THE VICTORIAN BAR CONTINUING PROFESSIONAL DEVELOPMENT PROGRAM

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SPECIFIC PERFORMANCE OF CONTRACTS FOR CONSTRUCTION

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Introduction

1. An article by David Levin QC and Andrew Laird, entitled "*Is a Building Contract Specifically Enforceable and, if so, under What Circumstances?*" appeared in (2007) 23 BCL 16. The article considered the position of whether a builder was entitled to obtain specific performance of a building contract, or more particularly, whether a builder can restrain termination of its licence to occupy the land upon which the building works are being undertaken. Not surprisingly there are very few cases in which a builder has achieved this relief. [2]

2. A builder usually has an express or implied licence to go on to the proprietor's land for the purpose of undertaking the building work. If disputes arise the proprietor may take steps to terminate the contract so as to appoint a new builder. The builder usually seeks security for unpaid progress payments and may press to complete the project. The cases considered in the BCL article concerned applications by a builder for injunctive relief to restrain attempts by the proprietor to remove the builder from the site. The same considerations apply to a proprietor seeking an injunction to regain possession from the builder.[3] Given the weight of authority against a builder succeeding in this quest I venture to suggest that such applications are more tactical than objectively intended in aid of final relief.

3. A number of cases have considered applications by builders for interlocutory relief. In Graham *H Roberts Pty Ltd v Maurbeth Investments Pty Ltd* [1974] 1 NSWLR 93 the proprietor had regained possession and claimed termination of the contract. The builder disputed termination. Both parties sought to refer the matter to arbitration. Helsham J said at 105

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[2] Levin QC and Laird refer to *Robert Salzer Constructions Pty Ltd v Embee Pty Ltd* (unreported, VSC, 29 June 1990) as an example but point out that relevant authorities against such a grant in favour of the builder were apparently not referred to the judge (Smith J); (2007) 23 BCL 16 at 18.

[3] See *Mayfield Holdings Ltd v Moana Reef Ltd* [1973] 1 NZLR 309

In my opinion it would not be proper for a judge at first instance in this State to assert that an ordinary building contract is properly the subject of a decree for specific performance. For this contract is an ordinary building contract whether or not there is not much work left to be performed, and whether or not there is an arbitration clause that might operate to relieve the court from the task of supervising the work. The simple fact is that it is a building contract of the ordinary kind, and traditionally equity has not, except in certain circumstances, seen fit to grant its remedy of specific performance to compel performance of such contracts.

4. It is likely that this overstates the position and there is nothing to commend the suggestion that any distinction should be drawn between *an ordinary building contract* (whatever that means[4]) and any other building contract. Nevertheless in *Hewett v Court* (1983) 75 ALJR 211 at 219 Deane J said that: *Now it is settled that, as a general rule, the Court will not compel the building of houses*[5]*.* Conversely in appropriate circumstances a building contract of any type *will* be specifically enforced.

5. This paper looks at the circumstances in which a party might successfully obtain specific performance of a contract requiring the construction of a structure. It will often be the case that a proprietor (meaning the party entitled to have a building constructed on their land) will not want specific performance. Frequently the proprietor and builder are in dispute, often over issues of the builder's performance or lack thereof or quality of the work done by the builder, and so the last thing the proprietor wants is for the builder to complete the work. The proprietor wants nothing more to do with the builder and seeks damages as the primary relief.

6. However, there are situations where the proprietor wants the contract performed. The proprietor might wish to avoid the inconvenience of replacing the existing builder and overseeing completion of the works. The works might be well advanced. If a proprietor takes over the works they assume all manner of risks. They have to arrange for others to complete the work - often at more cost. They might then be forced to deal with planning, building and insurance issues whilst at the same time managing a dispute with the original builder and possibly the builder's sub contractors. Rectification work must be both necessary and reasonable[6] and the quantification of damages is often disputed. Delays occur which add to

[4] In *Roberts v Maurbeth* the contract was for construction of a warehouse

[5] Quoting Mellish J in *Wilkinson v Clements* (1872) 8 Ch app 96 at 112

[6] *Belgrove v Eldridge* (1954) 90 CLR 613

the stress and inconvenience of the dispute. Things might be a lot simpler if the original builder was made to perform the contract. In such cases a proprietor might want specific performance as the primary relief. As the High Court has recently reminded us, decrees of specific performance and injunction *ensure or encourage the performance of contracts rather than the payment of damages for breach.*[7]

7. A useful starting point is to clarify what is meant by "specific performance". In its proper context, specific performance presupposes an executory agreement (that is, one yet to be completed), as opposed to an executed one. *"Specific performance, in the proper sense, is a remedy to compel the execution in specie of a contract which requires some definite thing to be done before the transaction is complete and the parties' rights are settled and defined in the manner intended."*[8]

8. On the other hand, an executed contract is one that does not require the execution of any further instrument for the purposes of placing the parties in the position contemplated: the contract itself does this. It is important however to understand that equitable relief approximate to specific performance may be given and "*the peculiar doctrines of the court as to the specific performance of executory contracts do not necessarily apply to the other forms in which the court grant specific relief"*[9] Accordingly, where the court directs a party to an executed contract to perform its obligations according to the terms, the relief is not specific performance in the proper sense. In practise this may be achieved by mandatory injunction bearing in mind that specific performance is usually associated with enforcement of the an entire agreement rather than a part thereof.

9. The learned authors of Equity Doctrines and Remedies, 4rd edition [2002], Meagher, Gummow & Lehane at [20-010] note that the distinction is important because in the case of relief analogous to specific performance, the strict equities required for true specific performance may not be required. So for example, when seeking relief analogous to specific performance it may not be necessary to prove that the plaintiff is ready and willing to perform its obligations under the contract. Further, it may not be important in that the plaintiff has

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[7] *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* [2009] HCA 8 at [13]

[8] *JC Williamson v Lukey and Mulholland* (1931) 45 CLR 282 per Dixon J at 297. See also *Wolverhampton and Walsall Railway Co v London and North-Western Railway Co* (1873) LR 16 Eq 433 per Lord Selborne LC at 439.

[9] *Packenham Upper Fruit Co Ltd v Crosby* (1924) 35 CLR 386 per Isaacs and Rich JJ referring to Fry *Specific Performance*, 5th edition, paragraph 38, 43 and 481

delayed in seeking to enforce its rights. The application of various equitable rules will depend on whether the contract is executor or executed and every case will turn on its own circumstances. For present purposes we are concerned with executed contracts and as the learned authors observe "*orders enforcing the observance of particular terms of executed contracts are quite common*".

10. Perhaps the most compelling reason why courts have been reluctant to order specific performance of building contracts is that by doing so they would be forcing parties in dispute to continue in a working relationship. [10] Courts have consistently declined to "*yoke parties together in a continuing hostile relationship*". [11] This is a reflection of the rule that equity will not decree specific performance of a contract for services. This point was made by JD Phillips J in *Nepean-YKK Pty Ltd v Leighton Contractors Pty Ltd* (VSC , 12178 of 1991, unreported) in dismissing an interlocutory application, again on behalf of the builder, to restrain a proprietor's claimed entitlement to take to work out of its hands. His Honour said (at 11):

> *Notwithstanding the argument of plaintiff's counsel that he was not seeking a mandatory injunction, it seems to me that what the plaintiff seeks is an order of the court which would effectively bring the plaintiff and the defendant back together again in a working relationship, if the rectification work is to be done at all - and the balance of convenience strongly dictates that the curtain wall be made good by one means or another. To adopt the words of Lush J in Porter at p679[12], the making of the order would compel the defendant to accept performance of the contract by the plaintiff, so that in the result partial or complete specific performance is forced upon the defendant by order of the court. A building contract is not specifically enforceable, as a general rule, and this principle has been confirmed many times.*

11. The learned authors of Brooking on Building Contracts say that damages will usually be an adequate remedy for defective work or construction and for this reason the cases in which specific performance will be granted will be rare; 4th Ed, [11.17].

12. Before examining relevant cases it is well to remember that historical differences in approach and limitations on the grant of relief between common law courts and courts of equity are no

[10] A similar point was made by Lord Hoffmann in *Co-Operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1998] A.C. 1. at 12 (see below). See also Dixon J in *JC Williamson* at 298

[11] *Argyll Stores* at 16 per Hoffman LJ

[12] *Porter v Hannah Builders Pty Ltd* [1969] VR 673

longer relevant. [13] Courts have a wide discretion to fashion relief to do justice between the parties. Section 38 of the Supreme Court Act 1986 provides:

> *If the Court has jurisdiction to entertain an application for an injunction or specific performance, it may award damages in addition to, or in substitution for, an injunction or specific performance.*

In what circumstances will specific performance be granted of a contract for construction?

13. In *Mayor, Aldermen and Burgesses of Wolverhampton v Emmons* [1901] 1QB 515 specific performance was granted to compel the construction of eight houses in accordance with agreed plans. The defendant had purchased land from the plaintiff authority subject to a covenant to build within a stipulated time to plans to be agreed. Under threat of proceedings, plans were approved under a subsequent agreement. The defendant failed to build and the authority sought specific performance. For reasons that will be discussed, it is important to bear in mind that specific performance was ordered of the subsequent agreement and not the original agreement by which the defendant acquired the land.

14. The judgement most often referred to is that of Lord Justice Romer who gave the third judgement. The general rule to which he refers was a restatement of the law according to Fry L. J. in his text Specific Performance, 3rd ed - as Romer LJ acknowledged. [14]

15. Romer L.J noted (at 524) that as a general rule the court will not enforce specific performance of a building contract but an exception was made if three things could be established, vis:

> *The first is that the building work, of which he seeks to enforce the performance, is defined by the contract; that is to say, that the particulars of the work are so far definitely ascertained that the Court can sufficiently see what is the exact nature of the work of which it is asked to order the performance. The second is that the plaintiff has substantial interest in having the contract performed which is of such a nature that he cannot adequately be compensated for breach of the contract by damages. The third is that the defendant has by the contract obtained possession of the land on which the work is contracted to be done.*

Smith MR gave the leading judgement and expressed the position (at 522) this way:

[13] See comments of Windeyer J in *Coulls v Bagot's Executor & Trusteee Co Ltd* [1966-1967] 119 CLR 460 at 503

[14] at p525 - in fact Romer LJ's comments were obiter

The authorities to which reference has been made appear to me to shew that, where there is a definite contract, by which a person, who has acquired land in consideration thereof, has agreed to erect on the land so acquired a building, of which the particulars are clearly specified, and the erection of which is of importance to the other party which cannot adequately be measured by pecuniary damages, that is a case in which, according to the doctrine acted upon by Courts of Equity in relation to such matters, specific performance ought to be ordered.

16. Romer LJ went so far as to say that no case had been cited in argument, and he did not know of any case, where if those three matters were shown to exist, a decree for specific performance had been refused (at 526-527).

17. Collins LJ (at 523) agreed with Smith M.R. but noted inconsistency on the part of courts of equity in sometimes granting specific performance and in other cases not. He was nevertheless satisfied that in the case in question, specific performance was warranted.

18. The first requirement is necessary so that the court can formulate orders with precision for the work to be carried out. In Wolverhampton the lack of definition of the works to be performed by the defendant/purchaser in the initial agreement was overcome by the subsequent agreement. In most cases this won't be a problem because the works required will be sufficiently described in the contract.

19. The perceived difficulty of the courts need for precision and reluctance to become involved in constant supervision is considered further below, particularly in the context of Lord Hoffmann's judgement in *Co-Operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1998] A.C. 1. Supervision was not raised as an issue in Wolverhampton.

20. The second requirement is a restatement of the general rule that specific performance will not generally be ordered where damages would be an adequate remedy. The classic statement of Lord Selbourne is that *the Court gives specific performance instead of damages, only where it can by that means do more perfect and complete justice*.[15]

21. In *Wolverhampton*, a factor in the exercise of the court's discretion was that the plaintiff was a sanitary authority which had sold the land with a covenant to build as part of an improvement scheme for construction of new streets and homes. The defendant demolished an existing

[15] *Wilson v Northampton & Banbury Junction Railway Co* (1874) 9 Ch App 279 per Selborne LC at 284

building but despite subsequent agreement to build eight houses, failed to proceed. It was important for the authority to have the houses built and thereupon assessable for rates. In those circumstances, damages would not be adequate compensation, per Smith M.R .at 523 and Romer L.J at 526.

Must the defendant be in possession of the land under the contract sought to be specifically performed?

22. The third requirement has been criticised as overstating the position. It has been suggested that all that is necessary is that the defendant is in possession of the land. In *Wolverhampton* the defendant obtained possession under the contract of sale and not the subsequent agreement for which specific performance was granted. Specific performance has been granted in a number of cases where this so-called requirement has not been satisfied.

23. *Carpenters Estates Ltd v Davies* [1940] 1 Ch 160 was a breach of covenant case. The transfer of land from the vendor/ defendant to the purchaser/plaintiff contained a covenant to the effect that the defendant would complete the roadway including sewers and drains over which the plaintiff was given a right of way. The defendant failed to complete the work and the plaintiff brought an action for specific performance. The defendant opposed the grant of specific performance on the basis that she did not obtain possession of the land (Romer LJ's third requirement) by the contract - she was already in possession as vendor.

24. Farwell J took issue with Lord Justice Romer's third requirement stating that it was sufficient if the defendant was in possession of the land on which the work was contracted to be done. He found it sufficient that the defendant had contracted to do the work on her own land in consideration of the purchase price (p165). The work being sufficiently clearly defined and damages being an inadequate remedy, specific performance was ordered. He was not concerned about the possible difficulty of seeing the order for specific performance obeyed (p167).

25. In *Thomas V Harper (1935) 36 SR (NSW) 140* Long Innes CJ in Equity postulated that the so-called third condition was merely evidence of part performance on the part of the plaintiff and showed that he was no longer in a position to erect the buildings himself and thus not in a position to ascertain the damages resulting from the defendant's non-performance. Accordingly, the third condition was not an independent requirement *but merely evidence of*

the second, that damages are not an adequate remedy (at 150).[16] Notwithstanding that the High Court in *York House Pty Ltd v FCT* (1930) 43 CLR 427 generally approved Romer LJ's statement, the endorsement was obiter and the third condition is yet to be specifically considered by the High Court.[17]

26. Further, if the work is to be performed on the plaintiff/proprietor's land and the defendant is not in possession, it's hard to see how this would be an obstacle if the proprietor was prepared to allow the defendant back onto the land. In the case of *Downer Construction (New Zealand) Ltd v Silverfield Developments Ltd*[18], referred to below, specific performance was ordered notwithstanding the subject town houses had been sold by the plaintiff and were occupied by new owners, not parties to the arbitration proceeding. Apparently the new owners were prepared to allow access.

Breach of covenant cases

27. Covenants in leases to keep and maintain the property in good repair or to reinstate the premises at the expiration of the term do not fit neatly into the subject matter of this paper. The High Court's decision in *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* [2009] HCA 8 should be considered in this regard. In that case, damages were awarded equivalent to the cost of reinstatement of the foyer of the building which, in breach of a covenant of the lease, had been modified by the tenant without the landlord's consent. The landlord had sought a mandatory injunction at trial which the trial judge was critical of in oral argument but did not deal with in his judgement.[19] The landlord also sought a mandatory injunction on appeal. Justices Finkelstein and Gordon referred to *Rainbow Estates Ltd v Tokenhold Ltd* [1999] Ch 64; [1998] 2 All ER 860 as authority for the proposition that specific performance might be available for breach of the repair covenant but felt that it was not appropriate in the case in

[16] In *Thomas V Harper* Long Innes CJ considered the question was not covered by binding authority and was still open for determination; at153

[17] Equity: Doctrines and Remedies [20-080] noting that in *Hewett v Court* (1983) 149 CLR 639 Deane J at 667 queried whether the third condition should be treated as an indication rather than a requirement; cf Wilson and Dawson JJ at 658. See also *Thomas V Harper (1935) 36 SR (NSW) 140*

[18] *Downer Construction (New Zealand) Ltd v Silverfield Developments Ltd,* High Court of New Zealand, CIV-2005-404-6800, Harrison J

[19] *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* [2009] HCA 8 at [22]

question. [20] The reason given was that it would raise "all manner of difficulty" in making an order that would not come into effect for many years (I infer at the end of the lease) when the person who controlled the appellant may not want that order.[21]

28. In *Rainbow Estates Ltd* specific performance was ordered requiring the tenant to effect substantial repairs to a dilapidated mansion. Having reviewed the authorities, Lawrence Collins QC (sitting as a deputy judge of the High Court) found that there was no reason in principle preventing such relief against a tenant especially in view of the "unusual features". The lease unusually contained no forfeiture clause or provision entitling the landlord to enter the premises to effect repairs.

29. By contrast, in *Jeune v Queens Cross Properties Ltd* [1973] 3 All ER 97, [1974] Ch 97 the tenant obtained relief by way of specific performance requiring the landlord to repair a defective balcony.

30. In *Radford v De Froberville* [1977] 1 WLR 1262; [1978] 1 All ER 33 the plaintiff had sold part of its land with a covenant that the purchaser erect a wall between the two lots. The purchaser failed to build the wall and on sold the land to a third party subject to the covenant to build the wall. The third party also failed to build the wall. The plaintiff sought damages equivalent to the cost of building a wall on his land. The plaintiff was successful in obtaining damages.

31. Importantly, Mr Radford elected to sue for damages and not specific performance but in the course of his reasons Oliver J (as he then was) referred with approval to a passage in the judgment of Field J in *Wigsell v School for Indigent Blind* [22] as to the availability of specific performance:

> *First, the plaintiffs, if they really wished to have the wall built in accordance with the contract, so that they might have the very thing contracted for, and nothing else, might have claimed in the Chancery Division specific performance of the covenant, and in that event, if the court had come to the conclusion that the damages to be recovered in an action for*

[20] Justices Finkelstein and Gordon having observed that since *Hill v Barclay* (1810) 16 Ves 402, [1803-13] All ER Rep 379 it was thought that no order for specific performance would be made against a tenant in respect of a repair covenant. As to which, see the review of the law by Lawrence Collins QC in *Rainbow Estates Ltd v Tokenhold Ltd* [1999] Ch 64. In *Hill v Barclay* the actual decision was the tenant could not obtain relief against forfeiture for breach of the repair covenant; *Rainbow Estates* at 867.

[21] *Bowen Investments Pty Ltd v Tabcorp Holdings Ltd* 166 FRC 491 at 502 [26]

[22] *Wigsell v School for Indigent Blind* (1882) 8 QBD 37; passage reproduced in *Radford's* case at p47

damages, upon the principles applicable to such actions, would not adequately protect the plaintiffs' rights and interest, it might have ordered the defendants to build the wall…

32. As a general statement, where the parties are adjoining landowners, a court will be more inclined to grant specific performance where the work can only be done on or from the defendant's land and hence damages would not be an adequate remedy (*Carpenters Estates* being an example). It is unlikely that a defendant would consent to allow the plaintiff on its land to do the work - especially so if the defendant was ordered to pay for the work to be done. A court would not countenance the plaintiff exercising self help and trespassing on the defendant's land.

Perceived problems of defining the works and the need for supervision by the court - more apparent than real?

33. In *Morris v Redland Bricks* [1970] A.C. 652, Lord Upjohn said as a general rule, that if the court in the exercise of its discretion decides that it is proper to grant a mandatory injunction, *"then the court must be careful to see that the defendant knows exactly in fact what he has to do and this means not as a matter of law but as a matter of fact, so that in carrying out an order he can give his contractors the proper instructions".* The rule is equally applicable to the formulation of orders for specific performance.

34. Modern courts have nevertheless shown a preparedness to make orders for specific performance in appropriate cases to effectively achieve a result rather than specifying the means of obtaining it. Lord Hoffmann grappled with these issues in *Co-Operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1998] A.C. 1 noted the distinction between orders requiring a defendant to carry on an activity, like running a business, as opposed to orders which required him to achieve a result.

35. The case concerned the lease of a supermarket in a shopping centre for a term of 35 years. The lease contained a covenant to keep the premises open for retail trade during usual hours of business in the area. The supermarket was the largest shop in the shopping centre. The lessee decided to close the supermarket and remove the fittings and fixtures. The lessor/plaintiff sought specific performance of the covenant, alternatively damages. The trial judge refused to order specific performance and granted damages. The Court of Appeal by

majority allowed the appeal and ordered specific performance. Lord Hoffmann delivered the speech in the House of Lords with which the other four Law Lords agreed. In short, the House of Lords restored the trial judge's award of damages. Damages was the appropriate remedy because the general rule is that a court will not order specific performance of an obligation to carry on a business (p11). It would be wrong to force parties in dispute to remain together for an extended period which would only increase the likelihood that further issues might arise which required the court's intervention (p12).

36. Of the distinction between orders requiring a defendant to carry on an activity as opposed to orders which required a result, Lord Hoffmann noted that in the former case there was a possibility of repeated applications for rulings on compliance with the order. Such possibility would not exist to the same extent with orders requiring the achievement of a result. He noted that even if achievement of the result was a complicated matter the court only had to examine the finished work to see whether it complied with the order. He endorsed what Lord Wilberforce said in *Shiloh Spinners Ltd v Harding* [1973] A.C. 691 at 724:

> *what the court has to do is to satisfy itself, ex post facto, that the covenanted work has been done, and it has ample machinery, through certificates, or by inquiry, to do precisely this.*

37. According to Lord Hoffmann this distinction between orders to carry on activities as opposed to achieving a result, explained why courts in appropriate circumstances have ordered specific performance of building contracts and repair covenants. He cited *Wolverhampton Corporation*, supra, as authority for an order being made to achieve a result in a building contract and *Jeune v Queen's Cross Properties Ltd* [1974] Ch 97 as a case where an order was made requiring compliance with a repair covenant. His Lordship noted however that not all obligations to achieve a result would be enforced by specific performance. He noted imprecision in the terms of the orders as one objection to this course.

38. Irrespective of the subject matter of the order, the terms of the order must be capable of being precisely drawn. [23] If they cannot be precisely drawn, there is an increased risk of wasteful litigation over compliance issues. So too, are the risks to a defendant who faces

[23] The Court of Appeal had been of the opinion that the covenant sought to be enforced was defined with sufficient precision. Lord Hoffmann disagreed, p16.

contempt for non-compliance. In Wolverhampton, Romer LJ noted at 525 that the first condition for specific performance of the building contract was that:

> *the particulars of the work are so far definitely ascertained that the court can sufficiently see what is the exact nature of the work of which it is asked to order specific performance.*

39. After referring to this passage Lord Hoffmann noted (at 14) that precision was a question of degree and the courts have shown a willingness to cope with a degree of imprecision in cases of orders requiring the achievement of the result where the plaintiffs' merits appeared strong. It is nevertheless an important discretionary factor to take into account.[24]

Some modern applications

40. *Opie and Opie v Collum* [1999] SASC 376 concerned a dispute between neighbours over building work being undertaken by the defendant. The defendant, a solicitor, had purchased a house with a separate tennis court block. The defendant's husband specialised in building period homes. The purchasers bought the house block and acknowledged in the contract of sale that the defendant intended to construct a two storey house on the tennis court block. The house was to be constructed by the defendant's husband. The parties had agreed on the plans for the house and that it *"must not vary significantly from those depicted"* in the plans. The building went beyond what had been agreed. The plaintiffs sued for breach of contract and sought specific performance to require the works to be brought into conformity with the plans agreed. The defendant not surprisingly argued that damages would be an appropriate remedy.

41. At first instance [287] Martin J said:

> *In considering the exercise of the discretionary equitable remedy, I am required to weigh the extent of the breach of the contract and its effect upon the plaintiffs against the hardship*

[24] In *Patrick Stevedores Operations No2 Pty Ltd v Maritime Union of Australia* [1998] 195 CLR 1 at 47-47 the High Court endorsed the approach in Argyll but said that reference to constant court applications should not be misunderstood. *"The courts are well accustomed to the exercise of supervisory jurisdiction upon applications by trustees, receivers, provisional liquidators and others with the responsibility for the conduct of the administrations"* [80]. These comments however have been criticised in Spry's Equitable Remedies 6th edition

that would be caused to the defendant if I ordered that the additional heights in the southern wall be removed.

42. His Honour found that the defendant's husband had misled the plaintiffs about certain features of the proposed development, the plaintiffs had acted reasonably and the increased height of the wall would cause unacceptable shadowing of the plaintiffs' property. The defendant sought to justify her position on the basis that the works were necessary to achieve "an authentic reproduction period mansion". The defendant was further concerned that any change in design might put her to further development approval costs. Notwithstanding the significant costs involved in demolishing work already undertaken to achieve conformity with the agreed plans, that was what the court ordered. Amongst other things, it was ordered that a slab and wall be removed and replaced to the correct height.

43. In dealing with the hardship argument, Martin J referred to the general rule that in order for hardship to be a defence to a claim for specific performance it must exist at the time of entry into the contract. He referred at [309] to *Webb v The Direct London and Portsmouth Railway Co* (1851) 9 Hare 126 where it was said (at 488):

I see no ground whatever on which I can refuse to interfere. The company entered into this contract with their eyes open. ...

44. Martin J then referred to Spry, Equitable Remedies (5th Ed) and the passage at p196-7 where the learned author suggests that the statements that hardship should be judged at the time of entry into the contract are not justified by the authorities. Spry suggests specific performance will not be refused simply because subsequent events render performance more onerous "*but the position is different if the actual consequences of enforcement would operate so harshly and oppressively towards the defendant that the grant of relief would be unjust in all the circumstances"*. Martin J agreed with this approach.

45. An appeal by the defendant was dismissed; *Collum v Opie* [2000] SASC 107. Lander J (with whom Williams J agreed)[25] said at [16] – [18]:

[25] Gray J gave a separate judgment dismissing the appeal with which Williams J also agreed.

Indeed the defendant's predicament is of her own making. It should be observed that the trial judge was careful to fashion remedies which caused the minimum cost and disruption to the defendant whilst at the same time preserving the plaintiffs' rights. He was well aware that the order which is complained of, which is of course mandatory in nature, would put the defendant to expense and prevent the defendant building that which she would wish to build. However I agree, with respect, with the trial judge that such an order was necessary to do justice between the parties.

46. The case referred to in Brooking at [11.17] as authority for the proposition that a grant of specific performance will be rare is the decision by Byrne J in *Agius v Sage* [1999] VSC 100. That was a case involving a contract of sale for the purchase of an apartment to be constructed as part of a multi-storey multi-unit development. Having found that there was a valid and enforceable agreement, His Honour refused to grant specific performance of it. His decision was motivated in part by the fact that the apartment was not completed and the parties had not specified the fixtures, fittings and finishes to be included. Relevantly he said at [97]:

The extravagant description of this unit to be found on p 11 of the initialled brochure is not adequate for this purpose. I would not decree specific performance of such an agreement because it is, in part, a contract to construct a building with minimal, if any, specifications. The court is very reluctant to make such orders for they require continual co-operation between the parties and the supervision of the developer's performance by the court.[26]

47. Specific performance of a builder's obligation to provide watertight residential apartments was considered appropriate by the New Zealand High Court in *Downer Construction (New Zealand) Ltd v Silverfield Developments Ltd,* supra. This is an interesting decision because specific performance was granted notwithstanding that the plaintiff was not in possession of the defective townhouses. S was the developer and D the design and construct builder. S had sold the completed townhouses which were suffering water damage. It was likely that the townhouse owners would pursue S if the problems were not fixed. The dispute between S and D was referred to arbitration. D was found to have breached its contract by constructing townhouses that were not watertight. The arbitrator ordered specific performance requiring D

[26] The authorities relied on for this statement were: *JC Williamson Ltd v Lukey & Mulholland* [1913] HCA 15; (1931) 45 CLR 282 at 298 per Dixon J and *Graham H Roberts Pty Ltd v Maurbeth Investments Pty Ltd* [1974] 1 NSWLR 93 at 108 per Helsham J

to remedy the defects at its cost. The court granted D leave to appeal the arbitral award on questions of law.

48. The arbitrator considered specific performance would do best justice between the parties primarily because S had experienced difficulty in obtaining other contractors to do the work and D had undertaken considerable work in preparation for the remedial work which could be done quicker and more efficiently through D than any other contractor [25].

49. The appeal judge, Harrison J, reviewed the authorities concerning specific performance of building contracts, including *Wolverhampton* and *Argyll Stores*, commencing at [46]. He was not troubled by the fact that S was not in possession. He noted that the arbitrators order for specific performance was conditional upon S obtaining the owners' consents to access and inferentially relied upon *Carpenters Estates* [69]. The judge was of the opinion that: *It is essentially a practical question, not one of principle, and the unit owners' consent to Downer's access has pre-empted any problems* [71].

50. Harrison J was also not troubled by the form of the order which required D to render the townhouses watertight. He relied on Lord Hoffmann's comments in *Argyll Stores*. He also relied on *Jeune v Queen's Cross Properties* where Pennycuick VC had made an order specifying the result of repairing the balcony [99]. He noted that the order provided a mechanism for compliance and for D achievement of the result [101].

51. The main challenge to the award by D was that the requirement for specific performance was out of proportion to the damages suffered by S. D submitted that S had led no evidence on remedial costs and its only losses were unquantified investigation costs to determine the nature and extent of the defects. By comparison, the effect of the order for specific performance was to oblige D to carry out remedial work which might cost more than $4 million. On this basis it was submitted that the financial consequences for D were grossly disproportionate to S's losses [75-77].

52. D sought to obtain support for its disproportionality submission from *Argyll Stores*. The judge dismissed this on the basis that Lord Hoffmann's comments were made in the context of comparing the appropriateness of specific performance to keep a loss-making supermarket trading for the balance of the lease of 19 years as opposed to ordering damages. Harrison J nevertheless accepted that S's losses were relatively small and the arbitrator's reliance on them to justify the order was unsustainable [82] but gave other reasons for justifying them.

One reason was that D had breached its warranty to build watertight dwellings which it had an obligation to remedy at its expense. Specific performance did no more than to enforce this contractual obligation. Further, D's contractual duty to repair was conditional upon proof of defects not upon S's proof of loss [84].

53. D was critical of S's failure to lead evidence about the cost of repairs. However, this was explicable because S could not find a replacement contractor. This was a decisive factor in favour of specific performance [85-86].

54. *Claystone Limited & Ors v Eugene Larkin & Ors* [2007] IEHC 89 was a decision of Jaffoy J of the High Court of Ireland on an application by the plaintiffs seeking effectively an interlocutory injunction restraining the defendants from erecting any building other than a dwelling house in accordance with a planning permit already granted. The defendants' cross application sought to strike out the statement of claim as disclosing no reasonable cause of action. By a contract of sale of land the defendants were to construct a dwelling on one of the lots but failed to do so. There was an issue about the enforceability of a subsequent agreement which varied the original contract requirements to provide for construction of a larger dwelling. The subsequent agreement provided for the construction of a larger house.

55. The judge rejected the defendant's enforceability arguments and found that the plaintiffs had an arguable case that the agreement was specifically enforceable. An interlocutory injunction in the terms sought was granted. There is no report as to what was the outcome of this case. The contest was over whether damages would have been inadequate remedy. The court was concerned that if an injunction was not granted the defendant might proceed to construct a smaller dwelling and if the plaintiff was thereafter successful at trial, the only remedy available would be damages. The court observing that *it would be highly unlikely that any court would order the demolition of a constructed dwelling house*. [27] I suspect it likely that if the matter had proceeded to trial the plaintiff would have obtained an order for specific performance.

56. *Miglas and Kinson v SM Developments Pty Ltd* [2010] VCC 0069 was a breach of the terms of settlement case. The terms required the defendant to construct a retaining wall along the common boundary between the plaintiff's property and the defendant's property together with associated drainage works. Agreement had been reached that the work would be carried

[27] First paragraph, last page of judgment

out in accordance with drawings prepared by the defendant's engineer. Work was required on both properties. The defendant failed to complete the works and the plaintiff sought specific performance. The trial judge ordered specific performance of the work that remained to be done on the defendant's land[28] but refused to order specific performance of work required to be done on the plaintiff's land and awarded damages instead. The judge's primary reason for refusing specific performance of work be performed on the plaintiff's land was that it would be likely to result in further disputation between the parties.

57. *Miglas* is an example of relief being fashioned to meet the circumstances. Specific performance and damages were ordered. Lawyers need to be alive to the possibility that notwithstanding that specific performance might be the preferred remedy the court might decide otherwise. Therefore care should be taken to ensure that proper evidence is adduced at trial to prove loss or damage. In most cases a court will afford the parties an opportunity to agree on final orders after reasons for judgement are provided, but it would be risky to assume that the court would allow the plaintiff to put on further evidence on the issue of damages if that evidence could properly have been given at trial. *Downer* is an example of a case where that evidence might not be available.

58. The plaintiff must persuade the court that damages are not appropriate and one way to do that is to put forward the evidence going to the assessment of damages so far as they can be ascertained. The more difficulty the plaintiff has in formulating a damages claim and providing evidence of quantification thereof, the more likely a court would be disposed to order specific performance. After all, why should the defendant who has caused the problem - and is much better placed to know what went wrong and how best to fix it - be relieved of the obligation to remedy the problem?

[28] The order for specific performance called for certification by both the plaintiffs' engineering consultant and the defendant's consultant or further order of the court that such certification was not required.