a frustrated purchaser under a contract for sale of land that cannot be completed due to the vendor's breach of contract. In such cases, the measure of damages has traditionally been (where specific performance is not available) the difference between the contract price and the market value of the property. See e.g. *Richter v Simpson* (1982), 37 BCLR 325 (SC); see also *Lalani v Wenn Estate*, 2011 BCCA 499 at para 24; *Peterson v 446690 BC Ltd (Seymour Arm Hotel & Restaurant)*, 2017 BCCA 394 at paras 40–41.

94 The damages calculated by Party A are analogous to the damages awarded by Justice Brooker in *Apex Corp v Ceco Developments Ltd*, 2005 ABQB 656, rev'd on other grounds, 2008 ABCA 125, leave to appeal to SCC refused, 32656 (9 October 2008). This matter involved the breach by Apex of a preferential purchase right in favour of Ceco Developments.

95 See e.g. *Barran v Assef* (1990), 105 AR 50 (QB), aff'd (1992), 117 AR 364 (CA).

96 *Semelhago*, *supra* note 2 at paras 11, 21–22.

overarching context of a fluctuating commodities market. In our view, this principle should apply irrespective of whether damages are based on the expectation interest in contract or awarded in lieu of specific performance. As Justice Lambert stressed in *Ansdell v. Crowther* "there is no distinction between damages at common law and so-called 'equitable damages', [and] no fixed rule as to the date as to when damages ought to be assessed."[97] As our Supreme Court warned in *Asamera,* a flexible approach is required, taking into account "[t]he pace of the market place and the complexities of business," and the particular circumstances of each case.[98]

C. DATE OF BREACH OR DATE OF TRIAL: A FALSE DILEMMA?

An accurate understanding of the expectations of the parties necessarily requires a principled allocation of risk as between parties. There is no reason why a technical choice between date of breach and date of trial should override this primary concern. The goal is to put the innocent party in the same position as it would have been if the contract had been performed; this goal cannot be met where the Courts prefer form over function and mechanically set dates for assessment of damages, without regard to the true nature of the bargain struck between the parties.

In that regard, the seminal case of *Hadley v. Baxendale*[99] is apposite: that case involved the failure to repair and deliver a broken crankshaft to the plaintiff for use in a steam-powered mill. In declining to award damages for lost profits from sales of product, the Court of the Exchequer famously reasoned that damages in breach of contract

> should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.[100]

Arguably, shifting benchmark prices are part of the "usual course of things" in the oil and gas industry; however, they are not the "probable result of the breach" of a joint operating agreement over land. What results from the breach is the loss of a right to win and work minerals from a portion of the joint lands, not the right to benefit from a significant increase in benchmark pricing, particularly when Party A could reap the benefits of that same increase by making any alternate investment in any petroleum producing asset, or even by purchasing and selling physically-settled futures contracts. Indeed, if prices had fallen during the damages assessment period, Party A would have had no incentive to pursue this claim at all. Following the reasoning in *Hadley*, those damages are arguably not proximate to the breach.

The damages model proposed by Party A's expert has two components: 1) the non-risk adjusted cash flows from the joint lands, based on evidence available to the expert in the form (presumably) of invoices and cash flow statements produced by the parties in the

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97 (1984), 11 DLR (4th) 614 at 619 (BCCA) [*Ansdell*].
98 *Asamera*, *supra* note 70 at 652.
99 (1854), 156 ER 145 (Ex Div) [*Hadley*].
100 *Ibid* at 151.

litigation; and 2) a risk-adjusted projected return on the properties as of the trial date, based on reserves reporting from 2017 and discounted cash flows from the properties in perpetuity. The date of assessment of damages is the date of trial; Party A gets the benefit of the real cash flows up to the trial date (on an undiscounted basis) but thereafter must be satisfied with damages in perpetuity on the basis of the discounted cash flow. This theory of damages has a certain intuitive appeal; after all, a date-of-breach assessment will require the cash flows to be risk-adjusted going backward to account for contingencies that materialized in real time when that money was earned. This approach focuses on real evidence and, to the extent possible, avoids speculation as to what the risk-adjusted cash flows from the properties would have been at various points in time.

Party A's approach to calculating damages has at least two serious problems. The first is that Party A's approach transfers all of the market risk associated with holding the joint lands to Party B for so long as the litigation lasts. As Schein puts it, such a damages model creates a perverse incentive for a plaintiff to "conduct his affairs so as to maximize his damages."[101] A plaintiff who commences litigation in a down market will see no benefit to fixing an early and prompt trial date; it will be far preferable to delay the start of trial until benchmark prices recover and create the optimal time for damages assessment.[102] After all, the plaintiff's "loss" in this case is in large part a function of fluctuations in market conditions that are beyond either party's control.

The second problem is that in effect this theory awards damages to Party A that at the time of the breach would under any analysis be far too remote: the damages flowing from the breach are in principle the lost opportunity to obtain and sell petroleum and byproducts from the joint lands.[103] Party A's damages include damages that flow from an unrelated event that no party could have predicted at contract formation: an increase in benchmark oil prices of over 100 percent between the date of the breach and the date of the trial.

Meanwhile, the approach of Party B's expert stresses that the date of assessment is the date of the breach and focuses on what damages flow directly from that breach. The value of what was lost was, *when the breach occurred*, the discounted cash flow attributable to the portion of the Joint Lands that was subject to the preferential right, based on what was known to the parties at that time, and (importantly) based on market prices as of those dates. All of these factors were assessed by and known to the purchaser and the vendor at the time of the transaction based on current strip pricing and a discounted cash flow projection based on remaining reserves. The purchase price for the lands thus accounted for future commodities price risk in a manner that was foreseeable to the parties at the time of the breach.

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101 Schein, *supra* note 91 at 67.

102 Or, as aptly put by Justice McKenzie in *AVG Management Science Ltd v Barwell Developments Ltd* (1976), 69 DLR (3d) 741 at 753 [emphasis added]:

> In inflationary times I would hesitate in using a trial date or judgment date as the date of reckoning for damages except in such exceptional circumstances as were found by Megarry, J., *because this might encourage plaintiffs to be laggard in bringing cases on to trial in the hope that a later assessment would be more likely to produce a higher award* because prices seem to show a stronger inclination to go up than to go down.

103 As Jonathan Levy points out, where parties may elect specific performance or damages up until the trial of the action, the result is a "supercompensation" of the plaintiff for the same reason: the plaintiff can obtain the benefit of the returns of a rising market while bearing no risk of the market falling (Levy, *supra* note 82 at 561).

Party B's theory suffers from its own conceptual flaws. First, it ignores the evidence of the real performance of the joint lands since the date of the breach and substitutes for that a party's speculation about the risks of a voluble market which though reasonable at the time is in hindsight uninformed. Parties to these contracts know that their working interests will fluctuate in value from time to time on the basis of changing market conditions.[104] Indeed, the going-concern value of Parties A and B themselves will undergo the same constant shifts; arguably the parties each know from experience that a valuation of a property at a fixed point in time does not lead to a reliable result at any other point in time. In addition, accounting for the effects of commodity price fluctuations creates its own challenges in the business valuation context.[105]

More fundamentally, Party B's approach ignores the specific features that make oil and gas properties individually desirable in the first place. After all, if the value of the joint lands were always equal to the discounted cash flows attributable to current reserves at current strip prices, it would never be rational to purchase oil and gas assets.

Second, Party B's theory of damages creates its own perverse incentives. Under this theory, damages for breach of a preferential purchase right will almost always result in nominal damages, which could result in cases of "efficient breach" where a purchaser desires to acquire lands that are subject to that preferential right as part of a larger package of assets.

D. TOWARDS A "HYBRID" APPROACH (USING LIMITED HINDSIGHT)

The differences between these damages assessments flow in large part from two factors: one is the selection of a date of assessment as of either the breach or the date of trial. The second is the manner in which evidence of past performance is analyzed and dealt with, either as admissible evidence of Party A's loss, or as "hindsight evidence" arising after the date of breach and not properly part of the valuation exercise. In both cases, the common law and the principles applicable to business valuation can admit of a third way forward that addresses the evidence of actual performance (but assumes that the revenues were not and could not have been earned risk-free), considers hindsight evidence appropriately, and fixes damages in a way that approximates the equal allocation of market risk as between the parties at contract formation. That approach, which the authors recommend, is to measure the loss based on actual cash flows up to the date of trial, risk-adjusted to reflect that revenues are never earned risk-free,[106] and then calculate the net present value of remaining cash flow on the basis of the most recent data available as at the date of trial.

The jurisprudence and commentary regarding the date of assessment of damages may be kindly described as "variable." Numerous sources suggest that the gold standard is to assess

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104 Indeed, parties who transact on the basis of the current WTI futures strip are in effect importing the market's short-term price expectations into the risk allocation of the transaction.

105 Volatility in earnings at commodity firms can lead to errors in valuation both because the commodity price cycle is ignored, or at times because analysts "fixate on it" (Aswath Damodaran, *The Dark Side of Valuation: Valuing Young, Distressed, and Complex Businesses*, 2nd ed (Upper Saddle River, NJ: FT Press, 2010) at 419).

106 Other factors would require consideration, such as the application of pre-judgment interest to cash flows earned prior to the date of trial.

damages based on information known and available at the date of the contractual breach.[107] Other authorities suggest that where damages are awarded in lieu of specific performance, damages should be based on a date of trial assessment.[108] However, some business valuators take a more balanced approach, with Richard M. Wise noting that "*in business valuation*, hindsight is inadmissible," but observing that the exercise of quantifying damages on the basis of lost profits is different and more complex.[109] He goes on to suggest that there are *four* possible dates that a Court might choose to assess damages: the date of the contract, the date of the breach, the date of the trial, and a date between the date of breach and the date of trial. Which date is appropriate in a given case depends on the particular facts.[110] At that point, Wise views the exercise as one of identifying the damages that are "proximately caused" by the breach and which may be proven on the evidence with "reasonable certainty."[111] Wise recognizes that the issue of "proximate cause" requires a valuator to exclude from the analysis the unconnected or "external" factors that may contribute to a loss of profits calculation. For instance, he reasons, "an economic downturn, seasonal or cyclical fluctuations, effects of a recession" and similar factors can result in a loss that should not, in principle, form part of a plaintiff's compensatory damages award.[112]

The notion that courts may select a date of assessment based on the particular facts of each case is borne out by the case law. In *Ansdell*, Justice Lambert stressed that there is "no fixed rule" respecting when damages must be assessed, including where they are assessed in lieu of specific performance.[113] In *Semelhago*, Justice Sopinka stressed that the common law in this regard has "flexiblity."[114] For the purposes of this analysis, it may be best to focus on what principles animate the choice of a date of assessment. Normally, where the date of trial is selected, it is to reach a damages award that (in cases of damages in lieu of specific performance) gives "*as nearly as may be what specific performance would have given*,"[115] or (in cases of compensatory damages) because that date is "appropriate in the circumstances" and will avoid an "injustice."[116]

107 See e.g. Schein, *supra* note 91 at 67; SM Waddams, *The Law of Damages* (Toronto: Canada Law Book, 2014) (loose-leaf revision 2014) ch 1 at paras 1.950–1.1110; *Rougemount Capital Inc v Computer Associates International Inc*, 2016 ONCA 847 at paras 50–53; *442246 BC Ltd v 0909 Management Inc*, 2000 BCCA 567 at para 21; *Noble v Principal Consultants Ltd (Trustee of)*, 2000 ABCA 133 at para 9.

108 As Justice Sopinka commented in *Semelhago*, *supra* note 2 at para 14, "it 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."

109 Richard M Wise, "Quantification of Economic Damages" [1999] J Bus Valuation 361 at 362 [emphasis added].

110 *Ibid* at 367.

111 *Ibid* at 364.

112 *Ibid* at 378.

113 *Supra* note 97 at 619.

114 *Semelhago*, *supra* note 2 at paras 14, 17.

115 *Ibid* at para 16 [emphasis in original], citing *Wroth v Tyler*, [1974] 1 Ch 30 at 59 [*Wroth*].

116 *Semelhago*, *ibid* at para 12, citing *Johnson*, *supra* note 84 at 401.

Conversely, the selection of the date of breach for damages assessment reflects the familiar principle enunciated by Justice Sopinka in *Semelhago* as follows:

> [I]f the innocent purchaser is compensated on the basis of the value of the goods as of the date of breach, the purchaser can turn around and purchase identical or equivalent goods. The purchaser is therefore placed in the same financial situation as if the contract had been kept.[117]

Date of breach assessment in compensatory damages cases is thus connected to the duty of a plaintiff (and the notional ability) to mitigate its loss.

In reality, the dichotomy between a date of assessment as of the breach and an assessment as of the date of trial is artificial. As Wise points out, there is an important difference between the valuation of a business at a point in time, and the valuation of a claim for lost profits, when the valuators (and the Court) have access to real evidence of the profits that the plaintiff would have obtained had the contract been performed.

The exercise, then, is to ensure that a claim for lost profits does not include external events not proximate to the plaintiff's breach, while preserving the principle that damages should compensate the plaintiff for its loss.[118] As a further policy consideration, the ideal approach would avoid encouraging "efficient breach" by adopting a model guaranteed to result in nil damages (as with the Party B example above).

The ideal approach compensates the plaintiff for the expectation damage that flows from the breach but (as Wise puts it) adjusts that damage to account for the fact that an increase (or a decrease) in the value of the underlying asset occurring after the breach should not form part of the plaintiff's loss. The approach outlined above approximates these objectives, though admittedly not in an exact or granular sense.[119]

Under this suggested approach, Party A's loss (a loss of an opportunity to win and work a portion of the joint lands) is notionally measured at the date of the breach, in that the plaintiff is presumed not to have been able to earn a risk free return on that production from that point forward. However, the discounted cash flow rate is applied in each month to the actual returns earned from the joint lands, thus ensuring that the damages award accounts properly for the evidence of what actually occurred subsequent to the breach while avoiding the creation of perverse incentives on the part of the plaintiff to defer the trial of the action until prices are more favourable. Future cash flow projections can then be based on the net present value of the joint lands under a discounted cash flow analysis based on current

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117 *Semelhago*, *ibid* at para 13.

118 As Wise points out, compensatory damages should not include the effects of economic forces external to the relationship between the parties, and "[a]djustments must be made so that the effect of external causes will not be included in the claim for recovery of lost profits" (Wise, *supra* note 109 at 378).

119 Estimates of lost profits in a damages calculation are well recognized to be approximate, and courts seldom require an exact accounting. See e.g. *Murano v Bank of Montreal* (1995), 20 BLR (2d) 61 (Ont Ct J (Gen Div)) ("[i]f the fact of damage is established, the law does not require the amount of damage to be proven with mathematical certainty; damages may be recovered if there is evidence upon which a reasonable assessment of the loss can be made" at 121, citing *South Carolina Federal Savings Bank & Thorton-Crosby Development Company, Inc*, 399 SE 2d 8 at 11 (SCCA 1990)).

reserves. The resulting damages award should in principle be akin to the damages in lieu of specific performance described by Justice Megarry in *Wroth*.[120]

In short, the plaintiff gets the value of the land less the cost to acquire it, but in every month the risk of price fluctuations in the underlying commodity is accounted for by the application of a discount rate. In every claim month, the plaintiff receives the cash it would have earned, but also assumes the risk of operating the land as of that time. The disadvantage of this approach is its complexity; its advantage is the extent to which it attempts to approximate, as closely as possible, what would actually have happened if the contract had been performed. Perhaps another disadvantage, admittedly, is its novelty; for obvious reasons it is not customary to apply a discount to past losses. However, this approach, the authors submit, strikes the appropriate balance between an approach that encourages efficient breach and one which incentivizes a plaintiff to choose a trial date that maximizes damages.

IV. THE QUESTION OF MITIGATION

A. THE SUPREME COURT DECISION IN *SOUTHCOTT*

Intertwined with the questions of appropriate remedy (specific performance or damages) and date of assessment (date of breach, trial, or otherwise), is the issue of mitigation.

The normal rule in damages for breach of contract is that a plaintiff cannot sit idly by and let its loss accumulate. Instead, the plaintiff has a positive obligation to take all reasonable steps to avoid or limit its loss. If a plaintiff fails to mitigate its loss, it will not be entitled to damages that could have been avoided through taking reasonable mitigation steps.[121]

There is some friction in the interaction between claims (particularly unsuccessful claims) for specific performance and the duty to mitigate. The concepts of specific performance and mitigation do not fit neatly together, and the steps a plaintiff takes (or does not take) relating to mitigation can fundamentally impact the remedy — both as it pertains to entitlement to specific performance and, conversely, if equitable relief is not appropriate, the amount of damages.

The starting point for any discussion on mitigation in the context of a claim for specific performance is the decision in *Southcott*, where Justice Karakatsanis considered whether a single-purpose corporation (created without assets, solely to purchase and develop real estate) was "excused from mitigating its losses when the vendor breaches the agreement of purchase and sale, and particularly when it has promptly brought an action for specific performance."[122] Justice Karakatsanis, referencing the previous Supreme Court of Canada decision in *Asamera*, set out the following test for considering whether a plaintiff is required to mitigate its loss when pursuing a claim for specific performance:

[120] *Supra* note 115 at 30.
[121] *Strategic Acquisition*, *supra* note 38 at para 61.
[122] *Supra* note 10 at para 1.

> This Court thus recognized that there may be situations in which a plaintiff's inaction is justifiable notwithstanding its failure to obtain an order for specific performance where circumstances reveal "*some fair, real, and substantial justification*" for his claim or "*a substantial and legitimate interest*" in seeking specific performance.… This does not mean that a plaintiff with such a claim should not attempt to mitigate; rather it recognizes that such a claim for specific performance informs what a reasonable behaviour is for the plaintiff in mitigation.[123]

The policy rationale for Justice Karakatsanis' "fair, real, and substantial justification" or "a substantial and legitimate interest" standard is clear: allowing a plaintiff to "insulate" itself from its obligation to mitigate its losses simply by asserting a claim for specific performance would "cast upon the defendant all the risk of aggravated loss by reason of delay in bringing the issue to trial."[124]

In *Southcott*, Justice Karakatsanis ultimately determined that the plaintiff did not have a "fair, real, and substantial justification" or a "substantial and legitimate" interest in specific performance, because the plaintiff was "engaged in a commercial transaction for the purpose of making a profit" and that the "property's particular qualities were only of value due to their ability to further profitability."[125]

Justice Karakatsanis rejected the argument that subsequent acquisitions by the plaintiff's parent company should not count towards mitigation because these transactions "were collateral, independent transactions that did not arise out of the consequences of the breach."[126] Justice Karakatsanis accepted the finding that these purchases "would have been made in any event,"[127] but noted that these acquisitions were "evidence that other suitable development lands *were* available and the decision not to purchase them in Southcott's name was based on other considerations."[128]

Justice Karakatsanis confirmed the breach of contract but awarded nominal damages ($1.00).[129]

Southcott teaches us that a plaintiff who fails to secure an award of specific performance may nonetheless be excused from an obligation to mitigate damages, if the plaintiff's decision not to mitigate was reasonable in the circumstances. Whether the plaintiff's inaction was reasonable depends on whether there is a "some fair, real, and substantial justification" for the claim or "a substantial and legitimate interest" in specific performance. In other words, a plaintiff need not succeed in its claim for specific performance to avoid mitigation obligations, but at minimum must advance a credible and good faith claim for specific performance.

123 *Ibid* at para 36 [citations omitted] [emphasis in original].
124 *Asamera*, *supra* note 70 at 668.
125 *Supra* note 10 at para 41.
126 *Ibid* at para 17, citing *Southcott Estates Inc v Toronto Catholic School Board*, 2010 ONCA 310 at para 143.
127 *Ibid* at para 57.
128 *Ibid* at para 58 [emphasis in original].
129 *Ibid* at para 22.

Pursuing a claim for specific performance does not, by itself, relieve a plaintiff from its duty to mitigate. The Alberta Court of Appeal recently rejected, as inaccurate and erroneous, the reasoning that "filing a claim for specific performance is inconsistent with the act of acquiring a substitute property and that [the plaintiff], acting reasonably, would not pursue specific performance and mitigate its loss at the same time."[130]

B. TO "LITIGATE OR MITIGATE"

A prospective plaintiff therefore has a difficult decision to make at the outset of litigation regarding mitigation. As Moore notes: "[a] party who pursues a claim for specific performance faces greater uncertainty and more serious risk than a party who chooses to mitigate his/her losses and seek damages."[131] For example, should the plaintiff commence and pursue litigation without taking steps to acquire another, similar interest or asset? This course of action may bolster the plaintiff's claims relating to uniqueness and the inability of damages to compensate for the loss — thereby enhancing the chance of being awarded specific performance. However, if the plaintiff fails to satisfy the court that it is entitled to specific performance or, more accurately, that it had a "fair, real, and substantial justification" or a "substantial and legitimate" interest in specific performance, it risks having the damages award reduced or eliminated through a failure to mitigate.

In *Fuhr Estate*, Justice Manderscheid stated that "the question of whether it is reasonable to 'litigate rather than mitigate' is dependent upon the particular circumstances."[132] The reasonableness of a plaintiff's actions (or inaction) pertaining to mitigation may be a fact based inquiry dependent on the circumstances; however, as noted in *Southcott*, the "determination of what is reasonable conduct must be read in light of *Semelhago*."[133] This suggests that the same considerations discussed in detail above relating to specific performance and date of assessment (evidence of uniqueness; business rationale; "early and repeated" notice of claim; land titles registrations; prosecuting the claim expeditiously and so on) apply equally in determining the reasonableness of a plaintiff's decision not to mitigate.

In short, the same (or at least very similar) considerations inform inquiries into whether to grant specific performance and whether a decision not to mitigate was reasonable in the circumstances. They are, in many respects, two sides of the same coin. That said, there are some important practical and strategic differences between the two inquiries.

First, as noted above it is possible to have "a fair, real, and substantial justification" for equitable relief or "a substantial and legitimate interest" in specific performance without actually being awarded specific performance. The two issues are not mutually exclusive, and failing in a claim for specific performance does not necessarily mean that a plaintiff will be required to mitigate its loss.

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130 *Strategic Acquisition*, *supra* note 38 at para 64.
131 Moore, *supra* note 21 at 194.
132 *Fuhr Estate*, *supra* note 34 at para 69.
133 *Supra* note 10 at para 38.

Second, on a practical level, the standard to meet, or the onus, are different when claiming specific performance (or damages in lieu of specific performance) compared to assertions regarding mitigation. At trial, the plaintiff has the onus to establish that damages would be an inadequate remedy in order to be entitled to specific performance.[134] The onus is reversed when it comes to an assertion that the plaintiff failed to mitigate its loss.

In *Southcott*, Justice Karakatsanis stated that when "it is alleged that the plaintiff has failed to mitigate, the burden of proof is on the defendant, who needs to prove both that the plaintiff has failed to make reasonable efforts to mitigate and that mitigation was possible."[135] While a finding that a plaintiff is not entitled to specific performance will obviously impact a determination as to the reasonableness of mitigation efforts, the onus remains with the defendant to prove that alternative investments, if any, that the plaintiff made, or could have made, should be considered as a deduction from a damages award.

Third, there are also technical and pleading requirements that arguably need to be met relating to mitigation. There is some authority for the proposition that mitigation must be specifically pled if a defendant wants to advance a mitigation defense.[136] The better view, however, is that provided the defendant puts a plaintiff on notice that mitigation is a live issue (at examinations, or at some point during the course of litigation in advance of trial) and that the plaintiff is not surprised or ill-prepared to rebut a mitigation defense, the court will accept evidence and argument related to mitigation. As such, while pleading mitigation is clearly the preferred practice, failing to do so is likely not fatal if mitigation has been canvassed as part of litigation.[137]

C. MITIGATION: STRATEGIC AND PRACTICAL CONSIDERATIONS

From a strategic perspective, it is important to consider what evidence is required to support or refute a mitigation argument. From the plaintiff's perspective, much of the evidentiary foundation to support the reasonableness of a decision not to mitigate will be identical evidence tendered in support of a specific performance claim (uniqueness of interest, business rationale, subjective views on value, how the property or interest relates to wider development plans or asset mix, and so on).

In addition, a plaintiff should consider leading evidence regarding:

- what other similar opportunities were available;
- the plaintiff's capacity, financial and otherwise, to pursue other opportunities;
- what other opportunities the plaintiff actually pursued, and what cash flows were generated by those opportunities;

134 Moore, *supra* note 21, citing amongst other decisions *Canamed*, *supra* note 26 at paras 102–103.
135 *Supra* note 10 at para 24.
136 *Lau v Geo-X Systems* (1998), 238 AR 276 at para 83 (QB).
137 *Petersen v Bannon* (1993), 107 DLR (4th) 616 (BCCA); *Briglio v Faulkner*, 1996 CanLII 3452 at para 143 (BCSC).

- what the plaintiff did with the funds or resources that it intended to dedicate to the transaction or acquisition;
- whether other opportunities pursued by the plaintiff differed materially from the subject matter of litigation; and
- whether other opportunities pursued by the plaintiff would have been pursued in any event, such that they should not be considered to have related to the mitigation of any particular loss.

Conversely, a defendant should request information relating to the above issues as part of document discovery (and canvass other relevant information that may be in the public domain through regulatory or securities filings), and explore these matters as part of examinations. In addition, a defendant may want to tender its own evidence relating to mitigation opportunities, particularly as it relates to industry transaction trends or the health of a particular market or region.

On cross-examination, a defendant should seek to discover a plaintiff's decision making process around pursuing (or not pursuing) other opportunities. Questions relating to how and when a plaintiff deployed capital, and whether or not the plaintiff had residual funds sitting idle waiting for investment opportunities are potentially relevant to the question of mitigation. For example, if a plaintiff is seeking specific performance relating to a ROFR that would have cost $10M to exercise, a defendant should explore what the plaintiff did with the $10M that was not dedicated to the ROFR property. If a plaintiff invested these funds in other transactions, or similar initiatives, this may (depending on the circumstances) provide a basis to assert that the plaintiff did, in fact, mitigate its loss.

The above evidence will presumably come primarily from fact witnesses, as opposed to expert witnesses. There is, however, a role for expert witnesses to play relating to mitigation. The expert may have specialized knowledge of a particular market or industry (oil and gas) that would allow her to speak to the reasonableness of mitigation efforts. A valuation expert may also, depending on the circumstances, come to an informed and independent conclusion on how to consider mitigation, if at all, in assessing damages. In other cases, the valuation expert may be directed by counsel to make assumptions about mitigation. If this is the case, it may be of value to explore the reasonableness of these assumptions on cross-examination.

D. MULTI-PARTY PREFERENTIAL RIGHTS AND "LOSS OF CHANCE" DOCTRINE

A final issue, distinct from mitigation, but which can nonetheless significantly impact damage assessments, relates to the "loss of chance" doctrine and theoretical contingencies.

Where a plaintiff brings a claim for breach of contract, relating to failure by another party to issue a ROFR notice, it is reasonable to consider whether the plaintiff would, in fact, have exercised those ROFR rights had the notice been issued. If it is unclear whether the plaintiff would have exercised its ROFR rights, it may be appropriate to apply a contingency or deduction to the assessed damages to account for the fact that what was lost was a possibility, not a certainty.

In *Strategic Acquisition*, the Alberta Court of Appeal considered, among other things, the appropriateness of the trial judge's decision to reduce the plaintiff's damages award by 50 percent to reflect the possibility that the plaintiff *may* not have exercised the ROFR, if given the opportunity to do so.[138] At trial, Justice Mahoney relied on the three step test for considering lost opportunity damages:

> Thus, assessing damages for a lost opportunity involves the following steps:
>
> (1) deciding whether the claim for lost opportunity is real, as opposed to fanciful;
>
> (2) assessing the value of the opportunity if it had been realized; and
>
> (3) assessing the likelihood the opportunity would have been realized and discounting the damages to reflect the possibility that the opportunity would not have been realized in any event.[139]

The Court of Appeal upheld the trial judge's decision, concluding that "it was open to the trial judge to assess the likelihood of Strategic exercising the ROFR"[140] to discount the damages owed to the plaintiff, based on the reasoning that the plaintiff exercising the ROFR was a possibility, not a certainty. Further, the Court of Appeal recognized that these determinations must often be made on less-than-perfect evidence:

> The evidence on the point was thin, but as the trial judge pointed out, difficulty in conducting an assessment does not deprive the plaintiff of damages. Although we may not have assessed the likelihood at 50%, we decline to interfere with the assessment of the trial judge. Accordingly, Strategic's damages, previously assessed as $1.3 million at the date of breach, will be discounted by 50%, to $650,000.[141]

Conversely, in *644036 Alberta Ltd. v. Kay McVey Smith & Carlstrom LLP*, the plaintiff was successful in establishing that the loss was not of a chance, but of a certainty. The plaintiff's case was distinguishable from *Strategic Acquisition* because

> in *Strategic Acquisition Corp*, the loss of opportunity was the loss of the plaintiff's ability to exercise its right of first refusal (ROFR) and enter into a further agreement with the defendant for the purchase and sale of a building. The element of chance that the court considered, which ultimately informed the discount applied to the amount, was whether the plaintiff would have exercised the ROFR at all.

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138 *Supra* note 38 at paras 65–81.

139 *Strategic Acquisition Corp v Multus Investment Corporation*, 2016 ABQB 681 at para 226. This test was originally set out by Chief Justice Neil Wittmann in *IFP Technologies (Canada) v Encana Midstream and Marketing*, 2014 ABQB 470 at paras 272–77, rev'd on other grounds 2017 ABQB 157 (approval of the trial judge's reasoning on loss of chance given specifically at para 215), leave to appeal to SCC refused, 37712 (5 April 2018) [*IFP Technologies*] ("[i]f the plaintiff is able to prove that the defendant's conduct prevented the enjoyment of an opportunity — beyond the *de minimus* range — to gain a benefit or avoid a detriment, the plaintiff may be granted relief, discounted to reflect the likelihood of the opportunity being realized" at para 274).

140 *Strategic Acquisition*, *supra* note 38 at para 80. Similar to *IFP Technologies*, *ibid*, *Strategic Acquisition* overturned the decision of the trial judge, while approving of the reasoning related to loss of chance. See also *644036 Alberta Ltd v Kay McVey Smith & Carlstrom LLP*, 2018 ABCA 236 at para 49 [*644036 Alberta Ltd*] (where the Court of Appeal recognizes the test set out in *IFP Technologies*, and applied in *Strategic Acquisition*).

141 *Strategic Acquisition*, *ibid*.

> Conversely, in this case, there was no evidence that the subdivision was uncertain or there was *a chance* that the subdivision may not happen. The lands were intended to be subdivided and in fact were subdivided.... Thus, the appellant is entitled to the *full value of the loss*.[142]

The "loss of chance" doctrine also finds application in circumstances involving discretionary acts by third parties. S.M. Waddams notes: "[t]he fact that the chance of loss for which the Plaintiff seeks compensation depends on the exercise of choice by a third party does not prevent the valuation of the chance and the award of respect of it."[143]

In *Multi-Malls Inc. v. Tex-Mall Properties Ltd.*, the plaintiff's damages claim was premised on the chance that a municipal board would have issued a zoning permit. Notwithstanding uncertainty as to whether the Board would approve the rezoning application at the time of breach, the court awarded damages on the basis that "the chance of a rezoning was not better than one in five or 20%, and that chance was destroyed by breach of contract."[144]

In *Michaud v. PMM Assurance & Services Inc.*, Justice Daigle also considered the question of how to assess damages involving a "loss of chance" claim. Justice Daigle held that the plaintiff's loss (which related to misrepresentation relating to an investment guarantee) was compensable but that the trial judge erred in awarding the full value of the guarantee when its value was contingent on future uncertain events. Instead, Justice Daigle determined that the proper approach was a loss of chance analysis to account for contingencies:

> [C]ontingent damages always depend on an element of chance, and it is precisely this element which must be assessed based on the likelihood that the future damages will occur. This type of assessment makes it possible to quantify the current value of the lost chance at the time of the trial. Thus, the degree of likelihood of the future event serves as the basis for assessing the lost chance and must be reflected, along with the other relevant factors, in the calculation of the damages awarded.[145]

Therefore, in a matter where a plaintiff commenced litigation immediately, and filed caveats and other land titles registrations, prior to the transaction closing or shortly thereafter, there will likely be little doubt that the plaintiff would have exercised the right. As such, there would be no basis to make a deduction from a damages award.[146]

The "loss of chance" doctrine is more likely to arise in situations involving multi-party preferential rights. For instance, assume a situation where Party A holds a 50 percent interest in lands with Party B (25 percent) and Party C (25 percent). The relevant agreement contains a ROFR which, if exercised by both counterparties, is allocated on a pro rata basis. Party A relies on a ROFR exemption when it sells its interest to a third party. Party A does not issue

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142 *644036 Alberta Ltd*, *supra* note 140 at paras 49–50 [emphasis in original].
143 Waddams, *supra* note 107 at para 13.380.
144 *Multi-Malls Inc v Tex-Mall Properties Ltd* (1980), 108 DLR (3d) 399 at 407 (Ont H Ct J).
145 *Michaud v PMM Assurance & Services Inc*, 2005 NBCA 66 at para 19.
146 This may not always be the case. See e.g. *Strategic Acquisition*, *supra* note 38.

ROFR notices to Party B and Party C. Party B sues Party A for specific performance or, in the alternative, damages. Party C does not sue Party A. If Party B is successful in litigation, is Party B entitled to Party A's entire 50 percent share? The answer arguably depends on the theoretical contingency of what Party C would have done if Party A had issued ROFR notices.

Working from the premise that a plaintiff bears the onus in this action to "prove its damages on a reasonable preponderance of credible evidence," Party A in the above case will likely argue that in order to receive the benefit of anything more than its pro rata share of applicable ROFR rights, Party B must prove (as it must with all components of its damages claim) that Party C would not have exercised its ROFR rights.

The answer and damages assessment will necessarily depend on the evidence, if any, of Party C's intentions, and the wider circumstances pertaining to the ROFR exercise. Absent any evidence on point, Party A will likely argue that, at minimum, Party B should only be allocated 50 percent of Party C's pro rata share of the ROFR lands, (based on the assertion that all else being equal, there was as good a chance as not that Party C would have exercised the ROFR right, if given the opportunity to do so).

V. CONCLUSION

Fluctuations in commodity prices are known to influence value and profitability of participants in commodity markets, such as the energy industry. As Aswath Damoradan notes, energy market participants are generally "price takers"; they are dependent, at least in part, on the price of a commodity for both earnings and value.[147] That is more than a fact of life; it is a peremptory reality with which market participants must constantly contend, and on which their very existence and (sometimes) solvency depends. Put another way, the dawn of every day brings with it a host of unknowns for the energy market, and with that comes a new set of market and price risks that industry participants must grapple with.

This is the reason that the date of valuation of damages can so often result in wildly different estimates when the damages are based on the fluctuating value of a commodity-producing asset. It is admittedly intuitively appealing to merely look backward through time and say "in hindsight, the markets improved over time, and so we needn't account for the risk of the markets." However, at least in certain circumstances, this approach is wrong both conceptually and in law. It results (irrespective of the measure of damages) in what Levy calls "supercompensation" by assuming, wrongly, that transactional costs in the past were entered into "costlessly" and with perfect efficiency.[148] The absurdity of this result is illustrated by the perverse incentive that it creates: a litigant who claims specific performance with respect to land (but reserves the right to elect damages later) will simply stand by and allow the current owner of the asset to exploit that asset and generate cash flow, knowing that

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147 Damodaran, *supra* note 105 at 418.
148 Levy, *supra* note 82 at 562.

by doing so it has created a perfectly efficient and risk-free transaction for itself. If commodity prices rise, the plaintiff participates in that increase by taking damages valued as at the date of trial. Even if they fall, the plaintiff merely demands specific performance and then also claims as restitution the non-discounted cash flows earned by the owner in a down market.

Damages in such a case come nowhere close to approximating contractual performance. If the contract had been performed, the plaintiff would (like every other market participant) have been in the position of a "price taker," subject to the whims of a rising and falling market — and its valuation from time to time would also have depended in part on the price at which it was able to sell its products, which would never have been knowable in advance. Therefore, an assessment of damages that calculates and adjusts for that risk (even if that calculation is necessarily approximate) is fair, allocates market risk appropriately, and is consistent with and gives effect to the basic premise of the law of contract damages that those losses which do not flow from the breach may not be recovered.

Mitigation of damages is an issue that is inextricably linked to the measure of damages in such cases. After all, one reason for valuing damages as at the date of breach is to account for the fact that a plaintiff can (and usually must) mitigate its losses beginning on that date. Where the loss is the inability to participate in a rising commodity market, mitigation arguments become that much more trenchant: after all, one need not own any particular oil and gas asset in order to profit from increases in WTI prices. Indeed, one need not own any oil and gas asset at all; the prerequisite is not ownership of an asset, but available cash to invest in future returns. This is perhaps the main difficulty with the holding in *Semelhago* that specific performance is conditioned on damages being an insufficient remedy; where the asset produces a fungible commodity, arguably damages may sufficiently compensate for *any* loss, including efficiencies generated by ownership of adjacent lands or infrastructure. All of these things merely lessen the transactional cost and the risk of participation in the market.

The solution, then, is a principled approach to specific performance, damages, and mitigation. This recognizes the risks inherent in the marketplace, the fungibility of commodities, and the ready availability of substitute investments which will have (to the extent that losses depend on a fluctuating market) identical characteristics and risk profiles. The underlying goal should be to allocate risk fairly, avoid overcompensation of plaintiffs based on risk-free returns on past investment, and adhere to the basic principles of mitigation set out in *Asamera*, which recognize that mitigation can and must occur when the loss is crystallized and that losses which depend wholly on market fluctuations normally could have been (and often were) completely mitigated through the acquisition of alternate properties or investments.

The existing legal and equitable principles are, the authors submit, flexible enough to accomplish these objectives and align any decision with the allocation of risk built-in to the underlying contracts. In some cases, where a plaintiff has asserted a *legitimate* claim for specific performance "early and repeatedly," reasonably decided not to mitigate, and prosecuted its case expeditiously, an award of specific performance or, alternatively, "damages in lieu of specific performance" (such as assessing damages at the date of trial), may be entirely appropriate.

Conversely, if a plaintiff relies on a claim of specific performance to "insulate" itself from its duty to mitigate, or takes a "wait and see" approach to market fluctuations throughout prolonged litigation, specific performance should be denied. In such a case, an assessment as of the date of breach (or some date in time at which it became clear the plaintiff was not aggressively prosecuting the claim) is likely appropriate, with deductions for mitigation thereafter.

However, there will likely be situations falling between these two ends of the spectrum, where despite a plaintiff's genuine interest in specific performance, and reasonable decision not to mitigate, there is a significant period of time (and a significant change in the underlying commodity price) between the date of breach and date of trial, making specific performance impractical. In these cases, the authors submit, it may be fair and reasonable to give the plaintiff the (partial) benefit of the passage of time, by taking into account the actual increase in commodities price, but risking or discounting the opportunity back to the date of breach. This hybrid approach, which is not without its downsides (discussed above), arguably better allocates risk between the parties and aligns with the original bargain struck in the contract. This approach also gives the court an additional tool to achieve the ultimate objective in complex remedies cases — which is to do justice between the parties.

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