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SPECIFIC PERFORMANCE OF CONTRACT CONTAINING LIQUIDATED DAMAGE CLAUSE

Armstrong v. Stiffler[1]

Specific performance was sought by the buyers of an option agreement to sell ten shares of stock in a dairy company at $300. per share. The contract, signed by defendant, contained the following provisions: "In case of default, I promise to pay $300. per share . . . as liquidated damages." Plaintiffs secured similar option agreements from the holders of more than a majority of the outstanding shares of the Company, with the purpose of securing control of the corporation but holders of less than one-third of such shares had transferred their stock to the plaintiffs, the remaining optionors, including the defendant, having refused to make the transfers promised. On defendant's appeal from an order overruling a demurrer to the bill of complaint, *held:*—Affirmed; plaintiff's bill stated a case justifying equitable relief.

Defendant raised two principal contentions in support of his demurrer, *viz:*—(1) that a contract for the purpose of securing control of a corporation is not specifically en-

[1] 56 A. (2d) 808 (Md. 1948).

forceable; (2) that the liquidated damage clause in the contract defeated specific performance. As to the first, defendant urged that in *Ryan v. McLane*,[2] the Court had indicated that a plaintiff seeking specific performance of a contract to purchase stock control of a quasi-public corporation came into court with unclean hands. The short answer could, of course, have been made that in the instant case, the corporation involved was not in any way quasi-public. The Court, however, expressly passing over this, pointed out that in the *Ryan* case, the language of the opinion, while strong, not only fell short of characterizing a purpose to secure stock control as being against public policy *per se*, but specifically refused to do so, and based its decision on facts in the case which were regarded as inconsistent with fair dealing on the plaintiff's part; the existence of such facts, if present in the instant case, could be raised by answer.

In denying validity to the defendant's second contention, however, the Court seems to have directly overruled *Hahn v. Concordia Society*,[3] although apparently somewhat chary of saying so in so many words. In that case, an actor's contract not to perform in any production not under the auspices of the plaintiff society contained a stipulation by which, in the event of breach, the defendant obligated himself to pay a "conventional fine" of $200. The society sought specific performance of the negative covenant by an injunction, relying on *Lumley v. Wagner*.[4] The Court, in discussing the doctrine of that case, pointed out that it had overruled *Kemble v. Kean*[5] and *Kimberley v. Jennings*,[6] cases that had been frequently followed in this country, as *e.g.* in *Burton v. Marshall*.[7] The Court was obviously hesitant to follow the lead of the English Court in discarding those cases and equally hesitant to refuse outright to accept the decision in *Lumley v. Wagner;* it consequently seized upon the liquidated damage clause as a way out, holding that by agreeing to pay a stipulated sum as liquidated damages the parties had both fixed the amount of damages resulting from a breach of the contract and had also "indicated as clearly as if so stated in terms that the only forum in which they could seek redress . . . was a court of law", being thereby precluded from seeking relief in equity.

[2] 91 Md. 174, 46 A. 340 (1900).
[3] 42 Md. 460 (1875).
[4] 1 DeG., M. & G. 604 (1852).
[5] 6 Sim. 333 (1829).
[6] 6 Sim. 340 (1836).
[7] 4 Gill 487 (1846).

In the instant case, the Court states that it is clear the same result could and today would be reached in the *Hahn* case without reference to the liquidated damage clause, because of the fact that the defendant there was not "so exceptional a performer as the opera singers, baseball players and others to whom the doctrine of *Lumley v. Wagner* has been restricted".[8]

Nevertheless, it was expressly held in the *Hahn* case that a "stipulation to pay a specific sum as liquidated damages", in itself and without more, prevented specific performance. And this principle was reaffirmed as late as 1922 in *Rogers v. Dorrance*.[9] In the latter case a contract for the sale of land, providing for deferred payments, contained a stipulation that in the event of default by the vendee, all sums paid on account of the purchase price and all buildings erected or crops planted should be forfeited and retained as liquidated damages by the vendor. This was held not to defeat the vendor's right to specific performance; but in a supplemental opinion filed on motion for reargument,[10] the Court expressly disclaimed any intention to overrule the *Hahn* case, and went on to say: "It will be seen that no definite sum or amount was fixed or named in the forfeiture clause in this case, nor was it known what payments would be made before a breach of the contract."

Since, in the instant case, there is an express agreement to pay a specific and definite sum as liquidated damages, it seems clear that the Court has directly overruled both the doctrine of the *Hahn* case and the approval thereof in the supplemental opinion in the *Rogers* case.

In doing so, it has brought Maryland into line with the great weight of authority in this Country. It is generally held that the right of specific performance, whether sought affirmatively or as here by way of injunction, is not lost because the contract is in the form of a bond with a penalty attached or contains a clause for payment of a specific sum as liquidated damages in the event of breach, unless the contract can be construed as giving the defendant an option to perform or to be released from performance on pay-

[8] See, *e.g.*, Rosenstein v. Zentz, 118 Md. 564, 85 A. 675 (1912); but *cf.* Baltimore Baseball Club v. Childs, 1 Balto. City Rep. 169 (1891) and Fulton Grand Laundry Co. v. Johnson, 140 Md. 359, 117 A. 753 (1922). It has been suggested that it makes no difference whether the performer is great or unknown; that any contract for personal services involves subject matter as unique and irreplaceable as a contract for the sale of land. Ashley, *Specific Performance by Injunction* (1906) 6 Col. L. R. 82, 91.

[9] 140 Md. 419, 117 A. 564 (1922).

[10] *Ibid*, 427.

ment of the stipulated sum.[11] This is on the theory, as stated in the opinion in the instant case, that such clauses are inserted as means of securing performance and not as an agreement to accept money in lieu thereof or as an adequate substitute therefor.

Where equitable relief is sought because the plaintiff's legal remedy of damages would be ineffective to enable him to purchase articles similar to those contracted for from other sources, or where the subject-matter of the contract has unique values for the loss of which money would not compensate, the majority rule followed in the instant case seems obviously sound. Damages as a remedy would be equally inadequate whether measured by a jury or fixed by agreement of the parties in the contract.

So, in the instant case, the very stock contracted for is necessary to the plaintiffs if they are to get the benefit of their contract. Its value in money will not give them control of the corporation, to secure which is their purpose in contracting; nor can they with their money damages purchase other similar stock on the open market which will serve their ends in this respect.

Where, however, as is not infrequently the case,[12] the inadequacy of the legal remedy arises, not from any peculiar or special value of the subject-matter of the contract, nor from any difficulty in replacing it with a similar article on the open market, but solely because of the presence of conditions making damages in the event of breach conjectural and difficult to measure, it is submitted that there is some basis for regarding the presence of a liquidated damage clause as defeating specific performance.

So in *Martin v. Murphy*,[13] where the purchaser of a doctor's practice sought specific performance of the seller's agreement, not to engage in practice in the locality, by an injunction to restrain breach of the negative promise, the court, after saying that normally the plaintiff in such a case would be entitled to relief, states:—

> "This is upon the ground that, from the nature of such a case, just and adequate damages cannot be estimated for a breach of the covenant. The parties

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[11] RESTATEMENT OF CONTRACTS, Sec. 378; POMEROY, EQUITY JURISPRUDENCE (5th ed. 1941) Sec. 447a; CHAFEE AND SIMPSON, CASES ON EQUITY (1934) 514; WALSH ON EQUITY (1930), 302. The cases are collected in 32 A. L. R. 584 *et seq.*; see also 98 A. L. R. 887, 2 L. R. A. (N. S.) 210, and 45 L. R. A. (N. S.) 52.

[12] See, *e.g.*, Hendler Creamery Co. v. Lillich, 152 Md. 190, 136 A. 631 (1927); Eastern Rolling Mills v. Michlovitz, 157 Md. 51, 145 A. 378 (1929).

[13] 129 Ind. 464, 28 N. E. 1118 (1891).

> to such a contract may, however, by its terms agree upon stipulated damages, which may be recovered for a breach of its conditions, instead of leaving that question open, uncertain and undetermined . . . The sum fixed by the parties themselves in this contract will, in the absence of fraud, be deemed to be adequate and the proper measure of damages by the Court."[14]

If we assume, as the Court does in the instant case, that in the *Hahn* case there was nothing unique or irreplaceable in the defendant's services for which the plaintiff society had contracted, there could still have been difficulty in estimating plaintiff's damages at law, except for the presence of the liquidated damage clause, which fact might in itself have been reason for decreeing specific performance. To that extent, the holding that the liquidated damage clause defeated specific performance could be justified. Consequently in saying in the instant case that such clauses do not defeat specific performance, the Court has perhaps laid down a rule broader than necessary for the decision of the case before it. If damages as such are an adequate remedy for the breach of a contract, and become inadequate in a particular case solely because of the difficulty in estimating them, it is not apparent why the removal of that difficulty by the parties' own agreement through a liquidated damage clause should not defeat any claim to specific performance. No such situation is presented or considered in the case before the court here.

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[14] See, to the same effect, Bartholomae & Roesing Brewing & M. Co. v. Modzelewski, 269 Ill. 539, 109 N. E. 1058 (1915); and *cf.* Primm v. White, 162 Mo. App. 594, 142 S. W. 802 (1912).