

SALE OF CHATTELS AND SPECIFIC PERFORMANCE: CAN A BUYER FORCE PHYSICAL DELIVERY?

Introduction

Imagine that someone agrees to sell you a chattel that is truly unique – an Old Master, an irreplaceable family heirloom, a vintage car of impeccable provenance, or whatever – but then refuses to deliver it. We all know that an order of specific performance is both possible (see s.52 of the Sale of Goods Act 1979) and likely to be available, if not for the asking, at least as a matter of course.¹ But this leaves a further question unanswered. What if the seller continues obstinate? There is obviously the possibility of threatening sequestration or imprisonment for contempt, but this may not be effective.² If it is not, what then? Will the law give up at that point, or can you get the agents of the state if necessary to take over, seize the chattel concerned and hand it over to you?

We can begin with the easy part. If ownership has actually passed under the contract (which is possible, though rather unlikely³), the answer is yes. Assuming that you have paid or tendered the price, your claim is a straightforward proprietary one. Furthermore, absent fairly extraordinary circumstances you are likely to get an order for specific delivery without the defendant having the option of paying damages: see s.3(2)(a) of the Torts (Interference with Goods) Act 1977. And if you still draw a blank having got such an order, then you have a further remedy by way of a warrant of specific delivery under CPR 83.14(1)(a), which in the last resort will allow you to send in court enforcement officers⁴ who are armed with powers of forcible entry, and can then take the goods *manu militari*.⁵

But what if ownership has not passed, with the result that no proprietary claim under the 1977 Act will lie?⁶ An order of specific performance obviously remains possible – see again s.52 of the Sale of Goods Act 1979 – but can the goods in the ultimate event be seized? The point matters, for obvious reasons. To anticipate, it will be suggested that the answer is yes. Nevertheless the process of reaching it is complex, convoluted and history-bound, in contrast to the much simpler position with land.⁷

1See *Benjamin's Sale of Goods*, 12th ed, para 17-098 and cases such as *Thorn v Commissioners of Public Works* (1863) 32 Beav. 490 and *Taylor v Hamer* [2002] EWCA Civ 1130; [2003] 1 P. & C.R. DG6.

2It is very possible to imagine cases where such threats may be unpersuasive: the seller may be abroad and without substantial property here, or may be a foreign company with few assets here to be seized.

3Theoretically the presumption is that ownership passes on agreement: Sale of Goods Act 1979, s.18 r 1. But this is only a presumption. Furthermore, even where it does apply it is very easily rebutted. A court in practice will not need much persuasion to hold that property in a seriously valuable work of art (say) should only pass on delivery and/or payment. See e.g. *Ward (RV) Ltd v Bignall* [1967] 1 Q.B. 534, 545 and *Benjamin on Sale* (12th ed), para 5-018.

4Who have replaced the traditional bailiffs and sheriffs: see generally the Courts Act 2003 and the Courts, Tribunals and Enforcement Act 2007.

5With the aid if necessary of the police, whose assistance they have the right to call on: Courts Act 2003, Sched 7, para 5.

6We are thinking here of a common law proprietary claim. An equitable proprietary claim based on a vendor-purchaser constructive trust might possibly be asserted, but there is considerable doubt about whether this doctrine applies to chattels as against other forms of personalty: see *Re Wait* [1927] Ch 606, 635-636 (Atkin LJ) and *The Aliakmon* [1986] A.C. 785, 813 (Lord Brandon). M. Pawlowski & J. Brown, "Sale of land and personal property: the purchaser as beneficial owner?" (2020) 34 Tru. L.I. 63, 68 suggest a contrary answer, but notably cannot cite a single case applying the doctrine to chattels agreed to be sold. And in any case, even if the court is prepared to make an order enforcing the equitable right, we come back to the same question: what if the defendant ignores it?

7Here the claimant need simply invoke s.39 of the Senior Courts Act 1981, under which a court official can sign the conveyance and thereby transfer title. The buyer can then initiate a possession claim under CPR 55, which will ultimately culminate in forcible eviction.

History I: the nineteenth-century impasse

We need to begin about 200 years ago. At that time the position of a purchaser who had obtained an order of specific performance, whether for land or goods, was scandalously, and notoriously, unsatisfactory. The rule that equity acted in personam cut both ways, and viciously so. While it empowered the Court of Chancery to make orders against people within the jurisdiction concerning property outside it,⁸ it also meant that the Court lacked direct powers over property as such, even if that property was physically within the jurisdiction. It followed that the court's powers were effectively limited to punishing the person who disobeyed its order of specific performance. If that person was contumacious, or in practice not amenable to sequestration or imprisonment, there was not much that could be done. As the report of an 1826 Royal Commission put it in the case of land:

“A difficulty has been sometimes experienced amounting to a failure of justice, from the contumacy of a party who refuses to obey a decree or order directing him to execute some instrument, thereby depriving his adversary of the benefit which he is entitled to derive from the judgment of the court.”⁹

Furthermore, subject to minor statutory exceptions,¹⁰ the same difficulty also undoubtedly applied to personal property. As Lord Redesdale put it in 1821:

“In case of chattels, [courts] frequently order specific delivery of the article demanded, but enforce their decrees and orders only by process of contempt. ... In such cases courts of equity enforce obedience by process of contempt, and never, but in the excepted case of a decree for land in a judgment upon title, direct the sheriff to take and give possession by force”.¹¹

Land, legislation and the nineteenth and twentieth century

This was obviously unsatisfactory, and reform duly came. However, it was concentrated on land, where it took the form of a series of Acts allowing the court in an ever-expanding number of cases to execute a conveyance or other documents in the name of a defendant who would not do so. In 1830 such a power was given in regard to cases where a vendor was already in custody for contempt for failing to convey land;¹² in 1850 a wider-ranging power was introduced for the court to execute a conveyance on behalf of any trustee of land, a term which was construed as including (in their capacity as constructive trustee) a vendor against whom a decree of specific performance had been obtained, or who had received the full purchase price.¹³ The legislation was consolidated in 1893,¹⁴ and expanded into a much more general form in 1925, when s.47 of the Supreme Court of Judicature (Consolidation) Act provided that any judgment or order “to execute any conveyance, contract or other document, or to indorse any negotiable instrument” could if necessary be given effect *in specie* by the court executing the document in lieu of the defendant.¹⁵ This provision was

⁸*Penn v Lord Baltimore* (1750) 1 Ves 444.

⁹Report of the Royal Commission on Chancery Practice, 1826, I, 34.

¹⁰Notably in the case of trustees of gilts (Bank of England Stock Act 1796) and certain other securities (Relief as to Transferable Stocks etc Act 1812), where the court had power to execute any necessary transfer documents.

¹¹See *United Co of Merchants of England, Trading to the East Indies v Kynaston* (1821) 3 Bliqh 153, 165-166.

¹²See the Contempt of Court Act 1830, s.15(15).

¹³Trustee Act 1850, s.17: see *Re Cuming* (1869) L.R. 5 Ch. App. 72.

¹⁴See the Trustee Act 1893, s.31.

¹⁵Thus filling a lacuna in the 1850 wording, which (for instance) did not allow court execution of a specifically-enforceable contract to take, as against grant, a lease: *Grace v Baynton* (1877) 25 W.R. 506.

carried over almost verbatim into what is now s.39 of the Senior Courts Act 1981, which represents the current law.

With land, the problem is therefore now solved. So too with those items of personal property, such as securities,¹⁶ life and marine insurance contracts,¹⁷ and statutory intellectual property rights,¹⁸ which are transferable by instrument in writing and hence amenable to the s.39 procedure.¹⁹ Unfortunately, while these developments relieved much of the pressure for reform they did nothing for the buyer of an ordinary chattel. With a Rembrandt, a fabulous necklace or a classic car, ownership passes not by writing but by delivery; and it is hard to see a court order to hand them over as an order to execute a “conveyance, contract or other document” – a term that seems naturally limited to written instruments, albeit doubtless in a broad sense.²⁰

Parallel to this, however, there was another more promising development, which would later become relevant, but whose understanding is again dependent on a delve into nineteenth-century history.

History II: The writ of assistance, the common law procedure legislation and the rules of court

Even if the early nineteenth-century Court of Chancery had no means of physically enforcing a contract to deliver chattels that did not already belong to the buyer, the situation seems to have been different where the plaintiff could point not to a mere contractual claim to delivery but to an existing right of ownership (or, more strictly, a proprietary right to immediate possession²¹). The process had two stages. First, the plaintiff would get a common law judgment in detinue. Admittedly this merely ordered the defendant to pay the goods' value or alternatively deliver them up; however, since *Pusey v Pusey*²² in 1684 a line of cases²³ had shown that if goods were unique, Chancery could intervene in favour of the true owner to order their return *in specie*. And furthermore it seems that here, in contrast to the case of specific performance, this order had physical teeth. If faced with contumacy, the court could and would issue another writ, known as a writ of assistance.²⁴ And this, it seems, did enable the sheriff to seize the goods physically, and if necessary forcibly, and hand them to the plaintiff.²⁵

16Stock Transfer Act 1963.

17Policies of Assurance Act 1867, s.5; Marine Insurance Act 1906, s.50.

18E.g. Copyright, Designs and Patents Act 1988, s.90(3).

19Indeed, the width of this is striking: see, e.g., *The Messiniaki Tolmi* [1983] 2 A.C. 787 (procedure used to allow court to sign commercial document necessary to trigger payment under a letter of credit).

20Including presumably email and other forms of electronic signalling. This may matter where, for example, a court wishes to order a defendant to transfer the right to a webpage, a unique NFT, or just possibly a quantity of unique cryptocurrency.

21Such a proprietary right being necessary to give title to sue in detinue: a mere contractual claim would not do. See *Addison v Round* (1836) 4 A. & E. 799 and *Jarvis v Williams* [1955] 1 W.L.R. 71.

22(1684) 1 Vern 273

23Notably *Somerset (Duke) v Cookson* (1735) 3 P. Wms. 390; *Fells v Read* (1796) 3 Ves Jun 70; *Lloyd v. Loaring* (1802) 6 Ves. 773; *Lowther v Lowther (Lord)* (1806) 13 Ves. 95; *Falcke v. Gray* (1859) 4 Dr. 651; and *Dowling v Betjemann* (1862) 2 J & H 544. The last two cases show that this jurisdiction continued to be exercised even after the shackles relating to equitable remedies were removed from the common law courts by s.78 of the Common Law Procedure Act 1854.

24Not to be confounded with the controversial customs and excise writ of assistance, which dealt with search for uncustomed goods (described generally in M. Smith, “Writ of assistance search: a flawed fossil?” [1986] P.L. 28). This confusingly shared the same name, but was entirely distinct.

25All the earlier cases on the writ of assistance seem to have concerned land: e.g. *Penn v Lord Baltimore* (1750) 1 Ves 444, 454; *Huguenin v Baseley* (1808) 15 Ves. Jr. 180; and *Green v Green* (1828) 2 Sim. 394. But a series of late nineteenth and early twentieth century cases confirmed that the writ of assistance was not limited to land but could equally apply to chattels: see *Cazet de la Borde v Othon* (1874) 23 W.R. 110; *Wyman v Knight* (1888) 39 Ch. D. 165; *Re Taylor* [1913] W.N. 212; and *Re Klingelhofer's WT* [1955] CLY 2124. These remain potentially relevant

Later developments

In the nineteenth century, statute then intervened. It did so by taking the writ of assistance mechanism, putting it into statutory form, and modernising it. The relevant legislation was s.78 of the Common Law Procedure Act 1854, which enacted as follows:

“The Court or a Judge shall have Power, if they or he see fit so to do, upon the Application of the Plaintiff in any Action for the Detention of any Chattel, to order that Execution shall issue for the Return of the Chattel detained, without giving the Defendant the Option of retaining such Chattel upon paying the Value assessed, and that if the said Chattel cannot be found, and unless the Court or a Judge should otherwise order, the Sheriff shall distrain the Defendant by all his Lands and Chattels in the said Sheriff's Bailiwick, till the Defendant render such Chattel, or, at the Option of the Plaintiff, that he cause to be made of the Defendant's Goods the assessed Value of such Chattel ...”

While the obvious purpose of this legislation was to anticipate the 1870s Judicature Act reforms and do away with the need for a dispossessed chattel owner to go into Chancery to get their goods back in specie, it did so with a twist. The important provision was that allowing the court to “order that Execution shall issue for the Return of the Chattel detained.” Although it was occasionally suggested that this merely gave power to distrain the goods of a recalcitrant defendant generally, and not to take the chattel in question,²⁶ the better view is that this was wrong: the power to distrain generally on the defendant “if the said Chattel cannot be found” implied that if it could be found, then it could simply be seized.²⁷

True, in this form s.78 did not help a non-owning claimant seeking specific performance, since it was limited to an “action for the detention of any Chattel,” a phrase which clearly referred to an action in tort for detinue.²⁸ However, all this would soon change. Two years later, s.2 of the Mercantile Law Amendment Act 1856, having allowed any court to give specific performance of a contract to sell specific goods, went on to say, using wording almost identical to that in the 1854 Act:

“... [T]he Court or any Judge thereof, at their or his Discretion, on the Application of the Plaintiff, shall have Power to order Execution to issue for the Delivery, on Payment of such Sum (if any) as shall have been found to be payable by the Plaintiff as aforesaid, of the said Goods, without giving the Defendant the Option of retaining the same upon paying the Damages assessed; and such Writ of Execution may be for the Delivery of such Goods ...”

The parallel is, it is suggested, patent. If the court had the power to send in the bailiffs to seize goods that the plaintiff already owned, the inference seems irresistible that it now also got a similar power over goods merely promised to the plaintiff. It follows that from then on the court had the ability, if it gave specific performance of a contract for the sale of specific chattels, to procure the enforcement of its order *in specie* and have the goods seized and handed over to the buyer.

A happy ending for specific performance claimants? In a sense, yes. However, as things turned out it was only a temporary one. Nearly forty years later, as an unintended consequence of further procedural law reform, the reform was undone. In 1893, s.2 of the Mercantile Law Amendment Act

today, for reasons appearing below.

26See the forcible expression of this view in counsel's argument in *Wyman v Knight* (1888) 39 Ch. D. 165, 166.

27And this seems to have reflected practice. Notably, see the order in *Hymas v Ogden* [1905] 1 K.B. 246, a Nottinghamshire dog owner's claim for the return of a “running dog” worth the then fantastic sum of £40. The bailiff was ordered “forthwith to seize the said goods and chattels so not returned as aforesaid, wheresoever they may be found within the district of this Court, and to deliver the same to the plaintiff.” This could not be clearer.

28Now, since the Torts (Interference with Goods) Act 1977, a claim in conversion: but nothing turns on this.

1856 was repealed and supplanted by s.52 of the Sale of Goods Act of that year.²⁹ Although this was seen as a minor consolidation exercise, there was a crucial difference that seems to have passed unnoticed. The reference to execution was removed; the new s.52 simply allowed the court to make an order of specific performance in respect of a promise to deliver specific or ascertained goods *tout court*. On the physical enforcement of such an order, there was nothing. This, it is suggested, mattered. By a side-wind Parliament had inadvertently removed the court's power to procure enforcement *in specie* and returned to the pre-1856 rule that the only sanction against a seller of a chattel who disobeyed a specific performance order was sequestration or contempt proceedings.

But this was not to be the end either. As it turned out the regression was itself to be temporary. In 1883, in a tidying-up exercise following the judicature reforms of the 1870s, s.78 of the 1854 Act was repealed and its words moved into the Rules of the Supreme Court (where it appeared as Order XLVIII.1). As such, this was no big deal: the wording was to all intents and purposes the same. In 1965, however, the new revision of the Rules introduced – one suspects again without realising its significance – an important change. In its new guise of R.S.C., Order 45, r 4, what had been Order XLVIII.1 now referred to a right to enforce a “judgment or order for the delivery of any goods which does not give a person against whom the judgment is given or order made the alternative of paying the assessed value of the goods,” and went on to say that this was enforceable by writ of specific delivery. And while a non-owning buyer's claim for specific performance might not be a claim for *detention* of goods (the wording in Order XLVIII.1), it most certainly was a claim for their *delivery*. In short, although the drafters of the 1965 Rules of the Supreme Court may not have realised it, they seem by a side-wind to have inadvertently restored the powers Parliament had equally unintentionally taken away in 1893. Moreover, this change in wording has been carried forward into CPR 83.14, which currently governs writs of delivery.³⁰

The present situation

If so, then we now have the answer to the problem outlined at the beginning of this paper. By a couple of legislative sidewinds, it now seems clear that a buyer of goods armed with an order of specific performance can, in the event of difficulty, invoke the provisions of CPR 83 in order to obtain a writ of delivery, and having obtained that thereby get the right to send in court enforcement agents to seize them.

One matter, however, remains. The writ of delivery procedure it seems only works against the seller themselves, since it appears that this writ can only be used against the person obliged to hand over the goods.³¹ This could matter. Imagine that, innocently or otherwise, a seller of a unique chattel has left it in the hands of someone else: a friend or dealer in the case of the picture, a safety deposit company as regards jewellery, and so on. What then? Is the buyer still stymied in such a case if they want their goods?

Oddly enough, the answer here seems to be no. And the reason is yet another twist in the nineteenth-century history. We mentioned earlier the old power of the Court of Chancery, when ordering goods to be specifically returned to their owner, to achieve the object of specific restitution

²⁹Reproduced almost word-for-word by s.52 of the present Sale of Goods Act 1979.

³⁰CPR 83.14(1) reads as follows: “A judgment or order for the delivery of any goods which does not give a person against whom the judgment is given or order made the alternative of paying the assessed value of the goods may be enforced in the High Court by one or more of the following means— (a) writ of delivery to recover the goods without alternative provision for recovery of the assessed value of those goods (‘writ of specific delivery’); (b) proceedings for contempt of court under Part 81; (c) where no such proceedings are brought, by a writ of sequestration.”

³¹This seems implicit in CPR 83.14(1), which clearly envisages enforcement against the defendant and no-one else.

by superadding a writ of assistance which justified their actual seizure. In *Wyman v Knight*³² in 1889 this long-forgotten remedy, which many thought had disappeared into quiet obsolescence, was disinterred. A solicitor-trustee absconded, leaving valuable title deeds in a safe which his clerk loyally refused to give the plaintiffs access to. The plaintiffs sought an order against the clerk allowing them to take the safe and break it open. Chitty J granted it, holding that the writ of assistance had survived in such third-party cases despite the new procedure in the 1883 rules of court. This again is important. Since writs of assistance can now be given in support of any writ of delivery under CPR 83, it is suggested that this could be used to allow seizure of a chattel sold, not only from the actual seller, but also from anyone with whom the seller has left it and who, whether out of misplaced loyalty or otherwise, refuses to grant access to it.

Conclusion

In one sense the conclusion of this article is simple. An order of specific performance relating to a chattel whose whereabouts are known may if necessary be enforced *manu militari*, whether the chattel is in the hands of the seller or a third party. But there is a further point worth making. This is a relatively simple but important point of procedural law concerning the enforcement of judgments.³³ That it should take a short article, not to mention a fairly deep dive into nineteenth-century legal history, to establish the position is disconcerting. The CPR are getting more complex by the day. But at times there is a case for the Civil Procedure Rule Committee not simply dealing with questions of detail, but standing back and thinking whether there are some simple matters that for the sake of legal logic and tidiness ought to be simply and succinctly stated, so we all know where we stand. This would seem to be a classic example.

32(1888) 39 Ch. D. 165. See too the earlier *Cazet de la Borde v Othon* (1874) 23 W.R. 110 (wine in hands of a third party); and two subsequent cases where a similar remedy was applied, *Re Taylor* [1913] W.N. 212 and *Re Klingelhoefer's WT* [1955] CLY 2124 (the latter concerning third party holders of title deeds). The whole is usefully discussed in an anonymous article in the *Solicitor's Journal*, "The Writ of Assistance" (1955) 99 Sol Jo 391.

33And which other systems of law deal with fairly straightforwardly: see e.g. the approach of French law in two codal provisions, C. Pr. Civ. Exec L 153-1 and L 222-1, and also Com 15.12.2015, 14-12.348. In Germany, compare the fairly logical provisions of the *Zivilprozessordnung* (Code of Civil Procedure), §§ 753-758.