

# **LIMITATION PERIOD OF ACTION FOR SPECIFIC PERFORMANCE IN CONTRACT OF SALE OF LAND: MALAYSIAN LEGAL POSITION**

by

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## **Abstract**

In all legal systems based on *common law*, limitation period plays an important part in all its civil actions. Failure on part of the parties who commence legal action in court within the stipulated limitation period, the legal action concerned would be barred and could be proceeded. The limitation period for all actions founded on contract pursuant to section 6 of the Malaysian Limitation Act 1953 is 6 years. However, based on the decided cases, the limitation period for action of specific performance of a contract of sale of land, notwithstanding that this action is unequivocally founded on contract, is 12 years, not 6. This is because all actions for specific performance of contract of sale of land were and are held in the decided cases to be actions 'to recover land'. Pursuant to section 9 of the Limitation Act 1953 all actions for the recovery of land, their limitation period is 12 years. However, in the author's view, the limitation period of action for specific performance of contract of sale and purchase of land should instead of 12 years, be 6 years as well, as this action too is an action founded on contract. However this is contrary to the judgements found in the decided cases. This article examines these cases and also provides the grounds to support the contrary contention of certain learned legal author in regard to the limitation period of specific performance for contract of sale of land. This article will attempt to unveil and study the grounds and policies of the courts concerning the issue.

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## Definition

Specific Performance means, 'a decree issued by the court that the defendant shall actually perform and carry out the promise that he has made, or the obligation, expressly or impliedly, cast upon him by the conduct between the parties'.<sup>1</sup>

Specific performance is an equitable remedy in English law.<sup>2</sup> According to ICF Spry although the granting of this remedy largely depends on the discretion of the court (as this remedy was originally an equitable remedy not provided by statutes), where no party in any litigation may pray for it, now, it is clear that the court, in applying this remedy in its judicial process, is manned and ingrained by specific rules to ensure that this equitable relief is suitably granted to any party in the litigation proceedings.<sup>3</sup>

## The Governing Act

The Act which governs and provides specific performance in Malaysia is the Specific Relief Act 1950<sup>4</sup> (revised in 1974)(Act 137) (hereinafter referred to as '**the said Act**').

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<sup>1</sup> G.C. Cheshire & C.H.S. Fifoot, *The Law of Contract*, 2<sup>nd</sup> Edition, Australian Edition, by J.G. Starke QC & P.F.P Higgins, Butterworth, Sydney, 1969, p. 771.

<sup>2</sup> Visu Sinnadurai, *The Sale and Purchase of Real Property in Malaysia*, Singapore, Butterworth, 1984, p. 414. See also *Chitty on Contracts, General Principles* (25<sup>th</sup> Edition) chapter 27. See also cases, namely *Re Schwabacher* (1908) 98 LT 127, 28; *Waring & Gillow v. Thompson* (1912) 29 TLR, 154; *Ryan v. Mutual Tontine Association* (1893) 1 Ch. 116.

<sup>3</sup> Spry, ICF, *The Principles of Equitable Remedies, Specific Performance, Injunctions, Rectification and Equitable Damages* (2<sup>nd</sup> Edition 1980), Sweet & Maxwell, England, pp 4 and 5. This has been stated in *Lamare v. Dixon* (1873) LR 6, 414, 423 where it has been stated in principle that:

*'The discretion to refuse specific performance is 'not an arbitrary...discretion but one to be governed as far as possible by fixed rules and principles'*

According to section 11 of the Specific Relief Act 1950, specific performance can be granted in matters pertaining to breach of contract to transfer immovable property where it is not sufficiently remedied by damages: *Zaibun S binti Syed Ahmad v. Loh Koon May & Anor* (1982) 2 MLJ, p 92 (PC). Similarly, this relief could not also be granted in the executory contracts: *Mohamad v. Ho Wai* (1961) MLJ, p. 7 and where actual losses could not be ascertained: *Gan Realty Sdn. Bhd. & Ors v Nicholas & Ors* (1969) 2 MLJ, p. 110. Under section 58 of the Sale of Goods Ordinance(Malay States) 1957, the courts have discretions to grant the application of the plaintiff for the order of specific performance on the default of contract by the defendant in the delivery of certain goods. Amongst the examples where the court is required to grant the relief is where the relief is only granted if it is prayed for by the parties in the litigation: *Ardeshir Mamma v. Flora Sassoon* AIR 1928, PC, p. 208., also where the grant of damages will not bar the grant of specific performance: *Zaibun S binti Syed Ahmad v. Loh Koon Moy & Anor* (1982) 2 MLJ, p, 92 and in *Lee Hoy & Anor v Chen Chi* (1971) 1 MLJ, p. 76, where it was held that the application of the plaintiff for specific performance has barred him from obtaining damages pursuant to section 18 Specific Relief Ordinance (Malay States) 1950.

<sup>4</sup> For example section 19 states that:

This Act originates from the Indian Specific Relief Act 1877, whereof thereafter, it had been amended by the Specific Relief Act 1926.<sup>5</sup> The Indian Specific Relief Act actually came from the established equitable principles as adopted and practised in England. The Indian 1877 Act was first drafted by Whitley Stokes, who also had referred to the draft of New York Code of 1862, which provided similar principles. This code was actually been introduced in India by a well known equity lawyer - Lord Hobhouse, who was also a member of the Indian Royal Legislative Council.<sup>6</sup>

Pursuant to section 21 of the said Act, the application of this remedy is completely subject to the discretion of the court and in carrying and applying this remedy, the court shall not be bound to the issue of its legality. However, according to Visu Sinnadurai the application of this discretion should only be applied based on reasonable and good grounds controlled by judicial principles. This order too should be rectifiable by the Appellate Courts, if it is found expedient to do so.<sup>7</sup>

### **Situations Where Specific Performance Cannot Be Granted**

There are situations where order for specific performance cannot be granted pursuant to sections 20<sup>8</sup>(this section states certain circumstances where it is not practical for the court to grant order for specific performance) and 21<sup>9</sup>(this section spells out the circumstances where the court would not grant order for specific performance if the order would lead to unwarranted and unreasonable hardship to the parties) of the said Act. Besides these sections, there is another situation where specific performance cannot also be granted *viz* when a legal action founded on contract praying for specific performance of the contract

*'A contract, otherwise proper to be specifically enforced may be so enforced though a sum be named in it as the amount to be paid in case of its breach, and the party in default is willing to pay the same'*

<sup>5</sup> Visu Sinnadurai, *The Sale and Purchase of Real Property in Malaysia*, Singapore, Butterworth, 1984, p.414.

<sup>6</sup> Ibid.

<sup>7</sup> Ibid, p. 415. See also end note no. 3.

<sup>8</sup> This section lists down certain particular situations where the courts could not practically and justifiably grant order of specific performance as the contract could not be enforced. Amongst the situations are, where contract for the non-performance of which compensation in money is an adequate relief, contract which involved minutest details which is not practical for enforcement, contract which have uncertainty of its terms, contract which in its nature is revocable etc.

<sup>9</sup> According to this section, the courts have the discretionary power to grant order of specific performance under certain circumstance. However, in certain circumstances the court would not order for specific performance of a contract if the situations render them not to enforce it because it is expedient to do so. For example where the contract may involve unfair terms and would be unjust to the other party of the proceeding if the order for specific performance is granted to other and where the granting of the order for specific performance would cause unwarranted and unfair hardship to the other party.

is instituted beyond 6 or 12 years from the accrual of the cause of action. This is so pursuant to sections 6 and 9 of the Limitation Act 1953.

## **Limitation Period**

According to section 6 (1)(a) of the Limitation Act 1953 (hereinafter referred to as the ‘**Limitation Act**’), provides that for action founded on contract, the action cannot be instituted beyond 6 years from the date the accrual of the cause of action.<sup>10</sup> Cause of action arising from a contract here means circumstances where a party in a contract obtains the rights and grounds to institute legal action against the other party who has defaulted the terms and conditions of the contract.<sup>11</sup> For the cause of action to occur, there must have been breach of the contractual duty.<sup>12</sup> Cause of action also means ‘a right to sue’. There cannot be ‘right to sue’ until and unless there is an accrual of the right asserted in the suit and its infringement or at least a clear and unequivocal threat to infringe that the right of the defendant against whom the suit is instituted<sup>13</sup>.

## **The Issue and Objective**

In so far as the statutory provision relating to the limitation period for action founded on contract is concerned, section 6 (1) of the Limitation Act 1953 provides that:

*‘Save in hereinafter provided the following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say-*

*(a) actions founded on a contract...’*

On the other hand, in respect of action for specific performance of a contract, section 6(6) of the Limitation Act provides that its limitation period shall be the

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<sup>10</sup> See also section III, Limitation Act 1623 for Australian Capital Territory and New South Wales; section 5(1)(a) Limitation of Actions Act 1958 for Victoria; section 9(1)(a) Limitation Act 1960 for Queensland; section 35(a) Limitation of Actions Act 1936 for South Australia; section 38(1)(c)(v) Limitation Act 1935 for West Australia; section 38(1)(c)(v), Limitation Act 1935 for West Australia; and section 3 Mercantile Law Act 1935 for Tasmania. This are stated by G.C.F Cheshire & C.H.S. Fifoot, *The Law of Contract*, 2<sup>nd</sup> Edition, Australian Edition, by J.G. Starke QC & P.F.P Higgins, Butterworth, Sydney, 1969, p. 789.

<sup>11</sup> Hamid Sultan bin Abu Backer, *Janab’s Key To Civil Procedure In Malaysia and Singapore*, 2<sup>nd</sup> Edition, Janab(M) Sdn. Bhd., 1995, p.158.

<sup>12</sup> Ibid.

<sup>13</sup> See ratio of Alauddin Mohd Sheriff J in *Padang Serai Kilang Kayu Bhd v. Khor Kia Fong & Ors*(1997) 5 CLJ 428, at p. 431

same period as that being prescribed by the provisions of section 6. Section 6(6) states as follows:

*‘...the provision of this section shall apply (if necessary by analogy) to all claims for specific performance of a contract...whether the same be founded upon any contract....’*

Thus, this provision (section 6(6)) means and it is submitted that, the limitation period for action of specific performance of any contract would also be 6 years. The word ‘any contract’ here, includes the contract of sale of land too. Thus, in all action for specific performance due to breach of contract of sale of land, its limitation period shall also be 6 years.

Yet, it is surprising to note that, based on the decided cases, the limitation period of action for specific performance of a contract of sale of land, instead of 6 years as apparent from the statutory footing provided in section 6(1) and section 6(6) of the Limitation Act 1953, is held to be 12 years. This is because this type of action *viz* action for specific performance of a contract of sale of land, even though founded on contract, it is regarded as an action to ‘recover land’. The limitation period for action to recover land is 12 years pursuant to section 9(1) of the Limitation Act. Section 9(1) of the Limitation Act<sup>14</sup> provides that:

*‘No action shall be brought by any person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him or if it first accrued to some person through whom he claims, to that person’*

The questions for us to ponder and to think about are:

- 1) Why should limitation period for action of specific performance of contract of sale of land be 12 years rather than 6?;
- 2) What is the scope of section 6(1) and section 6(6) which provides for the limitation period of action founded on contract must be made within 6 years?;
- 3) Alternatively what is the scope of section 9(1)?.. and,
- 4) What are the grounds that persuade the court to hold the limitation period for action of specific performance of contract of sale of land shall be 12 years pursuant to section 9(1) and not 6 pursuant to section 6(1) or section 6(6)?..

This paper is to study the above questions and to suggest certain legal contention relating to limitation period of specific performance of contract of sale of land in Malaysia.

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<sup>14</sup> Similar to section 4(3) of the English Act.

## The Cases

It was found in the decision of the Federal Court in *Nasri v. Mesah*,<sup>15</sup> in relation to the limitation period of action for specific performance of contract of sale of land, where Gill, FCJ had put this:

*'It follows, therefore, that whether the action is for specific performance of an agreement for the sale of land or for declaration of title to land, it is essentially an action to recover land, so that the period of limitation would be 12 years in either case'*<sup>16</sup>

Both judges Choong and Ali FCJJ agreed with this opinion. The opinion of Gill J, was made in accordance with the principles of the previous two cases. The case was, firstly, the judgment of the Court of Appeal in *Ponnusamay & Anor v. Nathu Ram*.<sup>17</sup> In this case, a contract of sale and purchase of land had been entered into in August 1944. The vendor (respondent) had executed a transfer in the statutory form. Before the purchaser passed away, the purchaser had made a will appointing and allowing the appellant to register the transfer, which was yet to be registered unto the purchaser's name. Not long after the will was made the purchaser died in 1949. Now the appellant wanted to register the transfer in accordance with the purchaser's will. On this, the appellant had, in 1956, after the death of the purchaser, taken an action to declare the said land and prayed for an order that the authorities do register the said land unto the name of the purchaser as the proprietor. The trial judge found that as the action of the appellant was taken beyond the period of 6 years from the date of the accrual of the cause of action, the action by the appellant was statute barred.

In the Court of Appeal, Thompson CJ said that, relating to *Ponnusamay*, regardless of whether the limitation period in this was 6 years pursuant to section 6 or 12 years pursuant to section 9(1), it was all dependent upon the form of the plaintiff (appellant's) claim. His lordship said that what was claimed by the plaintiff was a declaration that they were entitled to get back the said land. Hence, the action of the plaintiff was for recovery of land according to the meaning of section 9 of the Limitation Ordinance.<sup>18</sup> His Lordship further made the following consideration and this was concurred upon by Rigby and Hepworth JJ:

*'As I put it colloquially this morning in the course of discussion with counsel, what the plaintiffs are doing is this. They are coming to the court and saying 'we are entitled to this land and we want this land'. And if the*

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<sup>15</sup> (1971) 1 MLJ, p. 32.

<sup>16</sup> Ibid, p. 36.

<sup>17</sup> (1959) 1 MLJ, p. 46.

<sup>18</sup> Ibid, at p. 88. Section 9 of the Limitation Ordinance is similar to section 9 of the Limitation Act 1953.

*court is in agreement with them that they are entitled to the land and should be given the land, one appropriate way of giving it to them, in view of the provisions of the Land Code, is to make the declaration asked for and the consequential order on the registering authority. That reasoning leads me to the conclusion that this is an action to recover land within the meaning of s. 9 of the Limitation Ordinance (No 4 of 1955). Having reached the conclusion that this is an action to recover land it seems to me impossible to avoid the further conclusion that the case falls within section 9(1) of the Limitation Ordinance. Section 6(1) of the Ordinance provides that in the case the action founded on a contract the period of limitation shall be six years but that provision is expressly stated to be 'save as hereinafter provided'. By section 9, however, it is expressly provided that, subject to certain exceptions which are not relevant here, the period in relation to actions to recover any land shall be twelve years and it is clear that this applies to all actions to recover land irrespective of whether they are founded on contract or otherwise'<sup>19</sup>*

In *Ng Moh v. Tan Bok Kim*<sup>20</sup> – the plaintiff had been allowed to take action within 12 years after the accrual of the cause of action, as long as the action is made for the recovery of land either it is made through an action for the declaration of land or by way of specific performance. In this case, the purchaser claimed for a specific performance to the contract of sale entered into on the last 15 years. The cause of action was accrued to the purchaser 5 years later, *viz* 10 years before the present action was taken by the plaintiff. The Federal Court decided that, without considering and without further examining the applicability of the period of limitation period, had accepted the contention of the counsels that 'for an action to recover land, the limitation period is 12 years'.<sup>21</sup>

In *Ponnusamy*, the plaintiff had paid all the purchase prices and a transfer in the form of statutory had also been executed by the vendor but only awaiting the registration of the transfer be effected. This was prolonged for a considerable number of years. The action of the purchaser in this case was to obtain an order of declaration for his rights on the land and further to cause the registration of transfer of the land be effected in his favour. Thompson CJ found that the said action was meant to recover the land. His Lordship said that the action of the plaintiff, regardless whether the plaintiff was entitled to the land and thus ensued that he would get the land or not, a declaratory order should be prayed for. His Lordship decided that the said action was to recover the land and thus the limitation

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<sup>19</sup> Ibid.

<sup>20</sup> (1969) 1 MLJ, p. 46. However, Azmi LP did not refer to any statute or provision in the Limitation Act. His Lordship only emphasized that in ascertaining the limitation period of an action for specific performance, the limitation period is 12 years. See at p 4 of the same case. It is ironically submitted that this is wrong.

<sup>21</sup> Visu Sinnadurai, *The Sale and Purchase of Real Property in Malaysia*, Butterworths, Singapore, 1984 p. 47.

period of 12 years as provided in section 9 of the Limitation Act applied and not 6 years under section 6(1). His Lordship relied upon the opinion of Buckley J in *Williams v. Thomas*:<sup>22</sup>

*'It has been argued, and I think, successfully...the expression 'to recover any land' in section 2 of the (Real Property Limitation Act 1883) does not mean regain something which the plaintiff previously had and has lost, but mean 'obtain any land by judgment of the Court', yet it is not limited to the meaning 'obtain possession of any land by judgment of the Court.'*<sup>23</sup>

Further, Thompson CJ said, in the same case, that as the result of the plaintiff's application praying for an order '...to recover...land through the judgment of the court', means that the his action is to 'recover land' and this ensues that it falls within section 9 of the Limitation Ordinance and not section 6. Thus, the applicable limitation period in this action is 12 years not 6.

Likewise in *Ho Ah Kim & Ors lvn. Paya Trubong Estate Sdn. Bhd.*<sup>24</sup> where, Mohamed Dzaiddin J decided that action for specific performance of sale and purchase of contract of land is made in accordance with section 9(1). Therefore the limitation period of action for specific performance is 12 years. Mohamed Dzaiddin J said:

*'In my judgment, in an action for specific performance of an agreement for the sale of land, section 9(1) of the Limitation Act applies. Despite the comment of the learned author Professor Visu Sinnadurai's 'Sale and Purchase of Real Property in Malaysia' 1984 Ed P 440, I am still bound by the decision of the Federal Court in *Tan Swee Lan v. Engku Nik Binti Engku Muda & Ors* (1973) 1 MLJ, 187 where Nasri's case was considered.'*<sup>25</sup>

Another case is *Tan Shiang Shong v. Tan Lee Choon & Anor*<sup>26</sup>, whereby in this case a contract was entered into by the beneficiaries, on the property of two deceased owners for a transfer of land registered under the name of the deceased owners, with a purchaser. At the time the contract was entered into and executed, the said land was yet to be registered

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<sup>22</sup> (1909) 1Ch. 713.

<sup>23</sup> At page 730. Buckley J brought an analogy between action of the mortgagee for an auction and action by a widow for enforcing her rights on her deceased husband's property. See also *Vandeleur v. Sloane* (1919) 1 Ir Rep 116, in particular at page 129, CA where it was decided that action of declaration for recovery of land under a will was regarded as an action for recovery of land. This case had also been referred to in *Nasri v. Mesah* (1971) 1 MLJ, p. 32.

<sup>24</sup> (1987) 1 MLJ 143

<sup>25</sup> Ibid, pp, 146 - 147.

<sup>26</sup> (1985) 2 MLJ, p. 369

in the name of the deceased. In this case, no contract of sale and purchase was ever entered into by the parties nor had the purchase price been paid nor the possession of the said land been delivered to the purchaser. Only the extract of title of the land had been given to the purchaser. Exacerbating this, the purchaser did not take any action to recover the possession of the land except until 12 years later when he filed an action for specific performance to get back the land. Of course, the judge rejected the action. Yet, the purchaser appealed to the Federal Court. The Federal Court found that the purchaser did not have any interest in the land enabling him to have the right to transfer the said land into his name pursuant to the provisions in the Land Code. His action was barred by section 9(1) of the Limitation Act. This was because the action was taken after 12 years from the accrual of the cause of action.

Similarly, *Ahmad bin Said v. Nacharamal D. Subramaniam Servai Kr. Kt. Supramaniam & Ors*<sup>27</sup> demonstrated that an application for specific performance of a contract of sale of land was held to be an action ‘...to ‘obtain’...land by judgement of the court; and being such a cause of action...it falls within section 9(1) of the Limitation Act 1953 which, *inter alia*, bars any action being brought by any person to recover land after the expiration of twelve years from the date on which the right of action accorded to the plaintiff’. In this case, *inter alia* there were two actions instituted by the plaintiff, one by way of originating summons and another was by way of writ of summons. One of the actions, which concerns our discussion here is, the writ of summons issued by the plaintiff (Ahmad Said) which prayed that:

- a. a declaration to the effect that the transfer of the land by the first three defendants, as the beneficiaries or predecessors in title of the estate of one Servei deceased (husband of the first defendant and father of the second and third defendants) and as the co-proprietors of the land, to Chokkalingam (fourth defendant), was null and void on the ground that the first three defendants had fraudulently transferred the land to Chokkalingam (fourth defendant) and that Chokkalingam fraudulently accepted the transfer of the same to defeat the plaintiff’s rights under the agreement of sale of land entered into between the plaintiff and Servei in 1951 on the consideration of RM 800 (hereinafter referred to as ‘the said agreement’); and,
- b. It should ensue that, an order for specific performance of the said agreement, be granted by the court, against the defendants in favour of the plaintiff.

The agreement entered into in 1951 between one Servai and the plaintiff showed that:

- a. Servai had agreed that the plaintiff occupies the land immediately upon execution of the said agreement;
- b. That the land was in the name of one Harun who had died;
- c. That Harun had agreed to transfer the said land to Servai before he died;
- d. That Servai would take steps to obtain an order from the High Court, to transfer the said land to the plaintiff within five months from the date of the execution of the said agreement; and,

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<sup>27</sup> (1989) 1 CLJ 214(Rep) (1989) 2 CLJ 1192.

e. That if the transfer of the land to the plaintiff was not obtained within the five months stipulated, Servai shall refund the RM 800 paid by the plaintiff together with RM 100 damages.

However, Servai failed to transfer the land to the plaintiff in 1951. The plaintiff did nothing on this and only on 20 February 1985 did he discover that the land in question was distributed to the three defendants as the beneficiaries to Servai and that they had fraudulently sold the land to Chokkalingam. Knowing this, the plaintiff brought the present action, which was only filed in 1986.

The presiding judge, the learned KC Vohjah J found that the action of the plaintiff was statute barred in that he should have brought the action for specific performance within 12 years from the cause of action, pursuant to section 9(1) of the Limitation Act 1953, which occurred when Servai did not transfer the land into his name in 1951<sup>28</sup> and this was known to him, yet he still did nothing. Instead after some 34 years later, on the knowledge that the land in question was transferred to Chokkalingam in 1985 in which the plaintiff alleged that this was done fraudulently, from the accrual of the cause of action did he file the action for specific performance. On this his lordship dismissed the plaintiff's action.

In *Saw Gaik Beow v. Cheong Yew Weng & Ors*<sup>29</sup> involved an action for specific performance of a sale and purchase of a house. In this case, Edgar Joseph Junior J(as he then was), decided that because the action for specific performance had been taken within 12 years from the date of the accrual of the cause of action, the action was legal and enforceable pursuant to section 9. This was because an action for specific performance of a contract or for a declaration of ownership on the land is regarded as an action for recovery of land.

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<sup>28</sup> However it is submitted, with due respect, that this is not the proper cause of action on the ground that the cause of action should have occurred when there is infringement or at least a clear and unequivocal threat to infringe the plaintiff's right by the defendants. In this case, it is submitted that, the cause of action did not occur in 1985 when the plaintiff knew that the land in question was distributed to the three defendants and later transferred to Chokkalingam, but it occurred when the acts of the defendants gave rise to a 'clear and unequivocal threat to infringe the plaintiff's right' and thus should ensue that the cause of action should have commenced when the defendant filed defence to the plaintiff's action. See *Padang Serai Kilang Kayu Bhd v. Khor Kia Fong & Ors* (1997) 5 CLJ 428, where the cause of action did not occur when the owner (also then being one of the partners of the plaintiffs) of the land on which the plaintiffs' factory stood, died or when the sale agreement of the land to purchase the land by the plaintiffs on or before 30 November 1970, being the date of the completion of the agreement, nor should the cause of action occur after the letter of administration to distribute the assets of the deceased extracted BUT the cause of action occurred when the defendants filed their defence to the plaintiff's action on 14 April 1991. Only that would constitute an 'unequivocal threat to infringe the right of the plaintiff'. Similarly in *Ibrahim Musa v. Bahari Nayan* (1990) 2 CLJ 131 (Rep) (1990) 2 CLJ 223 where KC Vohrah J said that: "...For purposes of limitation in action like this one,...time runs from the date of infringement or at least a clear and unequivocal threat to infringe that right....Service of the writ on the defendant constituted plaintiff's intention to stand on his legal right under the agreement...and there was no threat to infringe that right until the defence was filed.'

<sup>29</sup> (1989) 3 MLJ, p. 301

Likewise in *Padang Serai Kilang Kayu Bhd. v. Khor Kia Fong & Ors*<sup>30</sup> where this case involved an action brought by the plaintiff against the defendants for specific performance of a verbal agreement to transfer a piece of land to the plaintiff. The land was registered in the names of the defendants as beneficiaries of the deceased. By a sale and purchase agreement between the deceased and the plaintiff, the plaintiff had agreed to purchase the entire partnership business of the deceased and in consideration of 3,000 shares in the plaintiff company, the deceased had agreed **orally** to transfer the said land on which the factory stood, to the plaintiff. However that oral agreement was not included as one of the terms in the purchase agreement, but the possession of the said land had always been with the plaintiff. By a writ issued on 14 April, 1985, the plaintiffs seeks *inter alia*, a declaration that the said land belongs to them and for an order of specific performance of the verbal agreement between the plaintiffs and the deceased, that the defendants do execute a transfer of the said land to the company and should the defendants refuse to sign all the documents to effect this transfer then the Senior Assistant Registrar be authorized to sign all documents on behalf of all the defendants to effect the transfer of the said land.

Alauddin Mohd Sheriff J, found that the cause of action in this case occurred when there is an infringement or at least a clear and unequivocal threat to infringe the right of the plaintiff and his lordship pointed out that this had occurred when the defendants filed their defence to the plaintiff's action on 14 April 1991. Thus the cause of action occurred on 14 April, 1991. Therefore, the defence that the plaintiff's action was statute barred as contended by the defendants on the ground that the cause of action in this case had occurred on the 30 November 1970(the date of the agreement between the plaintiff and the deceased completed) or five months after the date of the death of the deceased (10<sup>th</sup> October, 1970), was untenable.

His lordship again repeated that, relying on *Ponnusamy, Nasri and Ho Ah Kim*, an action for specific performance of a contract of sale of land is regarded also as an action to recover land and this ensues that the period of limitation is 12 years pursuant to section 9 of the Limitation Act 1953.

Similarly in *Wong Sin Meng v. Wong Sam Moi & Anor*<sup>31</sup>, *Abdul Hamid Saad v. Aliyasak Ismail*<sup>32</sup> and *Ibrahim Musa v. Bahari Nayan*<sup>33</sup> where the former first case involved applications to recover land, the second concerned on the application of the plaintiff for an order to retransfer back his land under 'jual janji' from the defendant to him under two agreement of Jual Janji and the third case pertained on an application for specific

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<sup>30</sup> (1997) 5 CLJ 428.

<sup>31</sup> (1991) 2 MLJ, p 277

<sup>32</sup> (1998) 4 CLJ 429.

<sup>33</sup> (1990) 2 CLJ 131(Rep) (1990) 2 CLJ 223.

performance of a sale and purchase of land. Likewise, these cases propounded that the limitation provided for such cases is 12 years because they are categorized as actions ‘for recovery of land’.

In *Kang Kok Hiang & Ors v. Ong Kah Hoe*<sup>34</sup>, where it was found that the action of the plaintiff to have taken the action for a declaration that they are entitled to an undivided share of land against the defendant, was time barred because the action was taken after the expiration of 12 years from the date the accrual of the cause of action, pursuant to section 9(1) of the Limitation Act 1953.

Again, in the latest case, *Peng Bee Sdn. Bhd. lwn Teoh Liang Teh & Ors*<sup>35</sup> has obstinately decided that any action for specific performance of sale and purchase of land must be made within 12 years from the date of accrual of the cause of action. In this case, two purchasers had, in 1980, entered into a contract of sale of land, whereby the purchasers agreed to purchase and the vendors agreed to sell a piece of land. The purchasers had paid the deposit and part of the purchase prices to several proprietors/vendors. However, the vendors had defaulted and breached the contract in that they failed to proceed with the transaction to sell to the purchasers, instead they sold the land to third party. Likewise ironically, the sale to the third party could not be effected and completed due to the failure of the vendors to deliver vacant possession of the land. After more than 12 years from the accrual of the cause of action, the purchasers commenced the present action against the vendors to recover the land by way of action for specific performance.

The court of appeal rejected their action because the action was brought in more than 12 years from the date of the accrual of the cause of action. Shaik Daud JCA had this to say:

*‘...In the present appeal we agree with the learned counsel for the first to fourth respondents that time began to run from the notice dated 7 June 1982 following the inability of the first to fourth respondents to give vacant possession. The present action filed on 13 January 1995-more than 12 years after the cause of action arose, is, we say, statute barred pursuant to section 9 of the Limitation Act 1953 (see Nasri lwn. Mesah).*<sup>36</sup>

Finally, that limitation period for action for specific performance is considered as action to recover land and thus falls within the meaning of section 9 is also upheld in *Dato’ Dr. Mohamed bin Taib v. Syed Abdullah bin Mohamad*<sup>37</sup>,

## **The Contrary Legal Contention**

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<sup>34</sup> (1994) 2 CLJ, 521.

<sup>35</sup> (2001) 1 MLJ, 1.

<sup>36</sup> *Ibid*, p. 4.

<sup>37</sup> 1995 MLJU LEXIS 600; (1995) 50 MLJU 1.

According to Visu Sinnadurai, it is submitted that action for specific performance of contract should not fall within the ambit of section 9 of the Limitation Act.<sup>38</sup> An action for specific performance is not an action for recovery of land but an action to enforce a contract.<sup>39</sup> Any party in contract, regardless whether he is the vendor or the purchaser, may take an action for specific performance<sup>40</sup>. This right is clearly founded pursuant to the terms of the contract entered into by the parties.<sup>41</sup> Therefore, if an action is instituted by the purchaser to enforce a contract with due respect to the ratio of Thompson CJ in *Ponnusamy*, and Bradley J in *Williams v. Thomas*, it could not be said that the purchaser has taken an action to ‘recover the land’. This is because the land is still owned by the vendor and yet to be belonging to the purchaser nor had it been registered under the purchaser’s name.<sup>42</sup> Hence, the limitation period should be 6 years. Alternatively, if an action for specific performance is examined in detail, one can submit that the action of the purchaser for specific performance is also an action to recover land.<sup>43</sup> However, according to Visu Sinnadurai, the limitation period could not be different, regardless whether the action is brought by the purchaser nor the vendor.<sup>44</sup> To illustrate this, take for example, say that Ali was the owner of a piece of land in Kodiang, Kedah sold his land to Abu for RM 10,000.00. If Ali as the vendor later refused to proceed with the contract and thus breached the contract, Abu as the purchaser can enforce it and applied for order of specific performance from the court to compel Ali to proceed with the contract. In this situation the action of specific performance commenced by Abu (purchaser), based on the *ratio* of Buckley and Thompson JJ in *Williams* and *Ponnusamy*, would be considered as an action to ‘recover land’. Thus the limitation period of the action would be 12 years pursuant to section 9(1). However, on the other hand, if in case Abu was the one who breached the contract for example, he abandoned his plan to buy the land, Ali as the vendor too could enforce the contract *via* the order of specific performance. In this situation, Ali as the vendor is not said to ‘recover the land’ but to ‘enforce the contract’. Thus, if this ground, according to Buckley and Thompson JJ were to be followed, Ali’s action for specific performance does not fall to be an action to

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<sup>38</sup> Visu Sinnadurai, *The Sale and Purchase of Real Property in Malaysia*, Butterworths, Singapore, 1984, p. 440.

<sup>39</sup> Ibid.

<sup>40</sup> Ibid.

<sup>41</sup> Ibid.

<sup>42</sup> Ibid. However, in the author’s view, an action for specific performance of sale and purchase of land by the purchaser (who is yet to be registered as the proprietor) is not yet an action to recover the land because the title of the land is still under the name of the vendor.

<sup>43</sup> Ibid.

<sup>44</sup> Ibid. This is in order to validate his action, the purchaser must take the action within 6 years from the accrual of the cause of action pursuant to section 6 of the Limitation Act whilst for the vendor, he will of course ‘want to recover the land’ pursuant to section 9 and thus the limitation period is 12 years. Hence, the limitation period for both actions will be different.

‘recover land’ and thus, its limitation period would not be 12 years pursuant to section 9(1). Instead, it falls on the general provision of ‘action founded on contract’ pursuant to section 6(1) and (6). Thus, based on this illustration, it is not logical to have different period of limitation for the same cause of action (action for specific performance by Ali (vendor) and Abu (purchaser)) as illustrated in Ali and Abu’s case. Thus in order to avoid this absurdity, it is better to consider the action for specific performance in the contract of sale of land as an action to enforce the contract and not an action to recover land. So that the same period of limitation would be applicable for both actions either they are instituted by the vendor or by the purchaser.

Further, in most of the cases, where in any action for specific performance, the party who institutes the action too could claim damages in lieu of specific performance.<sup>45</sup> An action for damages will be based on the breach of the contract committed by the other party. In the court’s trial, the party who has instituted the action may either choose to commence an action for damages without praying for specific performance or only claim specific performance of the contract. The action to claim for damages must be taken within a period of 6 years and not 12 years from the date of the accrual of the cause of action. Therefore, it can not be said that the period of limitation period will be different depending on the type of remedy chosen by the plaintiff which will be the basis of his claim: 6 years for claim for damages and 12 years for specific performance.<sup>46</sup> Thus, it is submitted that this is illogical in suggesting that the period of limitation will be varied depending on the remedy sought, albeit the cause of action in both cases is similar *viz* breach of the contract.<sup>47</sup>

If the contract is fully executed by the purchaser who has paid all the purchase prices but if there is some omission or breach on the part of vendor whereby he either fails to submit the document of title nor fails to effect the due transfer of the land in question in the form of statutory, the action of the purchaser to force and compel the vendor to exercise either of these terms could not become an action for specific performance.<sup>48</sup>

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<sup>45</sup> *McKenna v. Richey* (1950) VLR 360; *Johnson v. Agnew* (1980) AC 367 HL.

<sup>46</sup> Visu Sinnadurai, *The Sale and Purchase of Real Property in Malaysia*, Butterworths, Singapore, 1984, p. 187. However, in *Ho Ah Kim & Ors v. Paya Trubong Estate Sdn. Bhd.* (1987) 1 MLJ, 143, even though paradoxically, an order for specific performance can be granted because the period of 12 years from the date of the accrual of the cause of action is yet to lapse, but because of the inability of the defendant to comply and exercise the order for specific performance the court had instead granted an order for damages and compensation to the plaintiff. This shows that the court in granting order for damages, even though the action was made after the period of 6 years, yet damages could still be granted by the court. This is because of section 18 of the Limitation Act which permits damages in lieu of specific performance, if the latter is found impractical to be granted.

<sup>47</sup> *Ibid.*, p. 441.

<sup>48</sup> *Ibid.*

According to Visu Sinnadurai, the said action should be an action for specific relief<sup>49</sup>, or for a declaration<sup>50</sup> as occurred in *Ponnusamy*.<sup>51</sup>

According to Visu Sinnadurai, this view which holds that any action arises from contract of sale and purchase of land is similar to ‘action for recovery of land’ and thus ensues that the limitation period for both is 12 years and not 6 years, is wrong.<sup>52</sup> As mentioned before, section 6(6) of the Limitation Act clearly provides that the limitation period for any action founded on contract can also be ascertained by way of analogy with the limitation period for specific performance of contract.<sup>53</sup> According to Visu Sinnadurai, Gill FJ erred in allowing himself to be influenced by the previous two cases which he had referred.<sup>54</sup> This is because, according to Visu Sinnadurai, first in *Ponnusamy*, the action was not an action for specific performance of the contract entered into between the vendor and purchaser BUT an action for a declaratory order under section 41<sup>55</sup> of the Specific Relief Act.<sup>56</sup> Secondly, the reference made by His Lordships on the judgment of *Ng Moh* decided in the Federal Court was wrong because the issue of limitation period in the actions for specific performance had not been submitted or decided upon nor settled by the Federal Court, as the Federal Court had only accepted, without examining in detail, the concession of the counsels that the limitation period was 12 years.<sup>57</sup>

Thus the decisions of the Federal Court in *Ng Moh dan Nasri v. Mesah* were made based on less reliable sources to support the contention that the limitation period for action of specific performance in contract of sale of land is 12 years.<sup>58</sup>

In conclusion, according to Visu Sinnadurai, it can be said that the provisions in the Limitation Act require some amendment be made in explaining certain problems as that

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<sup>49</sup> Ibid. See section 4 of the Specific Relief Act 1950.

<sup>50</sup> Ibid.

<sup>51</sup> (1959) MLJ 86. According to Visu Sinnadurai, in *Ponnusamy*, what the plaintiff should have done was to invoke section 41 of the Specific Relief Act 1950 to claim for declaration of land.

<sup>52</sup> Ibid, p. 440.

<sup>53</sup> Ibid.

<sup>54</sup> Ibid.

<sup>55</sup> This section provides that any person entitled to declaration for the recovery of legal rights or character on any property by way of legal suit.

<sup>56</sup> Visu Sinnadurai, *The Sale and Purchase of Real Property in Malaysia*, Butterworths, Singapore, 1984, p. 440.

<sup>57</sup> Ibid.

<sup>58</sup> Similar to *Tan Swee Lan v. Engku Nik Binte Engku Muda* (1973) 2 MLJ, 187.

have been discussed above, particularly on the scope of section 9.<sup>59</sup> It is submitted that section 9 has been enacted to deal with situations in the acquisition of land, in particular, in adverse possession's situations and not situations under contract.<sup>60</sup> This is because this section is based on the English Act and was introduced in Malaysia without any consideration and question regarding its suitability to the system of registration under the Torrens system.<sup>61</sup> The National Land Code does not recognize adverse possession and this has been provided in section 314 in that adverse possession on land for any period of time shall not bar nor estop any action for the recovery of land by the proprietor or any person having interest on the land and further to cement this, the Limitation Act 1953 spells out that acts of adverse possession shall not in any circumstance negate the title and the interest of the actual proprietor of the land.<sup>62</sup> Therefore it is clear that until the decisions made in *Ponnusamy, Ng Moh, Nasri, Ho Ah Kim, Tan Shiang Shong, Ahmad Said, Saw Gaik Beow, Padang Serai Kilang Kayu Bhd., Wong Sin Meng, Kang Kok Hiang, Abdul Hamid Said, Ibrahim Musa etc* are revoked or an amendment on section 9 is made, the parties in the same situations such as in these cases can take an action for the recovery of land in 12 years after the accrual of the cause of action.<sup>63</sup>

### **Conclusion**

It is apparent that, the limitation period of an action for specific performance of a contract of sale of land and action for declaration of ownership on a land, based on the decided cases is 12 years from the date of the accrual of the cause of action because both actions are regarded as actions for recovery of land pursuant to section 9 of the Limitation Act. Further too, based on the above decided cases, any action to recover ownership of land is presumed and regarded as action for specific performance.

However, Visu Sinnadurai and the author are not in agreement on the conclusion that the limitation period for specific performance of contract of sale of land is 12 years. It should be 6 years. This is because:

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<sup>59</sup> Visu Sinnadurai, *The Sale and Purchase of Real Property in Malaysia*, Butterworths, Singapore, 1984, p. 441.

<sup>60</sup> Ibid. See also the ratio of Buckley J in *Williams v. Thomas*. However, the statement propounded by Visu Sinnadurai that 'section 9 has been enacted to deal with situations..., in particular, in adverse's possession situations and not situations under contract', should be read and understood with caution. This is because, there is not limitation period provided for action to possession of land under adverse possession. In adverse possession situation, the aggrieved party may institute the action at any time, pursuant to section 341 of the National Land Code 1965. See also *Penang Realty Sdn Bhd v. Aznan bin Haji Ismail*, (1996) MLJU LEXIS 940; (1996) 310 MLJU 1.

<sup>61</sup> Ibid.

<sup>62</sup> Ibid. See also section 9(2) Limitation Act.

<sup>63</sup> According to Visu Sinnadurai, there is no authority in the English law or in any commonwealth countries where similar provision as in section 9 could be applied in the actions instituted by the purchaser against the vendor.

- a. The submission in *Ng Moh* stating that the limitation period for specific performance is 12 years from the date of the accrual of the cause of action is weak because the judgment was made without relying on clear authority. The presiding judge only accepted the contention given by counsels;
- b. Section 6(1) of the Limitation Act itself provides that in any action founded on contract, the limitation period is 6 years.<sup>64</sup> It is submitted that an action for specific performance of contract of sale and purchase of land is also an action founded on contract. Section 6(6) too supports this, in that it states, for action of specific performance of contract, the limitation period would be the same as that being provided for all action founded on contract. This ground is made up upon ‘literal rule’s’<sup>65</sup> scrutiny of the existing legal provision concerning limitation period for action on contract pursuant to section 6 of the Limitation Act;
- c. With due respect to the vague ratio of Thompson CJ in *Ponnusamy* who said that the sentence ‘save as hereinafter provided’ spelt out in section 6(1) means that the limitation period for specific performance of contract of sale of land is subject to section 9(1) because action for specific performance of sale of land is regarded as action to recover land. It is submitted albeit section 6 of the act provides that, ‘save as hereinafter provided’, yet nothing in the Limitation Act which could clearly and unequivocally provide in coherent terms on the exception of the application of the limitation period of 6 years for action founded on contract which would include action for specific performance of sale and purchase of land. Again it is submitted his lordship disregarded the ‘literal rule’s’ approach;
- d. Even though section 9 provides that action for recovery of land must be made in 12 years, yet it is submitted, this section shall not be applicable to limitation period for specific performance of contract which could include specific performance for contract of sale and purchase of land. This is because firstly, action for specific performance if closely observed, is not an action for recovery of land but, as what had been said by Visu Sinnadurai, it is sought in order to enforce a contract. Secondly, based on decided cases, with due respect with the ratio of Buckley J in *Williams v. Thomas* and Thompson CJ in *Ponnusamy*, action

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<sup>64</sup> Similar to the meaning provided in section 6(6) of the said act.

<sup>65</sup> The literal rule...is that, when the words of a statute are clear in their ordinary and natural sense, the court ought to follow that meaning, even if it results in an impossibly interpretation. The court can only look at the words that parliament used. See JF Corkery, *Starting Law*, Scribblers Publishing, Australia, 1991, p 148. In regard to literal rule, Lord Diplock explained in *Duport Steels Ltd v. Sirs* (1980) 1 WLR 156 at p. 157:

‘Where the meaning of the statutory words, is plain and unambiguous it is not for the judges to invent fancied ambiguities as an excuse for failing to give effect to its plain meaning because they themselves consider that the consequence of doing so would be inexpedient, or even unjust or immoral...Under our constitution it is Parliament’s opinion on these matters that is paramount’

for specific performance on contract of sale of land is instituted at the time when the plaintiff is yet to be registered as the legal proprietor of the land concerned.<sup>66</sup> Hence, at the time he commences the action for specific performance, he could not be said as taking an action to ‘recover the land’. This argument is raised after considering this circumstance via the ‘golden rule’<sup>67</sup> and also ‘literal rule’ approaches;

- e. His Lordships in *Ho Ah Kim, Peng Bee, Tan Shiang Song, Ahmad Said, Saw Gaik Beow, Padang Serai Kilang Kayu Berhad, Wong Sin Meng, Abndul Hamid Saad, Ibrahim Musa, Kang Kok Hiang etc* had only referred to the decisions in *Nasri* and *Tan Swee Lan* on the ground that he was bound to the ‘judicial precedent’ of these cases, without further examining its rationale and suitability to cases tried before hand;
- f. Section 9 provides clearly that the limitation period for action to recover land is 12 years and it is submitted that this would not include action for specific performance on the contract of sale of land. It is submitted that section 9 is much more relevant to situations involving action of the chargee to auction off property of the chargor in cases involving security and mortgage transactions, action of a widow to enforce her rights over the deceased husband’s property and action for declaration of one’s ownership on land under a will;<sup>68</sup>. Again ‘literal rule’ approach applies in this argument; and,
- g. Normally in the prayer for specific performance, damages in lieu of specific performance will be prayed as well. If specific performance could not practically be granted, damages, in substitution to specific performance, will be granted by the court. It is illogical that the limitation period for specific performance is 12 years and for damages is 6 years. Both remedies must have the same period of limitation because otherwise if an action for specific performance were to be brought after 6 years from the accrual of the cause of action, the courts would not be able to, in lieu thereof, grant damages as the period of limitation of 6 years for damages has expired. However this is bemused and difficult to reconcile because of *Ho Ah Kim*, where in this case, it was held that in lieu of specific performance, damages (compensation) had been granted by the court pursuant to section 18 of

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<sup>66</sup> See also *Nasri v.. Mesah* (1971) 1 MLJ, p. 32, *Peng Bee Sdn. Bhd. v.. Teoh Liang Teh & Ors* (2001) 1 MLJ, p. 1, *Ho Ah Kim & Ors v. Paya Trubong Estate Sdn. Bhd.*(1987) 1 MLJ, p. 143. *Tan Swee Lian v. Engku Nik binti Engku Muda & Anor* (1973) 2 MLJ, p.187.

<sup>67</sup> In *Gray v Pearson* (10 ER 1216 at 1234), Lord Wensleydale, talking of wills and statutes, outlined the ‘golden rule’ of interpretation:

‘the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument...’

<sup>68</sup> See the obiter of Buckley J in *Williams v. Thomas* (1909) 1 Ch. 730 and *Vandeleur v. Sloane* (1919) 1 Ir. Rep. 116.

the Specific Relief Act 1950, albeit the limitation period for damages had expired *viz* more than 6 years. It is submitted that specific performance, including specific performance for contract of sale and purchase of land, should have 6 years limitation period similar to that of damages, so that it complies with section 6(1) of the Limitation Act and will tally with section 18 of the Specific Relief Act 1950. Thus, for example, in case order for specific performance could not be granted, damages which has limitation period of 6 years, in lieu of specific performance, may alternatively could. This reason and justification is made after considering and applying ‘literal rule’, ‘golden rule’ and ‘mischief rule’<sup>69</sup>, approaches.

To recapitulate, it is repeated again that, based on the decided cases, even though contrary to the opinions of Visu Sinnadurai and the author, application for specific performance in a contract of sale of land <sup>70</sup> and application for declaration of land fall under the same category of action *viz* action ‘to recover land’ as provided in section 9 of the Limitation Act.<sup>71</sup> Thus, the limitation period for the plaintiff to commence an action for specific performance should be made within 12 years from the date of the accrual of the cause of action.

Alternatively, if the plaintiff only applied damages without praying for specific performance, EXCEPT if the application for damages is made in substitution to or in lieu of specific performance,<sup>72</sup> it is submitted that he should take the action within 6 years from the date of the accrual of the cause of action as required under section 6(1) or 6(6) of the Limitation Act. This is because this application is not an application to ‘recover land’ according to section 9 of the Limitation Act but it is an action founded on contract.<sup>73</sup> Example of this action is an action commenced by the purchaser for damages due to the delay of the developer to deliver vacant possession of the property to the

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<sup>69</sup> The mischief rule says that the judge must adopt that construction with suppresses the mischief and advances the remedy, according to the intent of the makers of the Act. Today, when the court says that it is seeking the ‘purpose’ of the statute, it is really referring to the ‘mischief’ rule. The court may refer to the ‘object’ or ‘aim’ as well as the ‘purpose’ of the statute. They mean the same thing. See J.F Corkery, *Starting Law*, Scribblers Publishing, Australia, 1999, p. 150.

<sup>70</sup> The limitation period of an action for specific performance to contracts other than contract of sale of land is 6 years. See *J & Wong Logging Contractor v. Arab Malaysian Eagle Assurance Bhd.*(1993) 1 MLJ, 240, *New Zealand Insurance Co. Ltd v. Ong Choon Lin (t/a Syarikat Federal Motor Trading)* (1992) 1 MLJ, p. 185 and *Sia Siew Hong & Ors v. Lim Gim Chian & Anor* (1995) 3 MLJ, p. 141

<sup>71</sup> Whether the category to claim damages in lieu of specific performance also falls within the meaning of ‘recovery of land’ could yet be confirmed. However, section 18 of the Limiation Act allows application for damages if specific performance could not obtain..

<sup>72</sup> As that been stated in section 18 of the Specific Relief Act 1950. See also *Ho Ah Kim & Ors v. Paya Trubong Estate Sdn. Bhd*

<sup>73</sup> Ought not application for specific performance founded upon contract as well?. Thus, it is also subject to section 6(1) of the Limitation Act 1953.

purchaser in the contract of sale and purchase of property, which is governed by Housing Development (Control and Licensing) Act 1966.<sup>74</sup>

Regarding *Ponnusamy, Wong Sin Meng, Kang Kok Hiang and Abdul Hamid Saad* which involved applications for declaration of land, the plaintiffs did not specifically prayed for specific performance of the contract of sale entered into. It is an irony to note that the plaintiffs had not applied for specific performance in that case. In the author's opinion, the failure of the plaintiffs to have prayed specific performance could tarnish his action. This is because, specific performance is 'a decree issued by the court that the defendant shall actually perform and carry out the promise that he has made, or the obligation, expressly or impliedly, cast upon him by the conduct between the parties'. This relief has been so clearly provided in section 11 of the Specific Relief Act, but on the other hand application for declaration of land is made pursuant to section 40 of the same Act. Action for specific performance, it is submitted, is founded and dependent on the existence of contract<sup>75</sup> whilst application for declaration of land is made, it is submitted, could only be made when there is apparent, based on the evidence, there is no contract.<sup>76</sup> It can exist

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<sup>74</sup> *Insun Development Sdn. Bhd v. Azali Bakar* (1996) 2 MLJ, p. 188, *Loh Wai Lian v Sea Housing Corporation Sdn. Bhd.* (1984) 2 MLJ, p. 280 and *Loh Wai Lian v. Sea Housing Corporation Sdn. Bhd.* (1987) 2 MLJ, p. 1.

<sup>75</sup> See *Peng Bee Sdn. Bhd., Ho Ah Kim, Ahmad Said, Saw Gaik Beow, Padang Serai Kilang Kayu Berhad, Ibrahim Musa*

<sup>76</sup> See for example in *Ng Chim & Ors v Low Boon Beng* (1994) 3 CLJ 803 where in this case the plaintiffs and the defendant obtained undivided pieces of land as one of the beneficiaries of a deceased person proprietor of the land concerned and this land had been transmitted to them in 1972. However, the plaintiffs' undivided shares were registered in the name of the defendant under a purported agreement to transfer the land to the plaintiffs by the defendant for RM3,000.00. The defendant occupied and cultivated the land without interference by the plaintiffs for 16 years. In 1988, the plaintiffs commenced an action of declaration, against the defendants, for recovery of the same upon the failure of the defendants to comply to their request to retransfer back the said land to the plaintiffs. However, this action was struck off by the court on the ground that the action was statute barred pursuant to section 9(1) of the Limitation Act 1953. It is further submitted that in *Abdul Hamid Saad v. Aliyasak Ismail* (1998) 4 CLJ 429, where this case involved a declaration of the plaintiff to recover back his land under two 'jual janji' agreements after he had paid all debts owed to the defendant. However, it is irony to find that the plaintiff did not only apply for specific performance, instead he applied an action of declaration 'to recover the land'. Thus the period of limitation was 12 years pursuant to section 9(1) of the Limitation Act 1953. It is submitted, with due respect, that this application of the plaintiff to have applied action of declaration for the recovery of land was wrong. Instead, he should have applied for specific performance pursuant to the two agreements of 'jual janji' entered into between him and the defendant. See also *Kang Kok Hiang & Ors v. Ong Kah Hoe* (1994) 2 CLJ 521.

and founded, based on circumstances such as under a will or trust.<sup>77</sup> It is submitted that on this account, the action of the plaintiff for declaration of land in *Ponnusamy, Wong Sin Meng, Abdul Hamid, Kang Kok Hiang* were irredeemable and should be duly rejected. Further, due to the failure of the plaintiffs to specifically plead the order for specific performance, pursuant to section 41 also, the court should not have granted their applications for such declarations. This is because according to the proviso of section 41 which says

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<sup>77</sup> See *Ng Chim & Ors v Low Boon Beng* (1994) 3 CLJ 803 and illustration a and b in section 41 Specific Relief Act.

*'provided that no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration or title, omits to do so'*

It is submitted that the sentence ‘further relief than a mere declaration’ above, can also mean application for specific performance. Therefore, based on the submissions and performance of contract of sale of land it is suggested that a few provisions in the Limitation Act 1953 should be amended or future cases involving the same issue should apply the suggestion as put forward by the author above, in settling the issues arose. Finally, on matter pertaining to declaratory order prayed instead of specific performance, in actions involving contract, it is suggested that this also should be rectified and rightly applied in future cases based on the grounds as set out above opinions on the above inconsistency in regard to the limitation period for order of specific.

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