A Revised Remedy: Trends and Tendencies in the Law of Specific Performance since *Semelhago* v. *Paramadevan*

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I. Introduction

In 1996, the Supreme Court of Canada handed down its decision in *Semelhago* v. *Paramadevan*.[1] The decision altered the law on specific performance and contracts for the sale of land. *Semelhago* ruled on three important points. First, courts are no longer to grant specific performance automatically in the case of a breach of contract to sell land; the remedy is available only when the land is unique.[2] Second, a successful plaintiff may elect at trial to take damages *in lieu of specific performance*. This compensation should equal any losses between breach and the trial; therefore, the plaintiff has no duty to mitigate damages.[3] Third, damages in lieu of specific performance are to be a "full replacement" for performance.[4] Taken together, these three rules have a somewhat odd effect. By applying the uniqueness criterion to real property, the Supreme Court brought the treatment of land closer to orthodox contract principles; however, its rulings on both deductions and the date of measurement have made damages in lieu of specific performance a remedy quite removed from regular damages.

Semelhago has already been the subject of academic scrutiny and judicial interpretation, so it is not too early to ask whether it is good law. Several commentators have stated that the Court missed a chance to investigate the purpose of specific performance and develop the law according to sound policy and principle.[5] Others have wondered if *Semelhago* provided enough guidance to lower courts.[6] This essay will touch on both questions. It is useful to begin, however, where the Supreme Court did, with the issue of specific performance and the sale of land as it stood, before *Semelhago*.

II. Two Remedies: Damages and Specific Performance

Specific performance is a way to enforce a contract. As a court order forcing a party to do what it promised, specific performance is an exact and material remedy. In the common law tradition, however, it is an extraordinary redress. Courts usually employ monetary damages to compensate innocent parties. Traditional contract theory considers damages to be cheaper

1 [1996] 2 Supreme Court Reports 415, (1996), 136 Dominion Law Report (4th) 1; hereinafter cited as "*Semelhago*".
2 See above at para. 22.
3 See above at para. 14-20.
4 See above at para. 19.
5 O.V. Da Silva, "Case Comment: The Supreme Court of Canada's Lost Opportunity: *Semelhago* v. *Paramadevan*" (1998) 23 Queen's Law Journal 475 (QuickLaw); N. Siebrasse, "Damages in Lieu of Specific Performance" (1997) 76 Canadian Bar Review 551 at 551.
6 Da Silva, see note 5 at 1.

and simpler, in part because they allow parties to respond to the market while they await adjudication.[7]

It is not simple, however, to capture in a dollar figure the value of a contractual loss. The general rule is that damages are to place the plaintiff in the position he would have been in if the defendant had executed his part of the arrangement. Courts remunerate this "expectation interest" by awarding the value of the lost good or service, less the expense of gaining it. In addition, redress is available only for losses that were unavoidable.[8] The plaintiff, therefore, has to "mitigate" her losses by taking other opportunities. In a marketplace where values fluctuate, the principle of mitigation becomes important in assessing damages. Mitigation indicates the time at which a court will consider that losses have become avoidable. Courts generally consider that a plaintiff can mitigate after the breach, so that, traditionally, it is the market value of the good around the time of breach that establishes the plaintiff's losses.[9]

Specific performance stands outside of this complex architecture because it does not embody a loss in a dollar figure. As well, mitigation does not work in a situation where a defendant demands actual performance; the innocent party must wait and be ready to perform. The inapplicability of the mitigation principle opens the possibility for a sort of "windfall" or unfair advantage. First, a plaintiff who successfully pursues specific performance avoids mitigation. He can, in a rising market, watch his losses swell and he may benefit from

7 S.M. Waddams, *The Law of Contracts,* 3rd ed. (Toronto: Canada Law Book Inc., 1993) at 460.
8 P. Perell, "Damages and Fluctuating Land Values" (1996) 18:4 Advocates' Quarterly 401 at 402.
9 See above at 404-5.

continuing to hold whatever resources he intended to expend in the original contract. Second, the plaintiff has a chance, with greater knowledge of the market, to reconsider the merits of the contract. When confronted with a fundamental breach, a plaintiff has several options: do nothing; mitigate and sue for damages; or demand specific performance. Specific performance *revives* the contract, so that its terms remain in force until the plaintiff decides that it is at an end and seeks damages.[10] If she chooses specific performance, she will receive the good or property promised by the defendant; in an obvious sense, whether the market is rising or falling, the plaintiff has what she bargained for. Yet, the original contract, unless it had special terms, would not have offered the plaintiff the option to adhere to the contract only if it continued to be beneficial. Specific performance potentially allows speculative parties an advantageous second chance to assess rewards and risks, and it may provide less market-savvy parties with capital gain opportunities they might never have considered when contracting. A family home purchaser, for instance, may receive a property the market value of which has greatly inflated, perhaps to the point that resale becomes attractive.

The law on specific performance, however, has a device to solve this problem: for the most part, the remedy has been available only when a plaintiff would not be able to mitigate and collect damages. As a "gloss" on the common law, the equitable remedy was accessible only when damages would not fully compensate the loss because the innocent party had a special interest in the actual object of the contract.[11] The rule in modern Canadian law is that specific performance is possible only when the goods are *unique*, either because they have intangible qualities or are in very short supply.[12] Such goods are difficult to replace; therefore, the plaintiff cannot be expected to mitigate, either to satisfy his own desire or to stop the market-value loss from swelling. In the context of a rising market for the good or service, a windfall may drop on the plaintiff. However, he should not be in a position to benefit from the rise, since he has a special interest in the actual good, not its market value.

The doctrine of uniqueness, thus, has the same purpose as the principles of mitigation and trial date of assessment: in a fluctuating market, these principles confine the innocent party to their "expectation" interest. There were, however, two complications with specific performance in relation to real property. First, until *Semelhago*, courts considered all land to be unique. Second, there is case and statutory authority for the proposition that plaintiffs may claim damages *in lieu of specific performance*. Both of these principles raise the possibility of over-compensating the plaintiff.

The idea that all land requires the protection of specific performance seems to have derived from two sources. First, land had a special status in law because it yielded a special economic and social status in pre-industrial Britain.[13] Second, courts of equity did not want property questions settled in common law courts because they were not certain that plaintiffs would receive expectation rather than reliance damages.[14] As expectation became the general rule in damages, this "expectation" rationale for specific performance disappeared, as did much of the social significance of land. Thus, before *Semelhago*, some authorities were calling for an end to the special treatment of property.[15]

10 See note 1 at para. 15.
11 See note 7 at 464.
12 See for example, *Asamera Oil Corp. v. Seal Oil & General Corp.* (1978), [1979] 1 Supreme Court Reports 633 at 668, 89 Dominion Law Reports (3d) 1 at 26.
13 D. Cohen, "The Relationship of Contractual Remedies to Political and Social Status: A Preliminary Inquiry" (1982) 32 University of Toronto Law Journal 31.
14 J. Chapman, "A Stacked Deck: Specific Performance and the Real Estate Transaction" (1994) 16:2 Advocates' Quarterly 240 at 243-44.
15 See above at 240; See note 7 at 464.

The other complication is the right to choose damages *in substitution for* specific performance. The Lord Cairns' Act (1851) granted a power to Courts of Chancery that is now reflected in some Canadian jurisdictions by the following clause:

> A court that has jurisdiction to grant an injunction or order specific performance may award damages in addition to, or in substitution for, the injunction or specific performance.[16]

The meaning and original purpose of this clause are not immediately apparent, but a British court considered the provision in *Wroth* v. *Tyler*.[17]

In *Wroth,* the Court held that it could not order specific performance to enforce the sale of a house because the vendor's wife had not consented to the transaction; as a result, damages would have to substitute for performance.[18] Between contract and trial, however, the value of the house had risen considerably. Justice Megarry of the Chancery Court measured damages from the date of trial, so that the damage award reflected the increase in value. He justified the measurement on three grounds: measuring from the breach would result in under-compensation; damages at common law are flexible; and damages in equity under the Lord Cairns' Act are to be a full substitution for the equitable remedy.[19]

In this case, the frustration of specific performance perhaps justified moving the date of measurement. The statement that damages are flexible, however, left open the issue of when courts should depart from the norm of assessment at date of breach. Both the issue of damages and the question of the special status of land came before Canadian courts in *Semelhago.*

III. *Semelhago* v. *Paramadevan*

The fact scenario of *Semelhago* was similar to that of *Wroth*, the vendor breaching a contract for the sale of a house while prices were rising. In August of 1986, the plaintiff, Semelhago, entered into a contract to buy a house in the Toronto area from the defendant, Paramadevan. Closing was to be October 31, 1986; the price was $205,000. The purchaser planned to pay $75,000 of this sum in cash and raise the rest by taking out a six-month mortgage on his old house, which he planned eventually to sell. Paramadevan, however, repudiated the contract in a rising market. The property was worth $325,000 by the date of the trial, an increase of $120,000. The defendant stayed in his own property, which increased in value from around $190,000 at the time of breach to $300,000 by the date of the trial, a rise of $110,000. The purchaser sued the vendor for specific performance or damages in lieu thereof, and elected damages at trial.

The controversial character of Semelhago's claim lay in the fact that it was, arguably, larger than his expectation interest. If he had made an original claim for damages only, the court would have expected him to mitigate after the breach. Equally, had Semelhago persisted in a successful specific performance claim, he would have been given the actual property; and whether he could have enjoyed a windfall would have depended on whether he wanted the house itself or planned to sell it and capture the increase in value. But the claim for damages in lieu of specific performance, if awarded according to the full replacement principle of *Wroth,*

16 Ontario of the Courts of Justice Act, Revised Statutes Ontario 1990, chapter C.43, section 99. In other Canadian jurisdictions, the power is based on general provisions retaining the equitable jurisdiction of the court: J.B. Berryman et al., *Remedies: Cases and Materials*, 2nd ed. (Toronto: Emond Montgomery Publications, 1992) at 974.

17 [1973] 2 Western Law Reports 405 (High Court: Chancellor Division) (United Kingdom); hereinafter cited as *"Wroth."*

18 See above at 421.

19 See above at 427. See also *Johnson v. Agnew*, [1980] Appeal Cases 367 (House of Lords) (United Kingdom).

opened the possibility of overcompensation. Semelhago would be able to obtain the entire rise in the worth of the property in question as well as the leap in the value of his old property, which he had intended to sell before the residential price inflation.

Perhaps the judge who most clearly understood these facts was Justice Corbett of the Ontario Trial Division Court. She suggested that the property was not unique and was disturbed by the fact that the plaintiff benefited from the increase in the value of his original home.[20] She did not think, however, that the case law supported a denial of the remedy. Precedent also constrained her judgment on the assessment of damages. She noted that a court could calculate Semelhago's loss in many different ways. The plaintiff himself suggested that the court should recognize the cost of gaining the benefit and subtract the following: the contract price of the property, the cost of carrying the mortgage, and interest earned on the unspent $75,000.[21] But Corbett also entertained the idea of subtracting the value of the purchaser's house from that of the vendor, a formula that would have resulted in an award of $25,000.[22] She even thought of measuring damages as the difference between the two rises in value, which would have resulted in an award of $5,000.[23] Corbett felt, however, constrained by the decision of the Ontario Court of Appeal in *306793 Ontario Ltd. in Trust* v. *Rimes*.[24] *Rimes,* which had a similar fact pattern, overturned trial deductions according to the principle that damages in lieu of specific performance must be a complete replacement. Deferring to *Rimes*, Corbett awarded Semelhago the difference between the contract price and the value of the property at trial — that is $120,000.

Paramadevan appealed the trial decision on the basis that it represented a windfall for the plaintiff. The Court of Appeal[25] did not feel constrained by *Rimes*. It distinguished the case with the subtle factual distinction that the purchaser in *Rimes* was a shell company, one designed only to purchase land and not to invest money after a breach.[26] But the short judgement did not explain which sorts of deductions are licit. Counsel for the parties presented two options. The purchaser reiterated the deductions he had submitted to the trial judge, while the vendor argued that damages should be the difference between the two increases of value. Justice Austin of the Court of Appeal accepted the formula of the purchaser with the somewhat vague justification that the method allowed the court to "track the events" of the transaction.[27] The result, with legal and appraisal costs, was a damage award of $81,733.96.

Thus, the Court of Appeal had ruled that deductions should be made in the circumstances, but had not provided a theoretical justification or much practical guidance in terms of the types of deductions courts should make. Why, for instance, did the Court deduct money made from the cash purchase funds but not from the plaintiff's unsold house? A more principled, but perhaps less practical, decision came down from the Supreme Court of Canada.[28] Paramadevan again argued that Semelhago had received a windfall and should have only $10,000 in damages. Semelhago replied that Corbett's original assessment of $120,000 was correct and that neither it, nor the smaller award of the Court of Appeal, constituted a windfall. The purchaser, however, did not cross appeal to have damages restored to $120,000.

20 See note 1 at para. 7. The decision was not published but large portions of it are reproduced in the Supreme Court of Canada decision as well as in academic articles, such as that of Da Silva, who was counsel for Semelhago.
21 See above at para. 6.
22 See above at para. 7.
23 With respect, the judge seems to have done her math wrong here. The difference was $10,000.
24 (1979), 25 Ontario Reports (2d) 79, 100 Dominion Law Reports (3d) 350 (Court of Appeal).
25 *Semelhago v. Paramadevan* (1994), 19 Ontario Reports (3d) 479 (Court of Appeal).
26 See above at 482
27 See above.
28 See note 1.

Supreme Court Justice Sopinka wrote the unanimous decision.[29] He thought that the case involved, essentially, the application of *Wroth*. He noted that common law damages are flexible and that the Lord Cairns' Act rule enables courts to grant a substitution of damages for specific performance to a plaintiff who chooses damages at trial.[30] While the date of breach was the norm for measuring damages, the date depended on the ability of the purchaser to buy similar goods. Where the good is unique, different rules are needed, since a plaintiff can not mitigate after the breach and prices may rise before trial.[31] As well, in terms of principle, a claim of specific performance revives the contract, so that the date of breach is postponed until the plaintiff elects damages.

These reasons for pushing back the date of assessment may have a relatively solid footing in principle and policy; however, Sopinka was, perhaps, less convincing in arguing that a court should not deduct from any resulting windfall. He agreed with *Wroth* that the wording of the Lord Cairns' Act meant that damages had to be a full equivalent of specific performance and that, therefore, a court could not make deductions.[32] The factual scenario of *Semelhago* illustrates the logic behind the rule. Following Sopinka's thinking, if Semelhago were to receive actual specific performance, he would have the increase in the value of both properties. Damages in lieu of specific performance could give him no less.[33] As a result, Sopinka dismissed the appeal and suggested that, had the purchaser advanced a cross appeal, the Court may have granted damages of $120,000.[34]

It was by means other than deductions that Sopinka sought to solve the problem of overcompensation or unfair advantage. He held that courts should treat land as any other good. Sometimes it would merit specific performance, but usually it would not. The test would be uniqueness. The only guide Sopinka appended to the concept of uniqueness was whether it would be possible for the innocent party to mitigate. Property had to be "unique *to the extent* that its substitute would not be readily available."[35] Though he suspected that the property was not unique, Sopinka did not open this subject to inquiry. He concluded:

> In the circumstances, this Court should abide by the manner in which the case has been presented by the parties and decided in the courts below. In future cases, under similar circumstances, a trial judge will not be constrained to find that specific performance is an appropriate remedy.[36]

These comments ended a centuries old tradition of special status for land in the contract law of remedies.

As we shall see, some critics of *Semelhago* have argued that the uniqueness test constrains the real purpose of the remedy, which is to reflect the idiosyncratic interests of parties to a contract, and that the Supreme Court did not understand what interest specific performance is intended to safeguard.[37] It may be that the *Semelhago* decision was based more on principles than theory. The short decision did not provide a full analysis of the purpose of the remedy and the role of the uniqueness test. Nor did the Court address some of the foreseeable problems with the test, such as the fact that the quality of uniqueness is a matter of degree, assessments of which are naturally subjective. As well, the Supreme Court may have been too quick to hold that *Wroth* should apply to a situation where the plaintiff, not the

29 The decision in the case was unanimous, although La Forest made a caveat that he did not the think the Court should authoritatively settle the question of when specific performance is available since the Court had decided to conform to the assumption of the lower courts that specific performance was proper in the case. See above at para. 1.
30 See above at para. 16.
31 See above at para. 14.
32 In Sopinka's view, the *Wroth* principle of full substitution, not the fact that the purchaser was a shell company, explains the result in *Rimes*. See above at para. 17.
33 See above at para. 16 and 19.
34 See above at para. 19.
35 See above at para. 22. [Emphasis added].
36 See above at para. 23.
37 Da Silva, see note 5 at 5.

court, chooses damages. *Damages in lieu of specific performance* represents the junction of two very different remedy regimes, common law damages and performance in equity, and it therefore demands deft handling. In the next two sections, we shall look at how courts have applied the *Semelhago* principles of uniqueness and equivalent damages. We shall also consider how the law could be improved.

IV. Uniqueness and the Sale of Land

While Sopinka's comments on uniqueness were *obiter dicta*, courts have consistently treated them as law.[38] At the same time, however, courts have felt free to give weight to an earlier British Columbia Supreme Court decision, *McNabb* v. *Smith*.[39] This judgment stressed not just the uniqueness test but the discretionary nature of specific performance. In practice, little separates the *McNabb* and *Semelhago* principles since the uniqueness test is so flexible that a court can use it to assert its discretion.

Indeed, it is difficult to find principles in the cases that define uniqueness. One distinction, provided by some authorities, is between residential and commercial property. Before *Semelhago*, Professor Waddams suggested that specific performance should be accessible to disappointed homebuyers but not commercial plaintiffs.[40] Semelhago's lawyer has published an article arguing his client had an idiosyncratic "consumer" interest in the coveted property, and so merited the special protection of equity.[41] As well, there are two pre-*Semelhago* precedents for disallowing specific performance where the interest of the innocent party is essentially commercial. One is the aforementioned *McNabb*, where a plaintiff was barred from appealing to equity because she planned to resell the house for which she contracted.[42] The other precedent was *Chaulk* v. *Fairview Construction Ltd*.[43] In that case, the Newfoundland Court of Appeal denied a purchaser of condos specific performance because he was reselling the indistinguishable properties.[44]

The distinction between commercial and residential property has an immediate appeal; however, courts have not found the idea all that useful. For instance, in *Konjevic* v. *Horvat Properties Ltd*.,[45] the Ontario Court of Appeal ruled that a homebuyer seeking specific performance could find another home. *Corse* v. *Ravenwood Homes Ltd*[46] came to the same conclusion, noting the home was "*just* a residence in a residential subdivision," despite the fact it was being built to purchaser specifications.[47] In contrast, *Re Tropiano and Stonevalley Estates Inc*[48] held that an innocent party was entitled to the equitable remedy because the property "*is* a residential property" the location of which was significant to the buyers.[49]

Thus the question of whether or under what circumstances residential property should attract specific performance is an issue that remains open. *Semelhago* itself offers little assistance in this regard. Sopinka's scant references to the issue suggest that he did not think much of the residential/commercial distinction. For instance, he stated that:

> Residential, business and industrial properties are all mass-produced much in the same way as other consumer products. If a deal falls through for one property, another is frequently, though not always, readily available.[50]

It is, however, more difficult than Sopinka thought to apply consistently terms such as "mass

38 See for example *Corse v. Ravenwood Homes Ltd* (1998), 226 Alberta Reports 214 (Queens Bench) at para. 15; hereinafter cited as "*Corse*."
39 (1981), 30 British Columbia Law Reports 37, 124 Dominion Law Reports (3d) 547 (Supreme Court); hereinafter cited to Dominion Law Reports as "*McNabb*."
40 See note 7 at 464.
41 Da Silva, see note 5 at 7. Chapman makes a similar argument: see note 14 at 252.
42 See note 39 at 552.
43 (1977), 14 Newfoundland & Prince Edward Island Reports 13 (Newfoundland Court of Appeal); hereinafter cited as "*Chaulk*."
44 See above at 21.
45 (1998), 40 Ontario Reports (3d) 633 (Court of Appeal); hereinafter cited as "*Konjevic*."
46 See note 38.
47 See above at 9 [emphasis added].
48 [1998] 36 Ontario Reports (3d) 92 (General Division) [emphasis added].
49 See above at 98.
50 See note 1 at para. 20.

produced" or "consumer goods" to either kind of property, as we shall see.

In fact, courts have not consistently denied specific performance from commercial litigants, and the cases on the issue offer few steady criteria for defining uniqueness in a business setting. *McMurray Imperial Enterprises Ltd.* v. *Brimstone Acquisitions & Asset Management Inc*,[51] applying *Semelhago*, withheld specific performance on the basis that the lands in dispute were commercial. Similarly, in *White Room Ltd.* v. *Calgary (City)*,[52] the Alberta Court of Appeal denied specific performance to remedy the breach of a contract for the lease of building space. While the majority appeared open to the idea that commercial land may be unique, it demanded a higher standard of proof than did the dissenting judge, who saw important connections between the layout and location of the property and the plaintiff's business scheme.[53]

In contrast to the above cases, specific performance was available in *Comet Investments Ltd.* v. *Northwind Logging Ltd*[54] and *Morsky* v. *Harris*[55] because the location or features of the land gave the property a special significance. *Westwood Plateau Partnership* v. *WSP Construction Ltd.*[56] ordered specific performance because the purchaser in a multiphase deal had made improvements to the property before breaching the contract. Partial performance altering the character of the land was also important in *Comet,*[57] where a vendor sued for specific performance after having sub-divided land in accordance with a contract that the purchaser breached. In both *Westwood* and *Comet*, one could view partial performance as making the land unique or see it in "terms of the equity of the matter" – to use a phrase from *Comet*.[58]

It is probably true that the "equities of the matter" explain many of the cases where uniqueness was ostensibly decisive. For instance, an old principle of equity is the rule that you have to come to it with "clean hands." Some cases carry more than a suggestion that parties who are culpable of impropriety may have a more difficult time winning an argument about the singularity of the land in question. In *Morsky*, where a claim for specific performance succeeded, the Court suspected the reasons that the defendants gave for not performing to be plainly false.[59] *Taylor* v. *Sturgeon*[60] was more sympathetic to the purchaser defendant, who had, relying on the vendor's false representations about water percolation, contracted for land upon which he could not in fact build a house. The Court clearly had no desire to force the defendant to take possession of a property he could not use, and this disinclination may be a reason why it ruled the land was not unique.[61]

Various other concerns have guided the application of the uniqueness test. For instance, courts have been careful to protect the interests of third party purchasers. The majority in *White Room* did not think the evidence of uniqueness was sufficient, perhaps because enforcing a lease with specific performance would have stopped the city, which had recently bought the building, from demolishing an edifice that was uneconomical to repair.[62] In *Corse*, the Court stated openly that it did not want to order specific performance because a third party had bought the land.[63] Master Funduk decided there was little particular about the property.[64] Similarly, the Federal Court of Canada in *Gleason* v. *Dawn Light (The)*[65] held that a certain ship could not be the object of an order for specific performance under *Semelhago*

51 (1997), 210 Alberta Reports 97 (Queen's Bench).
52 (1998), 216 Alberta Reports 44 (Court of Appeal); hereinafter cited as "*White Room*."
53 See above at para. 24, 26 and 49.
54 (1998), 22 Real Property Reports (3d) 294 (British Columbia Supreme Court) at para. 38; hereinafter cited at "*Comet*."
55 (1997), 155 Saskatchewan Reports 193 (Queen's Bench) at para. 39. The Court of Appeal denied specific performance because the vendor's wife had not consented to the sale: (1998), 168 Saskatchewan Reports 27 (Court of Appeal); herinafter cited as "*Morsky*."
56 [1997] 37 British Columbia Law Reports (3d) 82 (Supreme Court); hereinafter cited as "*Westwood*".
57 See note 54 at para. 31
58 See above at para. 39.
59 See note 55 at para. 17.
60 (1996), 156 Nova Scotia Reports (2d) 147 (Supreme Court).
61 See above at para. 19.
62 See note 52 at para. 5.
63 See note 38 at para. 21.
64 See above at para. 18.
65 (1997), 130 Federal Trial Reports 284 (Trial Division)

principles. The ship was not singular and it had been sold to a third party, a fact that provided "a further strong discretionary reason for refusing to grant this remedy."[66]

Each of the cases above suggests that the important decision for a lawyer arguing specific performance may not be *Semelhago* but the earlier *McNabb* decision, which enunciated the following broad principle: "Specific performance is a discretionary remedy. A Court of equity seeks to do what is just and equitable in the circumstances of the particular case."[67] Whether or not a court is candid about the exercise of its discretion, the uniqueness test does not seem to put many limits on judicial freedom. It may be that courts have only begun to fill the concept with meaning. As noted above, courts have disagreed whether commercial players can expect to enjoy the remedy. That dispute turns on the question of what uniqueness means in the circumstances. Certainly, business properties have peculiarities and can offer particular business opportunities. But the line of cases coming down from *Chaulk* suggests that a businessperson can always mitigate a lost profit opportunity, because she can always invest elsewhere.[68] The inconsistency of the case law suggests that courts can choose either to level all businesspeople into impersonal market agents who seek the same shapeless goal – profit – or to recognize the special interest some businesspeople may have in certain properties that serve specific purposes.

High courts could, perhaps, create a precedent on the issue of singular business opportunities; however, in other ways, it seems difficult to give the uniqueness test a more certain form. The greatest problem is the fact that land and the structures on it are rarely mass-produced in the same way as televisions or cars. Many lots, homes, and commercial or industrial spaces have some distinguishing features. Unlike typical consumer goods, all properties have set "locations."[69] This fact may explain Master Peterson's reasons in *Konjevic*:

> Finally, much has been made of the uniqueness of the land. *All land is, of course, unique and purchasers may want it badly for numerous reasons.* However, in the circumstances of this case, considering that the Firestones are, in essence, an innocent party to the dispute between Horvat and Konjevic, in my view damages would be the most equitable remedy.[70]

Thus, the question for a justice confronted by a claim for specific performance will often be not whether the land is unique, but whether it is *sufficiently unique*. The sense of sufficiency may come from considerations such as fairness, practicality, compensation, and so on. It would improve the test if courts were always to state openly both that they are using the criterion of uniqueness as a "rule of thumb" in exercising a discretionary power and that uniqueness is not the only factor.

As well, courts should define uniqueness more precisely in order to make the rule predictable. One standard of singularity is the principle of mitigation, or rather the impossibility of mitigation: property is sufficiently unique when an alternative cannot be found. *Semelhago* emphasized mitigation in its description of uniqueness, and the judge in *Peate* v. *Elmsmere Ltd. Partnership* held that: "In my view, the test of uniqueness in these cases, focuses principally on whether or not other property would be available to satisfy a claim for specific performance by the plaintiff."[71] A stress on mitigation may seem rather circular since a court

66 See above at para. 12. This part of the judgment was upheld on appeal: (1998), 145 Federal Trial Reports 320 (note) at para. 2 (Court of Appeal).
67 See note 39 at 551.
68 See note 51.
69 D. Harris, A. Ogus and J. Phillips "Contract Remedies and the Consumer Surplus," (1979) 95 Law Quarterly Review 581 at 588.
70 See note 45 at 637 [emphasis added].
71 [1997] Ontario Judgements No. 4871 (General Division) (QuickLaw) at para. 21.

has to look at the singularity of the property to decide whether a plaintiff could have mitigated. But the question of whether there are actual, reasonable alternatives to a good or property is more specific and concrete than whether the item has, in the abstract, any unique features. Indeed, the uniqueness test exists to identify parties who cannot mitigate and therefore may have specific performance. A party who is unable to find a replacement property will likely be a party who has a special interest in the land that is unrelated to its fluctuating market value. Courts should, therefore, try to assess the quality of uniqueness with the measure of mitigation.

Mitigation depends in part on the desires of the innocent party since she needs to find an alternative that conforms to her personal expectations. Thus, there is another reason, some argue, to say all land is unique: all buyers have individual tastes or requirements. Potential purchasers value the same good or property differently. The difference between the normative value of a good – its price – and its worth to an individual is called "consumer surplus" or "utility". Economists also measure this surplus as the variation between what a person pays and what he would be willing to pay.[72] Several authors have argued convincingly that specific performance, with its stress on uniqueness, has been a way for courts to protect this special interest.[73] Da Silva states: "The award of specific performance itself is a recognition of the unique interests of the consumer purchaser."[74] But he goes on to argue that uniqueness should not limit specific performance because *all buyers* have a specific interest in the goods or properties they purchase. The question, therefore, is whether uniqueness hinders or helps courts in applying specific performance to the interests it is meant to protect.

If we assume, however, that damages will remain the main remedy for the contract law, then the uniqueness criterion is necessary. One of the functions of the test is to limit the remedy to situations where, in a rising market, a party cannot take advantage of specific performance to speculate and receive a windfall because their interest in the property is special. While the proponents of consumer surplus have a point that all land has a particular value to the buyer, a typical consumer surplus can evaporate quickly if the market for the property inflates. The purchaser of a house, for example, may agree to a contract for $100,000 but be willing to pay $115,000. If housing prices were to move quickly upward between a breach and a trial, a purchaser who is successful in a claim for specific performance would have an incentive to sell and gain a windfall. Whatever such a buyer wanted in the beginning, specific performance would give him a lottery ticket that had already shown itself to be a winner.

Since courts cannot apply mitigation to specific performance in order to limit the remedy to the expectation interest, they must employ the uniqueness test to ensure that plaintiffs have an interest in the property that is "special," unrelated to market value, so they want the good itself rather than a windfall. Uniqueness here, though still an uncertain and discretionary criterion, would require either a truly intangible interest, such as attachment to a family property, or a very large difference between what a person pays for a good and what they would pay, that is a consumer surplus out of the ordinary. Indeed, if the purpose of

72 See note 69 at 583.
73 See above at 586.
74 Da Silva, see note 5 at 15.

uniqueness described here is correct, then the essay can offer courts a principle to help them decide what is unique. In assessing a special interest, a court should ask not only whether a party could have mitigated a loss, but also whether the party would take advantage of a market gain. In other words, would the plaintiff keep the property if the market for it rose dramatically? For the plaintiff seeking specific performance, the object of the contract cannot be fungible: mitigation should be impossible and *any potential windfall should be unrealizable*. Courts have already recognized the idea to some degree, since they sometimes deny specific performance to plaintiffs who plan to sell the property.[75]

The analysis above would not find acceptance among commentators who advocate specific performance as a way to capture consumer surplus. Uniqueness, however, is needed to keep specific performance chained to expectation. As well, unless we want to make specific performance the regular remedy, then the problem of protecting ordinary consumer surplus is essentially a problem of damages. The solution may be to add a percentage of the price to a claim for damages.[76] In this way, courts could protect common surplus without resorting to exceptional remedies. After all, the ordinary disappointment of a consumer is no more extraordinary than the ordinary loss of profit of a businessperson. If damages are to remain the main remedy of Canadian contract law, courts must use them to compensate both lost profit and utility.

V. Damages in Lieu of Specific Performance

We noted above that mitigation ensures that damages are no larger than a party's expectation interest and the requirement of uniqueness may provide the same service for the remedy of specific performance. What principle, then, guards against windfalls in the case of damages in lieu of specific performance? A party seeking specific performance cannot, in general, be expected to mitigate; thus, it will continue to have its purchase funds or properties until after trial, and, at the same time, it can expect to have the equivalent in damages of an order of specific performance. What such a plaintiff cannot have is a special interest in the thing the court finally awards — damages. In the opinion of both the Ontario Court of Justice and Court of Appeal justices in *Semelhago*, if a claim for damages in lieu of specific performance coincides with a rising market, it would be equitable for the court to deduct the windfall from the damage award. The Supreme Court of Canada disagreed.

Commentators differ on whether *Semelhago* resulted in overcompensation. Some suggest that damages in lieu of specific performance result in a windfall only when the property is not unique.[77] The problem with this notion is that damages cannot give the innocent party the lost quality of uniqueness. Others argue that windfall damages provide compensation for lost consumer surplus.[78] A stable or falling market, however, offers no compensation for lost utility, while a rising market tide may lift a lucky plaintiff beyond her surplus. In either case, the remedy will not reflect consumer surplus but the vicissitudes of the market.[79]

The result in *Semelhago* seems to have been a windfall caused by the simultaneous application of two principles. First, a plaintiff who sues for specific performance can choose

75 See above at 18.
76 See note 69 at 583-84.
77 See note 8 at 422-23.
78 Da Silva, see note 5 at 13.
79 Siebrasse, see note 5 at 566.

damages at trial. Second, such damages must be a full replacement for specific performance; a court cannot make deductions.[80] We shall examine each of these conclusions in turn. The ability of a court to grant damages in lieu of specific performance comes, as we have seen, from the Lord Cairns' Act. The idea that the plaintiff can elect damages at trial, however, has a different source: the rule that a claim of specific performance revives the contract and it remains in existence until the plaintiff decides that it is at an end and seeks damages.

The combination of these two sources of law, however correct in principle, makes little sense in policy. A plaintiff who begins an action for specific performance does not have to mitigate and can judge the marketplace. If she sees the market is rising, she can then ask for damages. This may happen in a case such as *Semelhago*, where the considerable rise in the value of the house likely outstripped any particular attachment that Semelhago had to it. The unfair advantage and the potential for windfall gains indicate that the rules need adjustment.

In terms of the first principle, there is an issue of statutory interpretation. Research into the policy behind the Lord Cairns' Act does not show that Parliament intended to give plaintiffs a lottery ticket. The general purpose of the Act was to facilitate the fusion of common law and equity courts. It was also to deal with situations where courts find that a plaintiff may deserve specific performance but a court cannot grant the remedy for some reason.[81] That was the scenario in *Wroth*. Nothing frustrated equity in *Semelhago*; rather, the plaintiff dropped the equitable redress after it had allowed him to avoid mitigation. The speculative potential of the Lord Cairns' Act remedy can be removed by a Supreme Court of Canada ruling that courts can award damages in lieu of specific performance but plaintiffs cannot elect them.

The second *Semelhago* principle that can lead to overcompensation is the doctrine of awarding full equivalent damages. Again, the source for this ruling seems to be the Lord Cairns' Act, where it states that courts can grant damages in addition to or in substitution for specific performance. Once more, there is little reason to think that the drafters of this passage intended to do anything as revolutionary as free damages from the limits that mitigation imposes. *Wroth, Semelhago* and other authorities[82] decided that substitution means that a plaintiff who chooses damages at trial must have an award of the same market value as he would with an order of specific performance. This statutory analysis seems rather simplistic, almost cavalier. As Norman Siebrasse notes, the only logic behind the full substitution rule "is that if the purchaser would have gained a windfall from an order of specific performance he should also gain one from an order of damages in lieu of specific performance."[83] But the criticism can go deeper. Specific performance and damages in lieu thereof embody different interests. Separate treatment, therefore, is not difficult to justify.

In the case of specific performance, the court protects an interest in a unique product, not its worth on the market. The special interest test ensures that the plaintiff seeks something that is — for her at least — not fungible. She neither wants nor will she receive the market value of the land or good. In the case of damages in lieu of specific performance, the court cannot grant the unique interest; it can only offer compensation. The remedy mirrors the

80 Da Silva, see note 5 at 12-13.
81 J.A. Jolowicz, "Damages in Equity: A Study of Lord Cairns' Act" (1975) 34:2 Cambridge Law Journal 224 at 225.
82 See above at 230.
83 Siebrasse, see note 5 at 558.

plaintiff's expectation interest as much as is possible with money. Since the remedy is pecuniary (and therefore fungible), there is a possibility of a windfall. Overcompensation results from market fluctuations and has nothing do with the unique interests of plaintiffs. Considering that damages in lieu of specific performance present this danger of excess indemnification much more than specific performance, courts should not expect an order of damages to match an order of specific performance in its exact market value, which can balloon with any random gust of inflation.

Thus, when defining *in substitution*, we should simply keep in mind that damages and specific performance are, so to speak, apples and oranges. The one cannot ever be an exact substitute for the other; nor is it equitable to give certain disappointed orange buyers (those facing fortuitous market conditions) two apples for the trouble of losing one orange. The core principles of contract law state that where it intends to compensate a party with monetary damages, a court should seek to limit those damages to the party's expectation interest. This centrepiece of common law should stay on the table when damages in lieu of specific performance come to the bar. Only the means of ensuring expectation need be different. In the case of the Lord Cairns' Act remedy, mitigation is not feasible, so a court should use deductions to circumscribe damages within the boundaries of expectation. One suspects that if the "no deductions" rule remains in place, courts facing a fact pattern like that of *Semelhago* will avoid overcompensation by ruling that the property is not unique, so that the rules of common law damages apply. Thus, the application of the uniqueness test might become even more influenced by policy considerations.

VI. Conclusion

The Supreme Court of Canada in *Semelhago* was likely correct in holding that the uniqueness test for specific performance should apply to land. The test limits claims of specific performance to cases where the plaintiff cannot use the remedy to judge the market and gain a windfall. The test is indefinite, however, and may be especially difficult to apply to land, since real property is neither always unique nor often mass produced. Specific performance is an equitable, discretionary remedy. Uniqueness is, therefore, a beacon light for a court trying to steer a just course through the "equities of the matter." Litigants and counsel should know about the court's equitable discretion and courts should tell them that uniqueness, a vague criterion, might not be decisive.

As well, courts should strive to limit their own manoeuvring room (and the uncertainly of the rule) by slowly giving some content to uniqueness. Justices and counsel ought to refer to precedents of what has qualified as unique in different situations, such as in the domain of residential and commercial real estate. A good, basic start would be a consistent application of the "impossibility of mitigation" definition of uniqueness. Courts should also consider whether a plaintiff would sell the property in a rising market. This test directs courts to identify the real intentions and interests of specific plaintiffs and would ensure against speculative lawsuits.

Semelhago's conclusions on damages in lieu of specific performance are more problematic. A plaintiff pursuing specific performance is supposed to have a special interest in land. It makes little sense to allow him at trial — after he has avoided mitigation — to choose damages, something in which he cannot have a special interest and which, traditionally, uses mitigation to keep itself within the compass of expectation. This prerogative to choose damages shelters interests the law is not intended to recognize: unfair advantages in judging the market and windfall gains. The election of damages in lieu of specific performance should be at the disposal of the court alone, and courts should use the Lord Cairns' Act remedy only to compensate plaintiffs whose claim for specific performance is valid but has been frustrated by events, as in *Wroth*.

As well, a court that cannot give a plaintiff its special expectation interest should grant instead the party's monetary expectation interest, which may be less than the market value of the property at date of trial. No policy, principle, or language in the Lord Cairns' Act warrants awarding some plaintiffs (those who drift onto a market swell) an award that is beyond their expectation interest. The Supreme Court of Canada should overrule the "plaintiff election" and "no deductions" verdicts of *Semelhago*, or the Legislature should remedy the flaws.

The most appropriate conclusion to the problem of specific performance as it relates to land would consist of three remedies covering the plaintiff's expectation interest in three different situations. First, damages should protect ordinary interests. Second, specific performance, when possible, ought to cover special interests. Third, damages in lieu of specific performance should safeguard special interests where performance is not possible and the court can only offer monetary compensation. For these principles to operate, there needs to be a refinement of the *Semelhago* uniqueness test and a reversal of the *Semelhago* principles of full equivalent damages and the right of plaintiffs to choose damages at trial. These changes would resolve the problem of specific performance and land in a manner consistent with the central principles of contract law.