

# **CAN AN OWNER OBTAIN SPECIFIC PERFORMANCE OF A BUILDING CONTRACT UPON A BUILDER'S REPUDIATION?**

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## **The current residential building environment**

No one can doubt that right at the moment, residential construction costs are increasing rapidly.

The extent of these cost increases is such that some builders are being caught out with their pricing. After initially pricing prospective builds several months ago, builders now find they may lose money on builds because input costs have increased significantly in the meantime.

Builders are understandably looking to pass cost increases on to owners, by means of price escalation clauses appearing in signed sales proposals and residential building contracts.

However, not all sales proposals and residential building contracts contain price escalation clauses allowing builders to pass on cost increases. In these circumstances, the risk of cost increases remains with the builder. It is contractually obliged to absorb the cost increases, even though this may see a particular build run at a loss.

The extent of recent cost increases has been such that in situations where builders are obliged to absorb these, they may be encouraged to repudiate their contracts with owners and walk away altogether. While repudiation of a building contract is a drastic step, it may well be one that an increasing number of builders are at least prepared to consider in the current environment.

## **Specific performance of building contracts – New Zealand position**

If a builder goes to the extent of wrongly repudiating a building contract with an innocent owner, what options does the owner then have in terms of his or her legal remedies?

Perhaps the first point to note is that contractual damages may not be an adequate remedy for an innocent owner. In an environment in which residential building resources are very scarce, an owner may experience, and be likely to continue to experience, difficulties in obtaining another builder to undertake or to finish a build.

Another aspect worth noting is that at the time a builder repudiates its contract, a good amount of the building design and other preparation work may already have been completed.

In these circumstances, the question arises as to whether an innocent owner may enforce his or her building contract with a repudiating builder, by obtaining an order for specific performance of the contract from a Court.

Traditionally, Courts would not grant specific performance of building contracts. This was on the basis such contracts involved continuous acts by defendants requiring the watching and supervision of the Court.

Exceptions were developed and by 2006, the position in New Zealand was arguably that specific performance of a building contract might be obtained in circumstances where the following conditions could be fulfilled:

1. The building work was defined in a contract between the parties;
2. The owner had a substantial interest in performance of the building contract of such a nature that he or she could not be adequately compensated by contractual damages;
3. The builder was in possession of the land on which the building work was contracted to be done.

These conditions were first set out by Romer LJ in the well-known decision of *Wolverhampton Corporation v Emmons*,<sup>1</sup> given by the English Court of Appeal in 1901.

In 2006, the question whether an innocent owner could obtain specific performance of a building contract came directly before the High Court of New Zealand in *Downer Construction (New Zealand) Ltd v Silverfield Developments Limited* ('*Downer Construction*').<sup>2</sup>

Silverfield Developments Ltd developed a substantial townhouse complex and engaged Downer Construction (New Zealand) Ltd to design and construct the dwellings. Downer warranted that the completed works would be watertight and it would repair all defects. Downer built the dwellings in 2000 and 2001 and Silverfield presold most of the townhouses. Shortly upon completion, unitholders reported leaks and experts established that units were not watertight.

Downer failed to make good the defective works and an arbitrator ordered Downer specifically to perform its warranty to construct watertight dwellings, by repairing its defective workmanship. Downer appealed the arbitrator's orders, arguing specific performance was unavailable because Silverfield was no longer in possession and had no right to sue for losses of individual unit owners.

The High Court declined to adopt the three preconditions to specific performance of a building contract set out by Romer LJ in *Wolverhampton Corporation v Emmons* saying:

Specific performance is an equitable and thus fact-specific and discretionary remedy. Its exercise is governed by well-settled principles which are flexible and adaptable to achieve the ends of equity; that is, to "do more perfect and complete justice" between the parties than leaving them to their common law remedies... . Building contracts present special features "of a practical nature"... in the areas of sufficient particularity and superintendence of work. But provided the Court is satisfied they can be accommodated by the imposition of appropriate terms within the order, as the arbitrator was here, there is no principled reason why such contracts should not be the subject of awards for specific performance.<sup>3</sup>

Downer appealed to the Court of Appeal which agreed with the High Court saying:

We do not consider that Romer LJ's statement is of "universal or prescriptive application". Indeed, it did not even command the express support of the other two members of the Court of Appeal in which he was sitting. Romer LJ's dictum has been described as "too rigid to accord with equitable principles" (Spry, *Principles of Equitable Remedies* (6<sup>th</sup> ed, 2001), p 114). We agree with that view. We do not consider that Harrison J's substantive judgment can be seriously challenged on this ground.<sup>4</sup>

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<sup>1</sup> *Wolverhampton Corporation v Emmons* [1901] 1 KB 515 CA.

<sup>2</sup> *Downer Construction (New Zealand) Ltd v Silverfield Developments Limited* [2007] 1 NZLR 785 ('*Downer Construction*').

<sup>3</sup> *Downer Construction*, n 2 [63].

<sup>4</sup> *Downer Construction (New Zealand) Ltd v Silverfield Developments Limited* [2008] 2 NZLR 591 [48].

A proportionate amount of research indicates that in the time since 2007, the question whether an ‘owner’ may obtain specific performance of a building contract has come before a New Zealand superior court on just one occasion.

The High Court’s judgment on appeal from the District Court in *Goldsmith v Carter*<sup>5</sup> was in the context of protracted litigation in both the High and District Courts.

The major issue before the High Court was as to which of the two parties to a land purchase and construction project should bear the contractual risk associated with construction of one of the residential apartments to be built on the parties’ land. The High Court held that it was for the respondents to bear all the risk of the builder’s default, in relation to the apartment in question.

In their appeal, the appellants sought an order that the respondents specifically perform their contract, so as to complete the apartment.

While appearing favourably disposed to such relief, the High Court considered it unclear whether or not specific performance would be a practical remedy in the circumstances. The Court referred in particular to uncertainty around the respondents’ financial circumstances and the extent to which specific performance might require a degree of supervision.

The High Court sent the matter back to the District Court for further consideration as to whether specific performance of the respondents’ obligation to complete the apartment was appropriate. In so doing the Judge said:

I would not, however, exclude specific performance from the remedies that the District Court is able to consider.<sup>6</sup>

Although the High Court in *Goldsmith v Carter* did not refer to the earlier decision in *Downer Construction*, or to the comments made by the Court of Appeal, the decision is obviously consistent with these.

When the proceeding came back before the District Court, the respondent/defendants confirmed they did not raise their financial circumstances as a bar to specific performance. The Judge had little hesitation making orders effectively for specific performance of both parties’ construction obligations under their land purchase and development contract, based on the scope of works set out in expert reports obtained previously.<sup>7</sup>

## Conclusion

If a builder wrongfully repudiates a building contract in the current residential building environment, an innocent owner should consider the option of making an application to Court to enforce his or her contract by way of specific performance.

If left to his or her common law remedies, an innocent owner may very well experience considerable difficulties in finding another builder to undertake or to finish a build. On the other side of things, builders should be actively discouraged from repudiating building contracts with owners, if they know they may face an order for specific performance otherwise. Referring to the High Court’s exposition in *Downer Construction* concerning the exercise of this equitable remedy, specific performance would surely act to do more perfect and complete justice between the parties in such circumstances.

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<sup>5</sup> *Goldsmith v Carter* HC Tauranga CIV-2010-470-281 (21 December 2010) (*‘Goldsmith v Carter’*).

<sup>6</sup> *Goldsmith v Carter*, n 5 [52].

<sup>7</sup> *Goldsmith v Carter* DC Tauranga CIV-2007-070-1326 (14 November 2012).

Specific performance of a building contract is all the more appropriate, when detailed plans and specifications are included with a building contract as is typically the case in this day and age.

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