SPECIFIC PERFORMANCE AND UNASCERTAINED GOODS: A SPECIAL CASE OR NOT?

(1) Introduction

When can a buyer have specific performance[1] of a contract to sell goods? On the authorities, the answer depends on whether the goods the subject-matter of the contract are ascertained. If they are, and thus formally come within the statutory power in s.52 of the Sale of Goods Act 1979,[2] specific performance is available according to ordinary principles of equity. Despite repeated early suggestions that orders were exceptional and limited to things in some way "unique" and not amounting to "ordinary articles of commerce,"[3] today it seems clear that the question is simply whether overall it is just to confine the claimant to a remedy in damages.[4] Matters such as uniqueness and market availability remain relevant, but are simply factors that go into the mix when answering this question.

With unascertained goods, however, matters are said to be very different. In the leading recent authority, *VTB Commodities Trading DAC v JSC Antipinsky Refinery*[5] in 2020, Phillips LJ held that there was a "strong presumption" that, save for very exceptional cases, specific performance had to be refused where goods were unascertained.[6] He thus denied the buyer of a part cargo of oil (which amounted to unascertained goods) an order preventing the sellers from diverting oil that should under the contract have gone to it, and delivering it instead to a third party claiming to be entitled to delivery under a subsequent agreement.

This restrictive attitude now seems to be orthodoxy. Phillips LJ's words were taken up shortly afterwards by Marcus Smith J in *Watson's Dairies v A G Lambert & Partners*,[7] where he invoked them as a reason for declining an injunction to enforce an exclusive milk supply agreement against a farmers' co-operative,[8] adding that in his view a court should be "extraordinarily wary – I never say never, but extraordinarily wary" in giving specific relief to preserve the supply of fungible goods obtainable in the market.[9] Pointedly, he discounted a fact that might otherwise have

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1For brevity, this article will refer to "specific performance." Many of the cases in fact refer to injunctions that would in practice have the same effect as an order of specific performance: but since it is clear law that such injunctions will generally be refused if specific performance would not be given, not much turns on this.

2"In any action for breach of contract to deliver specific or ascertained goods the court may, if it thinks fit, ... direct that the contract shall be performed specifically, without giving the defendant the option of retaining the goods on payment of damages." For these purposes "specific goods" refers to the case where the precise goods subject to the contract are conclusively identified at the time it was concluded; ascertained goods to where this happens at a later stage. (See s.61 of the 1979 Act, as correctly interpreted by Lord Hanworth in *Re Wait* [1927] Ch 606, 630.) This distinction, however, is not very omportant for present purposes.

3E.g., *Falcke v Gray* (1859) 4 Drew 651; 62 E.R. 250; *Cohen v Roche* [1927] 1 K.B. 169; *Behnke v Bede Shipping Co Ltd* [1927] 1 K.B. 649, 661.

4"Is it just in all the circumstances for the plaintiff to be confined to his remedy in damages?" (*Evans Marshall & Co Ltd v Bertola* [1973] 1 W.L.R. 349, 379). See too the later chattel decisions, both involving ships, in *The Stena Nautica* [1982] 2 Lloyds Rep. 336, 348 (May LJ) and *Gravelor Shipping Ltd v GTLK Asia M5 Ltd* [2023] EWHC 131 (Comm) at [98] (Foxton J). So too in the earlier *Sky Petroleum Ltd v VIP Petroleum* Ltd [1974] 1 W.L.R. 576, 578 Goulding J simply asked himself whether the subject-matter so readily available that damages were a sufficient remedy. It was not; they were not; and the remedy was given.

5[2020] EWHC 72 (Comm); [2020] 1 W.L.R. 1227. For later events in the same saga, see *ABFA Commodities Trading Ltd v Petraco Oil Co SA* [2024] EWHC 147 (Comm).

6[2020] EWHC 72 (Comm); [2020] 1 W.L.R. 1227 at [78]. See too *Snell's Equity* (34th ed (2022)), para.17-009 ("very exceptional").

7[2020] EWHC 2825 (Ch).

8[2020] EWHC 2825 (Ch) at [19].

9[2020] EWHC 2825 (Ch) at [20].

amounted to a strong factor in favour of relief: namely, that without the assured supply the claimant buyer's solvency was gravely threatened.[10] And more recently, in 2021 in *Qatar Airways Group QCSC v Airbus SAS*[11] Waksman J again cited Phillips LJ's dicta in deciding that there was considerable doubt whether an airline would at trial be able to obtain specific performance of a contract by aircraft manufacturers to supply a tranche of 76 unascertained Airbus 321 airliners.[12]

The aim of this article is to question this received wisdom, and to suggest that the "strong presumption" referred to by Phillips LJ represents a wrong and unjustified turn. There is in fact, it will be argued, no reason for the law of specific performance to treat unascertained goods differently from other property. The supposed distinction is a hangover from history and contrary to a good deal of modern authority; the reasons given for it do not hold water; and there is no a priori reason to draw it.

(2) The problem of the legacy of history

The idea that there is something special about unascertained goods is closely tied to the history of specific performance in the sale of goods context. In the last hundred years there have been noticeable changes of view, not only about the desirability of granting the remedy in the case of such goods, but also about its very availability.

Until about a century ago, no-one seems to have seriously doubted that specific performance *could* be given in respect of all kinds of goods, whether ascertained or generic. In *Buxton v Lister*[13] in 1746 Lord Hardwicke mentioned an earlier case of uncertain date, *Taylor v Neville*, in which an agreement for the sale of 800 tons of unascertained iron had been specifically enforced. Similarly, in *Fothergill v Rowlands*[14] in 1873 Jessel MR fairly clearly assumed he *could* enforce a continuous coal supply contract in specie, though on the facts he refused the remedy. That said, however, it was somewhat unlikely to be given in practice, because of the then belief that it would be refused as a matter of course in relation to any kind of goods unless those goods were in some way unique,[15] a characteristic unlikely to apply to unascertained goods.[16]

Unfortunately there was confusion on the horizon. First, in some unguarded remarks in *Holroyd v Marshall*[17] in 1862, Lord Westbury said that there could be no specific performance of a contract to sell "five hundred chests of tea," since it did not "relate to any chests of tea in particular;" but that it might be different if the contract referred to a specific five hundred chests (or possibly five hundred chests from a given bulk).[18]

10[2020] EWHC 2825 (Ch) at [21].

11[2022] EWHC 1247 (TCC).

12[2022] EWHC 1247 (TCC) at [33].

13(1746) 3 Atk 383, 384. *Taylor v Neville* was later cited with apparent approval by Leach V-C in *Adderley v Dixon* (1824) 1 Sim & St 607, 610; 57 E.R. 239, 241, though admittedly it was characterised as "remarkable" by Page Wood V-C in *Pollard v Clayton* (1855) 1 K & J 462, 474; 69 E.R. 540, 546.

14(1873) L.R. 17 Eq. 132

15*Falcke v Gray* (1859) 4 Drew 651; 62 E.R. 250; *Cohen v Roche* [1927] 1 K.B. 169; *Behnke v Bede Shipping Co Ltd* [1927] 1 K.B. 649, 661. See too the Australian decision in *Dougan v Ley* (1946) 71 C.L.R. 142, especially the judgments of Rich and Williams JJ.

16Hence the result in *Fothergill v Rowland* (1873) L.R. 17 Eq. 132, where identical coal was perfectly easily available elsewhere: see at p.139.

17(1862) 10 H.L. Cas. 191; 11 E.R. 999.

18See (1862) 10 H.L. Cas. 191, 209-210; 11 E.R. 999, 1006. The H.L.Cas. Report referred to suggests that it was enough for the goods to be part of a given bulk, referring to "five hundred chests of the particular kind of tea which is now in my warehouse in Gloucester." But the Law Journal report at (1862) 33 LJ (Ch) 193, 196 is more demanding, referring to "*the* 500 chests of a particular kind of tea, which are now in my warehouse in Gloucester" (italics supplied). The latter reading was preferred by Lord Hanworth and Atkin L.J. in *Re Wait* [1927] Ch 606, 618, 633). Note that *Holroyd* concerned the more specialised question of whether an agreement could create an

Secondly, problems arose as an unintended consequence of the passing of the Mercantile Law Act 1856, s.2. This seemingly innocuous provision about specific performance empowered common law courts to enforce in specie contracts to sell specific goods; post-Judicature Acts it morphed into the present s.52 of the Sale of Goods Acts 1893 and 1979, though with some changes, including an extension to ascertained goods.[19] Although the 1856 Act was fairly clearly meant to increase the courts' specific performance jurisdiction by allowing common law courts to exercise powers previously limited to Chancery,[20] in 1926 its Sale of Goods Act manifestation was read by the Court of Appeal in *Re Wait*[21] in a very different way: namely, as an exhaustive statement of the power of any court, common law or equitable, specifically to enforce any sale of goods contract whatever. Denying that a buyer who prepaid for a part cargo could obtain relief in the shape of a vendor-purchaser constructive trust, the court gave as one of its reasons the argument that such a trust would demand specific enforceability, and that in this case, lying as it did outside s.52 since no specific or ascertained goods were involved, no such order could be made as a matter of law.[22]

The 1926 spanner in the specific performance works was followed by a legally surreal period lasting some 90 years. One series of cases, including tentative dicta of Lord Brandon in the House of Lords in 1986,[23] loyally reiterated the line taken by the Court of Appeal in *Re Wait*.[24] On the other hand, another contemporaneous line of decisions, beginning with *Sky Petroleum Ltd v VIP Petroleum Ltd*[25] in 1974 (where, *Re Wait* not having been cited to him, Goulding J enforced a contract to supply generic fuel to a petrol station), quietly ignored it and continued to award specific performance[26] to deserving claimants in the case of contracts to sell unascertained goods.[27]

This curiously schizophrenic approach, under which a number of lower courts quietly subverted a clear rule apparently cemented by the Court of Appeal, was only brought to an end as an indirect result of the decision in *The Res Cogitans*[28] in 2016. That case, being concerned with an unrelated topic and a completely different section of the Sale of Goods Act,[29] did not directly mention *Re*

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immediate security, which may explain the distinction drawn, since while a court can plausibly order the transfer of generic goods, you cannot in the nature of things create a security in unspecified assets. This issue is dealt with below.

19 Notably s.52 of the 1893 Act applied to all courts, and also to ascertained goods. This latter was arguably not intended as an extension, since despite the definitions given in s.62 of the 1893 Act (s.61 of the 1979 Act), until about 100 years ago lawyers were often prepared to apply the term "specific goods" to goods to be supplied from a given source but not otherwise identified at all. See e.g. *Howell v Coupland* (1874) L.R. 9 Q.B. 462, 465, and indeed the decision of the Divisional Court in *Re Wait* at [1926] Ch. 962. (This latter point is not new: it was made long ago in G.Treitel, "Specific Performance in the Sale of Goods" [1966] J.B.L. 211, 218-220.)

20 Hence its specific application to common-law courts and its reference to jury findings. To this extent, therefore, it was actually a proto-judicature provision: see I.Davies, "Continuing dilemmas with passing of property in part of a bulk" [1991] J.B.L. 111, 120-121.

21 [1927] 1 Ch 606. These were followed a few years later in Australia: see *King v Greig* [1931] V.L.R. 413 (no equitable interest could pass as a result of the sale of part of an undivided bulk of timber where the seller remained in possession, so state bill of sale laws did not invalidate the sale).

22 See Lord Atkin at [1927] 1 Ch 606, 635-636. Lord Hanworth's judgment can also be read as suggesting the same: see pp.621-622.

23 See *The Aliakmon* [1986] A.C. 785, 813.

24 Apart from *The Aliakmon*, see *Re London Wine Co (Shippers) Ltd* [1986] P.C.C. 121, 149 (Oliver J); *International Finance Corporation v DSNL Offshore Ltd* [2005] EWHC 1844 (Comm) at [50] (Colman J); *Astrazeneca UK Ltd v Albemarle International Corp & Anor* [2011] EWHC 1574 (Comm); [2011] 2 C.L.C. 252 [303]-[304] (Flaux J); and *Hughes v Pendragon Sabre Ltd* [2016] EWCA Civ 18; [2016] C.T.L.C. 91 at [42] (Cranston J).

25 [1974] 1 W.L.R. 576.

26 Or enforce by functionally equivalent injunctions, which comes to the same thing.

27 Apart from *Sky*, see *Thames Valley Power Ltd v Total Gas & Power Ltd* [2005] EWHC 2208 (Comm); [2006] 1 Lloyd's Rep. 441 at [63], where Christopher Clarke J, again without mentioning *Re Wait*, said he would have specifically enforced a generic gas supply contract; and also *Land Rover Group Ltd v UPF (U.K.) Ltd* [2002] EWHC 3183 (QB); [2003] 2 B.C.L.C. 222, below.

28 [2016] UKSC 23; [2016] A.C. 1034

29 That is, s.49, dealing with when the right to claim the price of goods sold arose.

Wait; but it did point out as an important part of its decision that the provisions of the Sale of Goods Act 1979 were not generally intended to be a complete or exhaustive code.[30] The point was soon made that these statements in *The Res Cogitans* effectively sapped the foundations of Atkin L.J.'s reasoning in *Re Wait* that s.52 of the Sale of Goods Act amounted to an exhaustive statement and hence there could not be specific performance in sale of goods cases outside it.[31] As a result, today we are back to the pre-1923 position: there is now no serious doubt about the court's *power* to enforce specifically any sale of goods contract whatever.[32]

One difficulty was thus solved. But this still left open the question how the court should exercise the discretion thus restored to it. Since the old idea that goods had to be in some way unique in order to justify a specific performance order has now been largely relaxed,[33] one might have thought that similar principles also applied to unascertained goods. Unfortunately, whether as a result of the continuing subliminal legacy of history or for some other reason, *VTB* and the other cases cited above show that this hint has not so far been taken.

(3) The problem with the restrictive approach

The difficulties with the restrictive approach outlined in *VTB* are threefold. First, it is hard to reconcile with a number of earlier authorities. Secondly, the positive reasons given for it do not hold water. And thirdly and more generally, it seems contrary to the principles governing specific performance.

(a) The treatment of authority

The first problem is *VTB*'s treatment of *Re Wait.* Phillips LJ in *VTB*, while accepting that the Court of Appeal in that case had been wrong about the jurisdiction to give specific performance, nevertheless saw *Wait* as remaining authority for a strong presumption against giving it in cases outside s.52.[34] At first sight one can see why he said that: *Wait* certainly cites a number of cases apparently pointing out the difficulties of the remedy in relation to unspecified goods.[35] However, appearances can be deceptive. Some of the cases cited in *Wait* turned merely on the issue of declining relief for goods readily available in the market:[36] but this is a general argument applicable to ascertained and unascertained goods alike. And most of others actually concerned something slightly different: namely, the creation of equitable security under the rule in *Holroyd v Marshall.*[37] Here, since one has to know what goods are secured, ascertainment is clearly essential: however, despite a frequently-stated connection with specific performance,[38] it does not follow that the latter remedy itself should be similarly constricted when no question of any proprietary interest arises.[39]

30See [2016] UKSC 23; [2016] A.C. 1034 at [58].

31*VTB Commodities Trading DAC v JSC Antipinsky Refinery* [2020] EWHC 72 (Comm); [2020] 1 W.L.R. 1227 [73]

32See *VTB* [2020] EWHC 72 (Comm); [2020] 1 W.L.R. 1227 [73]; cf *Qatar Airways Group QCSC v Airbus SAS* [2022] EWHC 1247 (TCC) at [33]; *Moorabool Valley Eggs Pty Ltd v Seasons Ranch Organic Pty Ltd* [2021] VSC 795 at [75].

33Notably in cases such as *Sky Petroleum Ltd v V.I.P. Petroleum Ltd* [1974] 1 W.L.R. 576 and *Thames Valley Power Ltd v Total Gas & Power Ltd* [2005] EWHC 2208 (Comm); [2006] 1 Lloyd's Rep. 441, referred to above.

34See [2020] EWHC 72 (Comm); [2020] 1 W.L.R. 1227 at [77]-[79].

35Notably *Hoare v Dresser* (1859) 7 H.L.C. 290, 324, *Fothergill v. Rowland* (1873) L.R. 17 Eq. 132, *Re Clarke* (1887) 36 Ch.D. 348, 352 and *Thames Sack & Bag Co v Knowles & Co* (1918) 88 L. J. (K. B.) 585.

36Such as *Fothergill v. Rowland* (1873) L.R. 17 Eq. 132 and *Re Clarke* (1887) 36 Ch.D. 348.

37(1862) 10 H.L. Cas. 191; 11 E.R. 999.

38Itself possibly doubtful: see A.Tettenborn, "Security over personalty: property, obligation and specific performance" (2022) 138 L.Q.R. 101.

39The point that different considerations may apply to enforcing a promise to convey personalty on the one hand, and to recognising an immediate equitable interest in it on the other, has sometimes been made, albeit in a different context. In *Pooley v Budd* (1851) 14 Beav 34; 51 E.R. 200 a South Wales ironmaster sold a specific parcel of iron lying at its works to X, who immediately agreed to mortgage it to P. P's claim in Chancery to an equitable security

The second difficulty with *VTB* is, it is suggested, that it pays too little regard to the cases decided before *The Res Cogitans* in which specific performance was awarded despite goods being unascertained. In *Sky v VIP*[40], it is true that Goulding J mentioned the difference between ascertained and other goods;[41] but he did so largely in connection with the adequacy of damages, on the assumption that most contracts for unascertained goods would be for commodities readily available elsewhere. In *Land Rover Group Ltd v UPF (UK) Ltd*[42], it was agreed that it was the specific characteristics of the goods to be produced[43] that made the case suitable for specific performance; the fact that they were technically unascertained did not feature. The same goes for *Thames Valley v Total*[44]. What motivated the court in that case was the question of the dependence of the buyer on the seller for reliable suppliers, with nothing at all being said about the technical status of the goods to be supplied.

(b) Specific reasons to refuse specific performance

Two specific, and slightly related, reasons are on occasion given for the refusal of specific performance of a promise to deliver unascertained goods: the effect of such an order in insolvency, and the problem of the inadvertent creation of equitable interests which may hinder commerce. Both will be dealt with here: neither holds water.

(i) The insolvency argument

The fact that a defendant is insolvent is no defence as such to a specific performance claim[45] (although it should be noted that the permission of the court is in certain cases required to bring it,[46] and liquidators and trustees are partly protected by their right to disclaim onerous property[47]). The courts are however alive to the necessity of refusing such an order in so far as its effect would be to subvert the insolvency laws by giving one claimant a *de facto* preference;[48] and it could be argued that orders to deliver unascertained goods in specie would do just that, by forcibly removing such goods from the insolvent estate and thus preventing *pari passu* distribution.[49]

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in the iron succeeded, despite a plea of lack of equity based on the fact that normally there would be no specific performance of a contract to transfer an ordinary commodity. Romilly MR admitted the specific performance point, but then carried on at p.43 (51 E.R. 203): “On the other hand, if a trust be created, the circumstance that the subject-matter to which the trust is attached is a personal chattel, will not prevent this Court from enforcing the due execution of that trust.” He specifically referred by analogy to the settlement cases.

40[1974] 1 W.L.R. 576

41See [1974] 1 W.L.R. 576, 578.

42[2002] EWHC 3183 (QB); [2003] 2 B.C.L.C. 222

43The goods were referred to there, perhaps confusingly, as “not generic goods but ... specific goods” ([2002] EWHC 3183 (QB); [2003] 2 B.C.L.C. 222 at [52]). But the meaning is clear. See too the similar *Aston Martin Lagonda Ltd v Automotive Industrial Partnership Ltd*, unrep., QBD, Feb. 9, 2009.

44[2005] EWHC 2208 (Comm); [2006] 1 Lloyd’s Rep. 441

45See e.g. *Freevale Ltd v Metrostore (Holdings) Ltd* [1984] Ch 199.

46Notably where the defendant is a bankrupt individual or a company in liquidation or subject to a moratorium (Insolvency Act 1986, ss.A21, 130(2), 285(3)).

47See the Insolvency Act 1986, ss.178 and 315.

48*Butters v BBC Worldwide Ltd* [2009] EWHC 1954 (Ch); [2009] B.P.I.R. 1315 at [113]-[114] (Peter Smith J); *BLV Realty Organization Ltd v Batten* [2009] EWHC 2994 (Ch); [2010] B.P.I.R. 277 at [15] (Norris J). See too *Anders Utkilens Rederi A/S v O/Y Lovisa Stevedoring Co A/B* [1985] 2 All E.R. 669, 674 (Goulding J); and G.Treitel, "Specific Performance in the Sale of Goods" [1966] J.B.L. 211, 222. (Note, however, the forthright contrary statement of Browne-Wilkinson J in *Swiss Bank Corp v Lloyds Bank Ltd* [1979] 1 Ch 548, 566-567, and the suggestion in *AMEC Properties Ltd v Planning Research & Systems Plc* [1992] B.C.L.C. 1149, 1155-1156 that in any case the need to protect *pari passu* distribution only applies once liquidation kicks in.)

49See *Re B A Peters Plc* [2008] EWHC 2205 (Ch) at [63]-[65], making precisely this point; also *Benjamin on Sale* (11th edn), paragraph 17-099.

This looks a serious objection, but there are two answers to it. For one thing, it does not justify singling out *unascertained* goods. Enforcement *in specie* against an insolvent of a claim to a unique asset has the same effect. Imagine an agreement to sell a picture by Rembrandt at below its market value. Specific performance of such a contract would equally threaten the *pari passu* principle by giving the buyer its profit (if any) at the expense of the seller's other creditors.

Furthermore, the problem is not insoluble in any case, since the discretionary nature of the remedy can always be prayed in aid to ensure that the insolvency regime is not prejudiced. There is good authority for the court's power to do this,[50] and indeed one case where precisely such reasoning was applied to protect the buyer of unascertained goods while also safeguarding creditors. In *Land Rover Group Ltd v UPF (UK) Ltd*[51] one of Land Rover's main suppliers went into receivership, but remained in business. Since Land Rover desperately required the parts they made, specific performance of an existing contract to manufacture and supply chassis was granted despite the insolvency: but the court made this conditional on the receiver not deciding in good faith to exercise his power to wind up the business. In a suitable case, it is suggested, similar reasoning could be used in the case of a sale at a discount. There seems no reason why, for example, a court should not grant specific performance to a buyer of goods from an insolvent seller, but make the grant conditional on the buyer agreeing to make up the difference between the contract price and the full market value of the goods, in so far as this was felt necessary to achieve insolvency neutrality.

(ii) The trust argument

The trust argument against specific performance amounts essentially to this. Specifically enforcing obligations to sell generic goods is objectionable because it necessarily results in imposing trust-like obligations on sellers in respect of the goods sold, and hence injecting an unwelcome dose of equity into commercial law. This was what worried Atkin LJ in *Re Wait*;[52] and more recently Phillips LJ in the *VTB* case:

> "In my judgment the rationale for refusing specific performance of contracts for the sale of future unascertained goods goes beyond the fact that damages will usually be an adequate remedy, although that is an important aspect of the rule. The granting of such a remedy effectively turns a contractual claim into a quasi-proprietary right in respect of goods which have not been allocated to the contract and may have been sold to a third party."[53]

If this argument was correct, it would indeed worry us. Commercial sales law, dealing traditionally in hard-edged issues of ownership neatly separated from questions of personal obligation, can ill afford a proliferation of contract-based equitable interests in chattels potentially prejudicing third parties who buy or lend against them. But it is not correct.

First, with great respect to Phillips LJ, no equitable interest can possibly arise in the case of a contract to sell genuinely generic goods. If A agrees to sell B five generic gold bars, there can be no trust for B, for the simple reason that until we know positively which bars are covered by A's promise there is no possible subject-matter for it to attach to.[54] This, moreover, remains the case

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50 E.g. *MacJordan Construction Ltd v. Brookmount Erostin Ltd* [1992] B.C.L.C. 350.

51 [2002] EWHC 3183 (QB); [2003] 2 B.C.L.C. 222.

52 [1927] 1 Ch 606.

53 *VTB Commodities Trading DAC v JSC Antipinsky Refinery* [2020] EWHC 72 (Comm); [2020] 1 W.L.R. 1227 at [77]; quoted in *Watson's Dairies v A G Lambert & Partners* [2020] EWHC 2825 (Ch) at [19] and *Qatar Airways Group QCSC v Airbus SAS* [2022] EWHC 1247 (TCC) at [30]. The view that the vendor-purchaser constructive trust should apply generally in sales of personalty is defended, though (it is submitted) unconvincingly, in M.Pawlowski & J.Brown, "Sale of land and personal property: the purchaser as beneficial owner?" (2020) 34 Tru. L.I. 63.

54 And for that matter once we do know this, ownership will presumptively pass at common law anyway: Sale of Goods Act 1979, s.18, r.5(1).

even if A already possesses five bars which they contemplate using to fulfil their obligation: any bars answering the description will do, and the fact that A intends to use these particular ones to perform their obligation is beside the point.

Secondly, even if we escape this problem – say by postulating goods to be supplied out of a given bulk, such as five gold bars out of the ten currently in A's safe – the trust issue is still highly problematical. The problem here is that even accepting that the ordinary vendor-purchaser constructive trust of land is capable of applying to personalty (something almost certainly correct in the light of cases like *Oughtred v IRC*[55] and *Neville v Wilson*[56]), the analogy is not a true one. The classic vendor-purchaser trust of land, arising out of a contract by A to sell Blackacre to B, corresponds to a contract for specific, not unascertained, goods. The correct parallel would be a contract by A, the owner of both Blackacre and Whiteacre, to sell B one of these at A's option. Here, until we know which plot B will get, the only choice would be to affix some kind of inchoate trust to both of them, something for which there is it seems no authority whatever.

Thirdly, while it seems clear that a vendor-purchaser trust *can* arise with personalty, this is not the same as saying that it *will* arise as of course. Cases such as *Oughtred* and *Neville*, establishing the possibility of a carry-over from land to personalty, have one thing in common. In all of them there was a clear positive intent to create an immediate proprietary interest, either on the making of the contract or when the promisor obtained the relevant assets, without the need for further action. The very object of the carefully choreographed oral agreement in *Oughtred* was to engineer an equitable conveyance so that the subsequent written transfer conveyed nothing more than a bare husk of legal title. So too the implicit agreement held to exist in *Neville*: this was fairly clearly aimed at regularising the parties' shareholdings then and there, not at setting up a promise, specifically enforceable or otherwise, to do it at some future time.[57]

The same also goes, it is submitted, for other cases which are sometimes cited as authority for the idea that an agreement to transfer goods creates a trust interest in them: in particular, the rule in *Holroyd v Marshall*[58] that an agreement to create a security over goods gives an equitable interest over the goods once obtained, and the rule that a covenant to settle goods (for example as part of a marriage settlement) has the same effect.[59] In these situations too no-one envisages anything further happening at a later stage: on the contrary, there is a clear intent to create an automatic interest in after-acquired property as and when it is obtained, rather than a mere right in the promisee to call for one. They are therefore actually very different from mere agreements to sell goods, about which, and about the specific performance of which, it is suggested that they tell us rather little.[60]

(c) Specific performance: the arguments of principle.

The third reason to reject any special treatment of contracts for the sale of unascertained goods is that, if one turns more generally to the arguments of principle about whether we should specifically enforce contracts, it is difficult to see that any of them applies differently according to whether the goods concerned are, or are not, appropriated to the contract.

(i) The question of the adequacy of damages

55[1960] A.C. 206

56[1997] Ch. 144. See too *Michaels v Harley House (Marylebone) Ltd* [2000] Ch. 104.

57And the same goes, it is submitted, for the agreement in *Michaels v Harley House (Marylebone) Ltd* [2000] Ch. 104.

58(1862) 10 H.L. Cas. 191. *Holroyd v Marshall* is, interestingly, the only case referred to as unequivocally supporting the wholesale extension of the vendor-purchaser constructive trust to goods in M.Pawlowski & J.Brown, "Sale of land and personal property: the purchaser as beneficial owner?" (2020) 34 Tru. L.I. 63, referred to above.

59See e.g. *Re Lind* [1915] 2 Ch. 345.

60See also the discussion of *Pooley v Budd* (1851) 14 Beav 34 in Note 39 above.

Take first the matter of the adequacy of damages. There is a perfectly good argument, if nothing else from the need to avoid excessive litigation, that courts should refuse specific performance for things like iron ore or soya beans which are readily and genuinely available in the market in the quantities and as near as possible within the time required under the contract.[61] (This argument overlaps with, but does not completely mirror, the "efficient breach" theory referred to below.) However, though this point is often argued with reference to contracts to sell unascertained or fungible goods,[62] there is no reason to limit it to these. What matters is the situation on the buyer's side, and how easy it would be for them to get a replacement from someone other than the seller. And in this connection it makes no difference whether the seller's obligation was to supply soya beans stored in a particular silo (specific) or or soya beans *tout court* (unascertained). So also with a contract for the sale of something non-fungible such as a truck. The contract may have contemplated a particular truck, or merely a truck of a particular type: often it may be difficult to tell which.[63] But the same argument still applies: whether justice is better served by an order to deliver or an award of damages depends on the buyer's position, and not the nature of the seller's obligation.

(ii) Efficient breach.

The same argument also goes, it is suggested, for the related "efficient breach" theory, under which specific performance should be refused, or at least severely restricted, where this is necessary in order to guide goods or services to the hands of those who value them most while compensating in money those who appreciate them less.[64] Whether one is convinced by such reasoning or not,[65] an important point remains: in so far as it is valid, it applies just as much to ascertained as to unascertained goods.

Indeed, if anything it applies rather *more* strongly to the former. Using law and economics language, specific performance of a contract by A to supply B with 1,000 undifferentiated widgets when A would rather sell that quantity to C who values them more leaves A free, at least in theory, to supply another 1,000 widgets to C and hence achieve an economically optimal result. By contrast, specifically enforcing an agreement by A to sell, say, a unique picture to B when A has another customer C willing to pay more for it by definition prevents C getting it at all, thereby promoting a sub-optimal solution. The corollary is that, if anything, efficient breach theory suggests it should be easier and not harder to get enforcement in specie of a contract for unascertained than specific goods.

(iii) Curial supervision

Arguments about the need for curial supervision in specific performance situations will normally apply to sale of goods contracts only in a very limited way: in most cases, there will be fairly little room for disputes over what amounts to proper performance or any need for prolonged monitoring to make sure it is forthcoming. Nevertheless they may still be relevant: for instance, if goods are to be delivered in a number of instalments over a period of time.[66] Nevertheless, the same comment

61 *Benjamin's Sale of Goods* (11th edn (2020)), para.17-098.

62 As in cases such as *Fothergill v Rowlands* (1873) L.R. 17 Eq. 132 or *Watson's Dairies v A G Lambert & Partners* [2020] EWHC 2825 (Ch).

63 Since it is perfectly possible that even if buyer and seller have in contemplation a given vehicle in the seller's possession, the contract is nevertheless not a contract for specific goods.

64 The literature is enormous: but see e.g. R. Posner, *Economic Analysis of Law*, (6th edn (2002)), para.4.12; M. Eisenberg, "Actual and virtual specific performance, the theory of efficient breach, and the indifference principle in contract law", 93 Cal. L.Rev. 975 (2005).

65 The theory has sometimes had a bumpy judicial ride: e.g. *Butler v Countrywide Finance Ltd* [1993] 3 N.Z.L.R. 623, 635 (Hammond J).

66 This seems to have been the basis of the refusal of specific performance of long-term supply contracts in *Pollard v Clayton* (1855) 1 K & J 462; 69 E.R. 540 and *Dominion Coal Co v Dominion Iron & Steel Co* [1909] A.C. 293. Cf

applies as above. It is hard to see that this consideration applies any more to unascertained than to ascertained goods: answering the question whether the seller has performed its obligation, and supervising the process of delivery, is no more difficult in the former than the latter case.

A second point supporting this conclusion is that contracts to supply unascertained goods, especially over time, have a good deal in common in this connection with contracts to carry out services. Now, in the latter case, the nineteenth-century unwillingness to grant specific performance because of worries about curial supervision[67] is today much reduced. Specific performance, or an order having the same effect, is now fairly readily granted of contracts to do building work,[68] preserve a franchise,[69] provide other services,[70] or make information available;[71] to avoid it a defendant normally has to point to a demonstrably good reason for the court to decide otherwise.[72] To accept this, but continue to treat the rather similar phenomenon of contracts to sell unascertained goods as being in a class of its own, would it is submitted be somewhat inconsistent.

(iv) The coercive effect on the defendant

An important argument against a too ready grant of specific performance is that ordering performance in specie on pain of committal is intrusive on the defendant's freedom of action:[73] a point which, it must be admitted, applies to sales of goods as much as to any other contract. This too, however, applies to all kinds of goods. Its gravamen is that the supply of physical goods is almost invariably more troublesome than the mere payment of money, and this remains true whether the goods are generic or not. Indeed, if anything it is, like the efficient breach argument, one that applies more powerfully to specific than to unascertained goods. In the latter case the defendant has a good deal of flexibility in how it obeys the order: it can choose what goods to supply, or (depending on the terms of the contract) simply pay someone else to supply them. In the former situation, by contrast, their position is far more constricted.

(4) Conclusion

The conclusion of this article can be simply stated. The arguments raised against granting specific performance of contracts to sell unascertained goods may have some basis in history, but are ultimately unconvincing. By contrast, those in favour of assimilating them to other sale contracts, and applying ordinary equitable principles to them, are overwhelming.

For the moment it must be admitted that the statements in the authorities seem to ignore these points. On the other hand, this is an area where discretion is uppermost, and we have already seen that changes in approach are not uncommon. It is to be hoped that fairly soon the Court of Appeal, which alone has the power to put some order into the matter, will grasp the nettle, assimilate

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SSL International Plc v TTK LIG Ltd [2011] EWCA Civ 1170, [2012] 1 All E.R. (Comm) 429 at [95]; *Chitty on Contracts* (35th edn (2023)), para.31-040.

67 See cases such as *Powell Duffryn Steam Coal Co v Taff Vale Ry* (1873-74) L.R. 9 Ch. App. 331 and *Ryan v Mutual Tontine Assn* [1893] 1 Ch. 116.

68 *Carpenters Estate Ltd v Davies* [1940] Ch. 160.

69 *Wake v Renault (UK) Ltd*, unrep., Ch.D., 25 Jul 1996 (Robert Walker J); see too *Sanderson Motors (Sales) Pty Ltd v Yorkstar Motors Pty Ltd* [1983] 1 N.S.W.L.R. 513.

70 *Posner v Scott-Lewis* [1987] Ch 25 (serviced apartments); *John Fairfax & Sons Ltd v Australian Telecommunications Commission* [1977] 2 N.S.W.L.R. 400 (machinery maintenance).

71 E.g. *Lee v South West Thames Regional Health Authority* [1985] 1 W.L.R. 845 at 851 (Lord Donaldson MR); *Yasuda Fire & Marine Insurance Co. of Europe Ltd. v Orion Marine Insurance Underwriting Agency Ltd* [1995] Q.B. 174.

72 G.Virgo et al, *Contractual Duties: Performance, Breach, Termination and Remedies* (4th edn), Paras.27-31 – 27-32; 27-60 – 27-61.

73 Compare Lord Hoffmann's reference in *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1998] A.C. 1, 12 to the "heavy-handed nature of the enforcement mechanism."

unascertained and other goods, and thereby produce a more orderly scheme of contractual remedies in sale of goods cases.