

SPECIFIC PERFORMANCE

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It is (sometimes) said that “money isn’t everything.” And (sometimes) money isn’t. For example, some collectors might never agree to part with their beloved old car, no matter how much money they were offered for it.

The idea that some things are not easily susceptible to a monetary value is part of what’s behind the legal doctrine of “specific performance.” Specific performance allows a contractual dispute to be resolved, not (or not entirely) by having the breacher pay the winner money, but by having the breacher do whatever it was that he or she was supposed to do under the contract. In the context of a collector car contract, specific performance could require the party who breached the agreement to sell the car to go ahead and sell it to the other.

But what if the seller has already sold the car to someone else? This was the situation in *Bander v. Grossman*, decided on April 25, 1994 by the Supreme Court of New York. (In New York State, the Supreme Court — despite its name — is the trial level court).

According to the court, in the summer of 1987, sports car dealer Robert Grossman had in his inventory a 1965 DB5 Aston-Martin convertible with left-hand drive in which Neil Bander was interested. Bander learned that this particular model was one of only 20 in existence of only 40 originally made. He believed the car was undervalued and anticipated a price rise. Bander and Grossman signed a contract of sale for \$40,000, with Bander depositing \$5000.

Unfortunately, problems developed with the transaction. Bander pursued the purchase for several months; finally, in December 1987 his lawyer notified Grossman that the contract had been breached and that Bander would commence litigation. However, Bander did not sue until 1989, four

months after Grossman sold the car to another for \$225,000.

Under the Uniform Commercial Code, a buyer in such circumstances may be entitled to the difference between (1) the market value of the goods when the buyer learned of the breach, and (2) the contract price. The jury awarded Bander \$20,000 — the difference between the value of the car in December 1987 (\$60,000) and the contract price (\$40,000).

Both sides made post-trial motions to the judge. Bander asked for “monetary specific performance” — the price the actual buyer paid Grossman for the car (\$225,000), plus interest from the date of sale. The court denied Bander’s motion. It agreed that, under the U.C.C., “specific performance may be decreed where the goods are unique or in other proper circumstances.” (The jury had found that the Aston-Martin involved was unique.) The court also agreed that Bander’s “request for an award of specific performance money damages is legally cognizable, for every object has a price and even rare goods are subject to economic interchangeability.”

The court observed that, even if monetary specific performance were awarded to Bander, it would be based on the value of the Aston-Martin at the time of trial (it had decreased to \$80,000), as opposed to an earlier (higher) valuation (such as the time of the actual sale for \$225,000). This was consistent with the goal that “the aggrieved party may be put in as good a position as if the other party had fully performed.” The court concluded that the \$80,000 would allow Bander to acquire another Aston-Martin. It thus rejected Bander’s claims for monetary specific performance beyond that amount.

But the court did not award Bander the \$80,000, which would have been

twice the contract price. It noted that specific performance may be denied if such relief is a “drastic or harsh remedy.” The court also observed that the “uniqueness” of the item involved is most significant when the action for specific performance is commenced immediately after the breach. As the court stated, “[w]ith the passage of time, specific performance becomes disfavored.”

Examining the facts of the case, the court noted that Bander “did not sue in December of 1987, when it is likely a request for specific performance would have been granted.” (The court speculated that Bander’s inaction was attributable to his purchase in April 1988 of a Ferrari Testarossa and in 1989 of a Lamborghini.) Although acknowledging Bander’s “valiant attempt to reach out for a higher level of damages,” the court denied Bander’s request for monetary specific performance, ruling he was limited to the \$20,000 the jury awarded.

The Bander case, in addition to providing an interesting discussion of damages for breach of contract, illustrates an important point. If you are wronged by another, you should assert and preserve your legal rights promptly. Delay may risk losing the opportunity to recover certain damages as seen here, or, worse, letting the applicable statute of limitations expire, barring your claim altogether.

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