A TIME TO SPEAK

Specific Performance in the New Zealand Courts from 1970

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I INTRODUCTION

Specific performance is an important remedy; it is probably the most vital element protecting not only the interests of parties to a contract but also the faith of the community in the notion of sanctity of contract: if a party may simply elect to "breach and pay", this negates one of the important objectives of a contract – the ordered regulation of future conduct. From the evidence of the law reports,[1] it would appear to be a remedy which is considered desirable by plaintiffs, yet at law it has occupied an anomalous position.

Traditionally, it has been regarded as an "equitable remedy" with the result that any theoretical treatment of it has tended to be equity-related; its importance as a primary remedy in the case of breach of contract has therefore been somewhat obscured.[2] Thus has been perpetuated the common law myth that an aggrieved party's real concern is with monetary compensation rather than obtaining what was actually bargained for.

It is contended in this article that there are two basic areas of illogicality in the current theory of specific performance: (a) the treatment of the remedy as a secondary one; and (b) the use of artificial grounds by courts to justify the exercise of the discretion to grant the remedy. It seems that by recognising the contractual nature of the remedy and accepting what happens in practice, these illogicalities can be corrected without much ado. The discussion will commence by considering the appropriate place for the remedy and then examining its treatment in the New Zealand courts. Following this is a discussion of the traditional basis for exercising the discretion compared with the New Zealand practice and suggestions for a more appropriate formulation.

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1 Since 1970 there have been over 140 reported cases in which the concept has been mentioned. The present investigation is confined to the period beginning in 1970 for various reasons: in that year a Privy Council decision effectively (and incorrectly) crystallised the principles governing the remedy in New Zealand. The subsequent cases, however, appear to be sufficient evidence of the trend which it is attempted to demonstrate.

2 The treatment in the leading English textbooks on contract is short; the leading New Zealand textbook devotes only three pages to the topic.

Although there has not been much discussion of the principles by the courts,[3] it appears that enough has been said to justify the solutions propounded.

II Appropriate Place for the Remedy

1 The Ideal Solution

There is no difficulty in regarding specific performance as an equitable remedy if by that is meant that the court is required to exercise a discretion in deciding whether or not to grant the order. However, as a result of the historical development of English law, specific performance came to be a secondary remedy, originally only available in the courts of equity, granted only where the common law remedy of damages was inadequate.[4] New Zealand, on the other hand, has never had a separate "equity court"; the original statutes creating the High Court provided that it should have jurisdiction at both common law and equity.[5] There has therefore never been any reason for the courts to separate their functions. Given that any court could grant relief of any type, there was no justification for claiming that the traditional common law remedy should be anterior to equitable relief; justice should be the objective in every case.[6]

The common law courts originally knew no form of specific relief;[7] even when, at a later stage, certain types of specific redress were granted, the courts were reluctant to compel the defendant to perform a particular act.[8] Equity, on the other hand, assumed the co-operation of the defendant and was prepared to compel performance. However, the settlement of the jurisdictional battle between law and equity produced the notion that equitable remedies were extraordinary and that damages were ordinarily adequate.[9] This "rule" persisted after the fusion of the two jurisdictions.

Contractual liability as it is understood today is generally regarded as having its origins in the commercial awakening of the nineteenth century.[10]

3 Of the large number of reported cases which have referred to the concept not one has provided a comprehensive exposition of the principles involved; there is, however, a useful discussion in *Brett Wotton Properties Ltd* v *Cameron* unreported High Court Rotorua, 29 July 1986, A 3/83, Bisson J.

4 See *Halsbury's Laws of England* 4th ed Vol 44 para 402. This is described by Collins, *The Law of Contract* (1986) as an "absurd rule" (at 193).

5 This was achieved by the Supreme Court Ordinance of 1841 and subsequently entrenched in the Supreme Court Acts 1860 and 1882.

6 The statement in *McManaway* v *Cleland* (1870) 1 NZ CA 343 at 372-373 that in New Zealand the fusion of the two jurisdictions only results in a difference in procedure misses the point: were it not for the difference in procedure, a separate body of rules of equity would never have developed; now that the procedural difference has been removed, so should the substantive one be. The maintenance of separate jurisdictions was approved by Prichard J in *Aquaculture Corporation* v *The New Zealand Green Mussel Company Limited* (1986) 1 NZBLC 999-068 at 102, 568; this seems an unfortunate development. The omens in *Day* v *Mead,* unreported, Court of Appeal, 31 July 1987, CA 90/86 are more promising.

7 See Farnsworth "Legal Remedies for Breach of Contract" (1970) 70 Col LR 1145 at 1151.

8 Ibid at 1152.

9 Ibid at 1154.

10 See Horwitz, "The Historical Foundations of Modern Contract Law" (1974) 87 Harvard LR 917 at 936 et seq.

Despite the pressures to provide suitable remedies for breach of contract, however, the distinction between the jurisdictions remained. Although it was accepted that compensation for breach was designed to protect the expectations of the aggrieved party,[11] it was never admitted that such an objective is best achieved by an order for specific performance. Assuming that it is desirable to protect expectation interests[12] then it must be acknowledged that there is a gap between the objective and the law. It would come as a great surprise to most people if they were to be told in the words of Oliver Wendell Holmes that:[13]

> The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it – and nothing else.

From an economic perspective, too, it has been argued[14] that specific performance is the most efficient way of resolving a breach of contract and that it should be the routine remedy to be granted except in certain limited circumstances.

It is not novel to argue that specific performance is a logical primary remedy for a breach of contract: this is the attitude adopted in the Civil law countries[15] and its adoption has been urged by several commentators.[16] Formal recognition has not been awarded by the judiciary although, as will be seen, there has been a movement away from the rigid categories historically developed by the courts of chancery. New Zealand has, theoretically, been in a particularly favourable position to do something about the situation.

Despite having a golden opportunity to straighten out the law, however, the New Zealand courts have largely been content to accept as correct the English formulation without attempting to propound a legally and logically sound remedy suited to the needs of the customer. Furthermore, there stands, casting its gloomy shadow over the whole of this area of the law, the decision of the Privy Council in *Loan Investment Corporation of Australasia* v *Bonner*;[17] although concerned specifically with the enforce-

11 Farnsworth op cit at 1148-9.

12 If it is contended that this is not the function of contract then the picture alters somewhat. For present purposes, however, this assumption will be made.

13 "The Path of the Law" (1897) 10 Harvard LR 457 at 467.

14 See Schwartz "The Case for Specific Performance" (1979) 89 Yale LJ 271; Ulen, "The Efficiency of Specific Performance: Toward a Unified Theory of Contract Remedies" (1984) 83 Michigan LR 341. The argument is not conclusive however: for a summary of the various approaches see Kornhauser "An Introduction to the Economic Analysis of Contract Remedies" (1986) 57 U Colorado LR 683.

15 See Dawson "Specific Performance in France and Germany" (1959) 57 Michigan LR 495. It is also the position in Scots Law: see Walker *Civil Remedies* (1974) at 276; McKendrick "Specific Implement and Specific Performance – a Comparison" 1986 Scots Law Times 249. It is of some interest to note that the South African Appellate Division has recently held that the discretion to grant specific performance is unfettered and the courts will as far as possible give effect to a plaintiff's election to claim specific performance; it will be refused, however, if to grant it would amount to injustice: *Benson* v *SA Mutual Life Assurance Society* 1986 (1) SA 776 (A).

16 Dawson, ibid at 532; See also Farnsworth op cit at 1156 and the authorities cited by him in n 52; see too Baker (1973) 89 LQR 326 at 328; Schwartz supra n 14.

17 [1970] NZLR 724.

ment of a contract of loan, the court nevertheless stressed the traditional approach to specific performance as the correct one. This was expressed in Lord Pearson's conclusion:[18]

> On the whole, damages are a sufficient and suitable remedy, and the special remedy of specific performance should be refused.

Thus, specific performance is a "special remedy": a discretionary remedy governed by "very firmly established rules" which dictate that a mere contract of loan will not be enforced whereas an ordinary contract for the sale and purchase of land will.[19]

But this shadow is not gloomy only because of the rigidly traditional approach exuded by it; between the High Court, the Court of Appeal and the Privy Council, so many different nuances were expressed that it is difficult to determine exactly what the approach of the courts should be. Subsequent courts, however, have not experienced this difficulty; in the years since it was decided, *Bonner's* case has been referred to only once,[20] and that reference was to the dissenting judgment of Richmond J in the Court of Appeal. Apart from its precedential significance, however, this case is a useful starting point to commence an analysis of the attitude taken by New Zealand courts towards the remedy.

2 *The New Zealand Approach*

(a) *Loan Investment Corporation of Australasia* v *Bonner*

In this case the Loan Investment Corporation of Australasia Ltd agreed to purchase a certain property from Mr Bonner, one of the conditions of the agreement being that the vendor would deposit portion of the purchase price with the purchaser for a period of ten years at 7½% interest. Subsequently the vendor refused to complete and an action for specific performance was brought by the purchaser.

There were essentially two issues involved in the case, namely (a) whether the contract involved was divisible into a contract of sale and a contract of loan; and (b) whether specific performance was available.

In the Supreme Court, Wild CJ treated the entire contract as one for the sale and purchase of land and approved the statement from *Halsbury's Laws of England*[21] that:

> . . . [I]f the contract is valid in form and has been made between competent parties and is unobjectionable in its nature and circumstances specific performance is in effect granted as a matter of course even though the Judge may think it involves hardship.

Questions as to the financial standing of the plaintiff and lack of wisdom on the part of the defendant in entering into the contract were held not to affect the exercise of the discretion.[22] In other words the standard practice

18 Ibid at 735.
19 Idem.
20 In *Scott* v *Goode* [1975] 1 NZLR 488.
21 3rd ed, Vol 36 at 264.
22 [1968] NZLR 1025 at 1027.

of granting specific performance to the purchaser of land was adhered to.

In the Court of Appeal, North P found that the loan and the sale were separate transactions[23] and held that specific performance of a loan agreement will not be granted.[24] While he accepted that the court would have jurisdiction to grant specific performance of a sale of land where the vendor agreed to leave part of the price owing to him,[25] he held that even if that had been the case, he would have exercised his discretion against the plaintiff.[26] No attention was paid to the appropriateness of specific performance or the adequacy of damages — in fact the matter was referred back to the Supreme Court for an assessment of the damages suffered.[27]

Turner J also considered that the contract was divisible[28] and that the rule governing contracts of loan was that "at least in the absence of proved countervailing considerations, damages must be regarded as an adequate remedy".[29] Like the President, however, he considered that even had the contract been construed to be indivisible, specific performance should not have been granted. His reason for this was that the land had no peculiar or special value to the plaintiff[30] — it was merely an asset; and that it would be inequitable to deprive the defendant of an unencumbered asset without providing anything in return.[31] He also mentioned the "very special circumstances" of the case.[32]

While he refused to be bound by any notion that an order for specific performance *had* to be granted to a purchaser of land and strongly asserted the court's discretion,[33] Turner J, too, failed to give any real consideration as to the adequacy of damages as an alternative in the situation; in his judgment, also, the matter was remitted to the Supreme Court.

The judgment of Richmond J was the only one to be based on a consideration of the applicable principles rather than rules, although the principles formulated were very much in the English tradition. He commenced with a quotation from the Australian case of *McIntosh* v *Dalwood (No 4)*:[34]

23 Ibid at 1034.

24 At 1034, based on Fry, *Specific Performance* 6th ed at 25 and *Rogers* v *Challis* 54 ER 68.

25 At 1034.

26 The exact reasoning behind this conclusion is not clear; the judge contented himself with following the reasoning of Williams J in *Samson* v *Collins* (1910) 29 NZLR 1163 but that reasoning was based on the inseparable nature of the contract, portion of which was a loan.

27 1037.

28 At 1040.

29 Idem, based on Snell, *Principles of Equity* 26th ed at 639; *South African Territories Ltd* v *Wallington* [1898] AC 309.

30 At 1043; this was to comply with the explanation given in *Adderley* v *Dixon* (1823) 57 ER 239 for the rule that damages at law are not a complete remedy for the purchaser of land.

31 At 1043; this was the effect of the linking of the sale to the loan. This reasoning is totally opposed to the general notion that a contract between parties of equal bargaining power should be enforced. There was certainly nothing unconscionable about the transaction and therefore no reason not to enforce it. See infra.

32 At 1044; they were not so very special and it is this vague type of interference which makes such an approach particularly unsuitable for general application. See also the comments of Sir Garfield Barwick in the Privy Council.

33 At 1043.

34 (1930) 30 SR (NSW) 415 at 418.

> The test is always the same. In every case the contractual obligation must first be ascertained in order that it may be seen whether an adequate remedy exists at law in the event of a breach.

His conclusion, based on various authorities, was that:[35]

> A Court of Equity will presume in favour of a purchaser of land that the land in question has a peculiar and special value to him. It may be that our law has developed to a point where this presumption has become irrebuttable.

Unlike the other judges, Richmond J considered that the contract was indivisible and essentially a sale of land;[36] these principles were therefore of application. He held that, despite the fact that there may have been an investment motive, damages would not be an adequate remedy for the purchaser; they could be "nominal or negligible and a poor substitute for the land itself".[37] The judge pointed out that there was no practical difficulty in making an order of specific performance and was constrained to disagree with *Samson* v *Collins*.[38] He concluded ultimately that:[39]

> . . .[T]he respondent is entitled to a decree of specific performance as much of course as damages are given "at law" unless circumstances are shown to exist which make the agreement "objectionable" in accordance with the fixed rules and principles which govern the court's discretion to refuse a decree.

He stressed that the bargain was entered into by competent parties and that the only reason for exercising the discretion could be the risk of financial hardship to the defendant which was not established.[40]

Each of the judges considered that the plaintiff's conduct was no bar to an order of specific performance: at the time of the action he was ready and willing to perform his part of the contract.[41] None of them, however, investigated even in a general way what the appropriate measure of damages would be in such circumstances. It is submitted that, if the traditional formulation of the rule is to be adopted, it is impossible to decide that specific performance is inappropriate without going into this question. This demonstrates, on the part of the majority, a rigid adherence to the "loan" rule and on the part of Richmond J, a failure to pursue the principles through to their logical conclusion. If it is accepted that the transaction was an investment,[42] then damages for breach would have to place the plaintiff in a position to acquire a similar investment elsewhere. In a transaction of a complex nature such as this, it is clear that specific

35 At 1047.
36 At 1045.
37 At 1047.
38 At 1048.
39 At 1050.
40 Idem. It is, in any event, unlikely that financial hardship will be a factor of much influence: see infra.
41 1036-7, 1044, 1052.
42 In which case the argument by the majority that the two parts of the contract were divisible becomes considerably weaker, because the whole idea was clearly to acquire the assets and finance the acquisition in the same transaction.

performance is a more appropriate remedy and the test outlined by Richmond J seems to be the correct one.[43]

The treatment by the Privy Council was somewhat cursory,[44] in essence simply laying down the English law in simplified terms. It was considered that the contract should not be regarded as a sale and purchase of land, but a composite transaction including a long-term unsecured loan.[45] In principle, said Lord Pearson, there is an "obvious objection" to granting specific performance of such a loan, which it seems, may not prevail in "exceptional cases".[46] The court concluded, in the quotation cited above, that damages were a "sufficient and suitable" remedy. There was not even the vaguest suggestion as to why damages should be so very appropriate in this case or how they should be calculated; it is perhaps not surprising, therefore, that this case has been judicially ignored.[47]

Of considerably more interest is the powerful dissent in the Privy Council by Sir Garfield Barwick who concluded that the contract was an indivisible one[48] and that there was no objection in principle to ordering specific performance of a loan.[49] He stressed that the general test in all cases was the adequacy of damages.[50]

With regard to sales of land, however, his approach was more conventional, regarding the motive of the purchaser as irrelevant.[51] He also stressed that specific performance was a matter of discretion, not right, and that this discretion was not a general one, but one exercised on settled principles.[52] On the facts he found that none of the reasons generally regarded as sufficient for refusing specific perfomance was present.[53] His approach, while indicating an adherence to principle, nevertheless still displays the inflexible background of the law-equity distinction and an unwillingness to adopt a general discretion to *refuse*[54] specific performance based on justice.

The general principles enunciated in *Bonner's* case, other than those relating to loans, were specifically concerned with sales of land. Traditionally, it seems that such contracts have been treated differently from other sales.[55] As the majority of specific performance cases deal with contracts of this nature, however, it is difficult to generalise the principles involved. Nevertheless, it is submitted that in principle there is no difference between

43 Supra, text to n 39.
44 The speech consists of a summary of the judgments in the Court of Appeal together with five conclusions in point form, occupying a total of less than two pages.
45 At 734.
46 735.
47 ICF Spry, *Equitable Remedies* 3rd ed, considers it to be incorrect.
48 At 738.
49 At 741.
50 At 743-744.
51 At 745-746.
52 At 746.
53 At 749.
54 Ie rather than a discretion to grant the remedy, which effectively renders it a secondary alternative. This may be contrasted with the approach of Richmond J in the Court of Appeal.
55 See G H Treitel, *The Law of Contract* (6th ed 1983) at 765; A G Guest, *Anson's Law of Contract* (26th ed 1984) at 517.

such contracts and any other contract.[56] The passage from Halsbury cited by Wild CJ in *Bonner's* case and which has subsequently been approved by New Zealand courts, is not a passage relating specifically to sales of land; it appears, therefore, that there is no objection to taking the court's approval as a general one. In *Brett Wotton Properties Ltd* v *Cameron,*[57] Bisson J, although once again dealing with a sale of land, also gave very general approval to a similar statement in *Chitty on Contracts.*[58]

(b) The Practice in the New Zealand Courts

As has been mentioned, scant attention has been devoted by the New Zealand judiciary to the principles governing the exercise of this discretion. From the little that has been said, however, it seems possible to draw a fairly consistent pattern.

In *Upper Hutt Arcade Ltd* v *Burrell and Burrell Properties Ltd*[59] the court was confronted with an action by the lessor for specific performance of an agreement to lease. One of the contentions of the defendant was that this should be refused because the plaintiff had failed to construct and maintain a fountain as agreed upon. The question asked by Beattie J was:[60]

> Should I then in my discretion refuse a decree because of the lack of a proper fountain?

He thought not, but the interesting point is that he viewed the discretion as a discretion to *refuse* in appropriate circumstances. That this was indeed his intention is buttressed by his quotation of the passage in Halsbury approved by Wild CJ in *Bonner.*

Citing as authority the case of *Parker* v *Taswell,*[61] he stressed that part performance was an important factor:[62]

> . . .[I]n the case of a lease where a party has been let into possession, the court should order specific performance unless there are compelling reasons to the contrary as shown by gross or wilful breaches on the part of the plaintiff.

The judge did not find any reason to draw a distinction in principle between sales of land and leases; the conclusions reached therefore, may reasonably be thought to be of general application. It is also important to note that at no stage was a consideration of the adequacy of damages as an alternative embarked on. Furthermore, applying the rigid classification approach, it could be argued that this type of order would have required detailed supervision by the court and should have been refused; such an

56 The reason for this bias in the cases is probably related to the value of the subject matter and the expenses involved in selling land; in ordinary sales it is easier to buy the goods elsewhere and claim damages: Collins op cit at 192. The dearth of non-land cases, however, makes it all the more necessary to attempt a general formulation of principle.

57 Supra n 3.

58 (25th ed 1983) at 979.

59 [1973] 2 NZLR 699.

60 At 701.

61 44 ER 1106.

62 At 703. On this point see infra 2(b).

approach would obviously have been contrary to the interests of both plaintiff and justice.[63]

In *Scott* v *Goode*[64] Beattie J considered that it was an "appropriate case" for a decree of specific performance but did not consider the adequacy of damages.[65] His only comment was that:[66]

> The plaintiff commenced his proceedings promptly and from the outset made it clear to the defendant he wished to complete the contract.

Here, as in *Burrell's* case, stress was laid on the non-culpability of the plaintiff but in this case, it seems in addition that the plaintiff's desire to have the contract performed was also of some relevance.[67]

Perry J in *Boviard* v *Brown*[68] confined his discussion of principle to the last line of the case:[69]

> The property has special significance and value to the plaintiffs — it is not suggested there is any hardship on the defendant and in the exercise of my discretion I will make an order for specific performance.

While this hardly seems an adequate basis for the judicious exercise of a discretion, it does indicate that the first thought is to grant the remedy rather than refuse it in the absence of hardship. The consideration of the adequacy of damages was confined to the special value of the land to the plaintiff, but even this indicates a departure from the mechanical test of *Bonner.* A similar attitude can be seen in *Leighton* v *Parton*[70] where an order for specific performance was granted without any discussion of principle, notwithstanding a plea of unilateral mistake.

Also illustrative of this attitude are the dicta in *Ferguson* v *Scott:*[71]

> There have been no grounds suggested why specific performance should not be granted . . .

and *Buddhia* v *Wellington City Corporation:*[72]

> . . . [T]he plaintiff is entitled to have his contract completed in accordance with its terms and I see no circumstances which would justify the refusal of a decree of specific performance.

63 On supervision see infra 2(a)(ii).
64 Supra n 20.
65 Apart from quoting the approach taken by Richmond J in *Bonner.*
66 At 494.
67 This may be reading too much into Beattie J's statement; it is submitted, however, that the plaintiff's desires as well as his expectations are an important factor which have not been given full cognisance in the past.
68 [1975] 2 NZLR 694.
69 At 703-704.
70 [1976] 1 NZLR 165.
71 [1976] 1 NZLR 611 at 613.
72 [1976] 1 NZLR 766 at 768.

From the only occasion on which such matters have engaged the attention of the Court of Appeal in the period under consideration, it can be inferred that this is the correct approach: In *McLachlan* v *Taylor*[73] Quilliam J held in the High Court that he could see no basis on which he should exercise his discretion to *withold* specific performance.[74] The judgment was upheld in the Court of Appeal where Cooke J said:[75]

> We do not regard the case as one of unreasonable delay on the part of the vendors, nor do we see anything else in their conduct which should deprive them of the remedies they seek.

It is also of interest to note that this was an action by the vendor; the conventional arguments relating to the value of the land are therefore inapplicable. Even in such a case, however, there was no suggestion that damages would be the appropriate remedy; the plaintiff was permitted to select his preferred course of action.

In *Brett Wotton Properties Ltd* v *Cameron*[76] the court cited with approval from *Chitty on Contracts:*[77]

> The question is not simply whether damages are an "adequate" remedy, but whether specific performance will "do more perfect and complete justice than an award of damages".

The way this is phrased seems to indicate that an overall picture is required rather than a mechanical application of the "adequacy of damages" rule. This is illustrated by the ultimate finding of the court:[78]

> . . .[F]or the reasons given the "more perfect and complete justice" of the case requires the first defendants to fulfil their contractual obligation to the plaintiff.

This decision is one of the few to have given any thought to the adequacy of damages before ordering specific performance; this is of interest because, apart from illustrating the position which such a consideration should occupy, it seems to show that the remedy is not automatic in cases of sales of land. In this respect there appears to be a clear, if unstated, departure from the type of approach taken in *Bonner's* case.

Such a departure has not been evidenced in recent cases involving summary judgment.[79] In both *Billington* v *Kale*[80] and *Stephens* v *Gater*[81] the courts refused summary judgment partly because a discretionary

73 [1985] 2 NZLR 277.
74 At 284, emphasis added.
75 At 286.
76 Supra n 3.
77 Op cit at 979.
78 At 25.
79 This is a new procedure in terms of Rule 135 et seq of the High Court Rules and as such is likely to experience some teething problems; the specific performance aspect would appear to be one.
80 Unreported High Court Napier, 12 June 1986, CP 34/86, Jeffries J (oral).
81 Unreported High Court Invercargill, 9 Sept 1986, CP 12/86, Holland J.

remedy was involved. In *Stephens* v *Gater,* Holland J went so far as to say that:[82]

> A purchaser of land can normally expect an order for specific performance against a defaulting vendor. That expectation does not, however, apply with such force to a claim for specific peformance by the vendor against a defaulting purchaser. The question always is whether damages may not be an adequate remedy . . . Not only am I not satisfied that a Court might hold damages to be an adequate remedy, I am not satisfied that specific performance must inevitably be the appropriate remedy. The defendant may not be able to carry out the agreement. An order for specific performance will not usually be made unless it can be carried out.

This is not the appropriate place to embark on a lengthy consideration of the principles applicable to summary judgment applications. Suffice it to say that the statements made by Holland J with regard to specific performance appear unnecessarily rigid and that, in the absence of cogent evidence from the defendant, this matter could have been decided by way of summary judgment.[83] If every specific performance case is required to go to trial, this severely prejudices the plaintiff claiming performance rather than damages and it is submitted that this should not be so.[84]

To summarise then, the summary judgment cases apart, it seems reasonable to conclude that the New Zealand Courts, in exercising their discretion in specific performance cases, have moved away from the historical English approach where the remedy is a secondary alternative to damages;[85] the discretion is exercised as one to refuse the remedy should it be inappropriate rather than grant it if damages are inappropriate.[86] The fact that the courts have all but ignored the requirement that damages be inadequate tends to support this conclusion: on the few occasions it has been mentioned only lip service has been paid to it. Although it may be contended that the courts have simply assumed the correctness of the traditional approach it is submitted that the cases do not bear this out. Traditionally, (a) sales of land are singled out for special treatment and there are indications that the courts are not prepared to apply this "rule" blindly; and (b) a consideration of the adequacy of damages is required

82 At 4.

83 The defendant's argument related only to jurisdiction and it appears that no affidavit was filed on the merits; the jurisdictional aspect was, it seems, decided in favour of the plaintiff in which case the defendant should have raised a substantive defence (See *McGechan on Procedure* para 136.04). It is hardly for the plaintiff to establish that the defendant is able to carry out the agreement.

84 In England summary judgment has been granted for specific performance: *Verrall* v *Great Yarmouth Borough Council* [1981] QB 202 (CA). See also my note "Summary Judgment and Specific Performance" [1987] NZLJ 81.

85 See *Halsbury* 4th ed Vol 44, para 402. Collins points out (at 194) that the English practice is also different from the statement of the law.

86 The only real note of dissent is to be found in an obiter dictum by Cooke J in *Thomas Borthwick & Sons (Australasia) Ltd* v *South Otago Freezing Co Ltd* [1978] 1 NZLR 538 at 548 where it was stated that an ordinary sale of goods will not be enforced by specific performance.

before deciding to grant specific performance whereas the tendency is to view the overall picture to see if there is any reason to refuse the remedy.[87] Further support is gained from a consideration of the principles accepted by the courts as governing the discretionary remedy of injunction.

(c) Injunctions

In certain cases an injunction may be a more appropriate remedy to enforce a contract than a decree of specific performance.[88] This does not, however, make the remedy any less one compelling performance *in specie* of the contract. As this too is an "equitable" or discretionary remedy, the pronouncements of the courts are of considerable relevance.

Unlike the situation with regard to specific performance, the Court of Appeal has provided a useful and reasonably comprehensive summary of the principles relating to injunctions in the case of *Thoms Borthwick & Sons (Australasia) Ltd* v *South Otago Freezing Co Ltd.*[89] Cooke J, delivering a unanimous judgment, approved the statement of Dixon J in *J C Williamson Ltd* v *Lukey & Mulholland*:[90]

> If . . . a clear duty is imposed by contract to refrain from some act, then, prima facie, an injunction should go to restrain the doing of that act.

He himself concluded there were not[91]

> . . . sufficiently substantial reasons against the granting of the injunction to which Borthwicks are prima facie entitled.

The court referred to various authorities which suggested that an injunction would not be granted in a case which was not suitable for specific performance, but Cooke J did not specifically lay this down as a rule. Consideration was given to damages as an alternative; on the evidence as a whole, however, the court did not regard them as adequate.[92] In the final analysis it was held that:[93]

> . . . [I]t would prima facie be in the public interest for the court to uphold and enforce such a contract by granting the *the effective available remedy.*

87 It could also be argued that a rigid application of the "sale of land" rule obviates the necessity for considering the adequacy of damages. It seems, however, that this has not been the way the courts have approached the problem. In no case has the court said "This is a sale of land and therefore specific performance *will* be granted"; the feeling has rather been that the right to specific performance is not automatic, yet nothing has arisen to suggest that it is inappropriate.

88 Generally where it is a negative covenant that is being enforced; see Treitel 778-779.

89 Supra n 86.

90 (1931) 45 CLR 282 at 299.

91 At 551.

92 At 548-549.

93 At 551, emphasis added. While this remark was made by the court immediately after its discussion of restraint of trade, there does not seem to be any reason to limit its generality.

The statements by the court appear to indicate unequivocally that in a situation which is appropriate for an injunction, it will be granted unless there are sufficient reasons against this course of action.[94] Furthermore, it would seem that the last mentioned quotation can be taken as a general statement regarding contracts; public interest requires the most effective remedy.[95] This would accord with the approach which, it has been argued, has in practice been adopted by the courts with regard to specific performance.

III Exercise of the Discretion

1 The Traditional Approach

Even if it were to be accepted that specific performance of a contract should be granted unless it is inappropriate, there are clearly instances when it will be refused. Traditionally there have been a number of categories of contracts which have been regarded as unsuitable for such orders. Included in this have been contracts of sale where the goods are readily available in the market; contracts involving personal services; contracts involving extensive supervision, etc.[96] It has sometimes been suggested that orders for specific performance of certain of these contracts are beyond the jurisdiction of the courts;[97] it is submitted, however, that the better view is that all the matters considered by the courts go to discretion rather than jurisdiction.[98]

2 The Pattern in New Zealand

From the statements made in cases it seems that the tendency of the courts in recent times has not been concerned so much with rigid classification as with general notions of fairness. While this is to be welcomed, it obviously overlaps to a considerable extent with notions of unconscionability and it is submitted that in such cases it would be wise for the courts to demarcate the territory clearly. Considerations of fairness fall into two broad categories: those leading to a refusal to enforce the agreement and those leading to a willingness to do so. In addition, the first category has two distinct parts: unfairness inherent in the contract itself and unfairness in enforcement in particular circumstances.

(a) Unfair to enforce

(i) Inherent unfairness

94 Exactly what constitutes "sufficient reasons" is considered infra.

95 This statement was made in a context where it might have been thought that an injunction was unlikely to be granted because of the long period involved and the supervision required by the court; ultimately, however, it was the most *effective* remedy which was sought and the interests of the plaintiff also received considerable attention.

96 See Treitel 764-777.

97 See *Price* v *Strange* [1978] 1 Ch 337 at 369, per Buckley LJ.

98 See Heydon, Gummow and Austin *Cases and Materials on Equity,* 306-311; Burton & Winton, "Specific Performance: Mutuality: Damages in Lieu: A Question of Jurisdiction or Discretion" (1979) 8 Sydney LR 716 at 726.

In *K* v *K*[99] a decree of specific performance was refused because the court considered that the evidence disclosed an unfair bargain and the plaintiff had not been able to prove that the transaction was fair, just and reasonable, and that no advantage had been taken.[100] The facts which gave rise to the inference of unfairness were the husband preying on the wife's emotional state and the inadequacy of consideration.[101] The court approved dicta of the English courts to the effect that equity examines the conduct of the plaintiff before enforcing a bargain,[102] that a transaction resting on unconscionable dealing will not be allowed to stand and that where the parties have bargained on unequal terms, the plaintiff must prove that his or her conduct has been above reproach.[103]

In *Couch* v *Branch Investments (1969) Ltd*[104] Cooke J, in a minority judgment, considered a compromise to be unenforceable because it was too one-sided and the defendant had no independent legal advice.[105] On the other hand, in *Waimar Holdings Ltd* v *Dean,*[106] the court in enforcing the contract stressed that there was nothing unfair about it; there had been legal advice and no question of hardship was raised.[107]

McMullin J, in *Archer* v *Cutler,*[108] refused a decree of specific performance because of a lack of mental capacity combined with an unfairness of the bargain.[109]

In each of these cases, the *validity* of the contract was at issue because of some unfairness in the bargain itself. There have been suggestions, however, that even where the contract would not be set aside by the court, unfairness in some respect may lead to a refusal of specific performance.[110] The main difference in such a case would obviously be the still extant possibility of a claim for damages. It has been suggested by Crawford[111] that the two categories may be dealt with simultaneously, examples of the latter being scarce; in principle, however, there is an important distinction between them. The only occasion on which such a course of action has been considered by the New Zealand courts since 1970 is in the case of

99 [1976] 2 NZLR 31.
100 At 39.
101 This factor by itself, however, will not lead to interference by the court (39).
102 *Blomley* v *Ryan* (1956) 99 CLR 362 at 402.
103 *Slator* v *Nolan* (1876) IR 11 Eq 367 at 387.
104 [1980] 2 NZLR 314.
105 At 322.
106 [1981] 2 NZLR 416.
107 At 426.
108 [1980] 1 NZLR 386.
109 At 404. The two defences seem to overlap considerably: it was only possible to rely on mental incapacity because the bargain was unfair (401); the unconscionability was based on the defendant's disadvantaged bargaining position created by her unsoundness of mind, taken together with a sale at a price greatly below its true value and lack of independent legal advice (403-404). The mental incapacity arguments must, in any event, now be regarded as incorrect in the light of the Privy Council decision in *O'Connor* v *Hart* [1985] 1 NZLR 159.
110 Spry, op cit at 184-187.
111 (1966) 44 Canadian Bar Review 142 at 143 n 6.

Peeters v *Schimanski*[112] where Cooke J held obiter that, in a case where the defendant had been drinking before signing a contract, specific performance of the contract would have been refused, but an enquiry as to damages nevertheless ordered.[113]

This refusal of the courts to invoke their "equitable" jurisdiction is clearly based on the notion that equity will not enforce unconscionable contracts.[114] In some instances, however, equity will, according to *Halsbury,* neither avoid nor enforce the contract.[115] The difficulty with this type of approach is that, should equity refrain from granting the remedy on grounds of unfairness, it will by default be enforcing the contract at law; the whole purpose of contractual damages is to give the aggrieved party the benefit of the bargain. It also gives rise to a situation where one has to acknowledge the existence of degrees of unfairness. If a contract is so unfair as to be regarded as unconscionable,[116] it will be set aside; if, however, it is only slightly unfair, it will still be valid, but specific performance will be withheld.

It is submitted that there is no particular merit in this "punishment"; its only practical effectiveness would be in a case where damages would amount to considerably less than the value of performance. In such a case, the court is relying on the inadequacy of the law as a sanction against the plaintiff but nevertheless bringing about a result effectively negating the bargain in any event. It seems that this approach is based on the old subservience of equity to law and should not be encouraged. If a contract is to be regarded by the Court as unconscionable, it should not be enforced; it, on the other hand, it is not unconscionable, it should be enforced specifically should the plaintiff so desire and there be no objection as considered below. The only function of the middle path is to create uncertainty; there is no evidence that it serves a useful purpose in practice.[117] It is submitted too that ad hoc considerations of mistake, inadequacy of

112 [1975] 2 NZLR 328.

113 At 335. It was unnecessary for the court to follow this approach because it held that the contract had in any event come to an end (334). The case of *Conlon* v *Ozlins* [1984] 1 NZLR 489 was one where the Court of Appeal thought specific performance ought to be refused; this was, however, based on the wide discretion available to a court in terms of s7 of the Contractual Mistakes Act 1977. McMullin J mentioned the possibility of specific performance being refused at common law (at 503) but did not elaborate on the principles. McLauchlan "Mistake as to Contractual Terms Under the Contractual Mistakes Act 1977" (1986) 11 NZULR 123 is of the view that refusal of specific performance would have been the most suitable remedy in the *Conlon* v *Ozolins* situation. It is submitted, however, that this does not take sufficient account of the plaintiff's situation – it would be unduly oppressive to punish a purchaser who was not at fault while at the same time saddling the vendor with debt.

114 Cooke J referred to Vol 9 of *Halsbury* para 299 to derive support for his conclusion; a similar approach is seen in *K* v *K* and *Archer* v *Cutler,* supra.

115 Op cit n 114. See eg *Walters* v *Morgan* (1861) 3 DF & J 718; *Malins* v *Freeman* (1837) 2 Keen 25.

116 In the strict sense of the word.

117 It certainly would not have done so in *Peeters* v *Schimanski.* A similar attitude was adopted in *Dell* v *Beasley* [1959] NZLR 89, but, once again, it seems to have had little practical relevance – there was no suggestion that the damages would be worth less than performance.

consideration, etc, as factors leading to an unfavourable exercise of the court's discretion have no place in a proper model of the remedy of specific performance; they belong in an analysis of unconscionability.

If, then, the equitable refusal of specific performance under this head is to be limited to an invalidation of the control on grounds of unconscionability, the type of case normally considered here is in effect removed from the province of the discretionary refusal of a remedy; it belongs rather to the anterior inquiry as to whether there is a contract at all. That leaves, to act upon the discretion, those factors relating to the effect of the order.

(ii) Effect of the Order

Traditionally, various categories of contract were considered as unsuitable for the operation of the remedy of specific performance. Although most of these categories have not been the subject of discussion by the New Zealand courts, there have in any event been sufficient changes of attitude in the English courts to herald the changes which must come about.

Where a suitable substitute is readily available to the purchaser, the courts have refused this remedy.[118] The only possible justification for the rule is the subordination of equity to law which, it has been shown above, is not justified in New Zealand. Section 53 of the Sale of Goods Act 1908 specifically gives the court the discretionary power to order specific performance of specific or ascertained goods. Although the courts have interpreted this discretion as being subject to the traditional equitable considerations,[119] it seems that there is no reason why this should be the case – it certainly goes against the grain of the prima facie right accorded to the plaintiff in the cases discussed in the second part of this article.

Contracts involving personal services were long regarded as an area where the courts should not interfere because of the unpleasant relations which could result between employer and employee as well as the difficulty of enforcing such orders.[120] More recently however, with the advent of labour law and the importance which is now placed on employees' rights, it has become clear that this cannot be laid down as an absolute rule.[121] It would appear that each case should be decided on its facts and that only where such an order would in fact result in an unworkable relationship should it be refused.[122] This is in line with the suggestion made above that the court should consider the most appropriate remedy and grant that.

118 Treitel 764-765.

119 See *Borthwicks* supra at 548.

120 See *Chappell* v *Times Newspapers Ltd* [1975] ICR 145 at 178.

121 The various approaches which have been adopted by the courts are very neatly summarised by Warner J in *Irani* v *Southampton & South West Hampshire Health Authority* [1985] ICR 590; see, too Burrows "Specific Performance at the Crossroads" (1984) 4 Legal Studies 102 at 110 et seq; *Posner* v *Scott-Lewis* [1986] 3 WLR 531. Although it is more likely that an employee will be granted this remedy than an employer (see Collins 198) there is no reason in principle why the employer should be barred.

122 See *Irani* at 604; in that case it was stressed that there was no question as to the employer's faith in Mr Irani's honesty, integrity and loyalty. It must be remembered, however, that the case concerned only an interim injunction and is therefore of less significance than it might otherwise have been.

Where performance is impossible, it goes without saying that a court will not order specific performance. Where it is difficult to supervise, judges have shied away from making such an order, but without much support in principle. The real point is that if the defendant intends to flout the order he or she will do so whether it is difficult to supervise or not; in such a case it is a simple matter to request the court to grant an order for damages in lieu of specific performance.[123] Part of the reluctance of the courts to take the bull by the horns here may have stemmed from the situation prior to Lord Cairns' Act of 1858[124] and the notion which persisted before *Johnson* v *Agnew*[125] that a claim for specific performance precluded a subsequent change of mind and claim for damages. In *Tito* v *Waddell (No 2)*[126] Megarry VC stated that this was not an immutable rule, the real question being whether what had to be done was sufficiently defined.[127] He stressed, however, that a court would be slow to order specific performance where that would amount to a "sheer waste of time and money".[128] From the decision of the Court of Appeal in *Borthwick's* case, it seems clear that difficulty of supervision is a minor obstacle.[129]

Severe hardship to the defendant has been another conventional ground for declaring an order of specific performance to be unsuitable in a particular case, although its ambit is rather elusive. In some instances, cases which may be thought to fall in this category really belong to the field of unconscionability. It is, however, difficult to get away from the notion that it is generally very difficult for a party to claim that an order compelling what he or she has expressly agreed to do (or not to do) would cause undue hardship.[130] If it is something external to the contract which has changed, this may provide grounds for a defence of frustration; it may, however, simply be irrelevant as in *Brett Wotton Properties.* In that case, changes to the tax laws made an investment purchase by the defendant completely unviable. Nevertheless, Bisson J held:[131]

> While one has sympathy for the first defendants in that situation a change of circumstances subsequent to the contract being entered into is a business risk and is not a defence to specific performance of the contract where its terms are, as in this case, clear and not oppressive.

If, on the other hand, it is merely the personal circumstances of the party which have changed, these would normally not affect any contractual

123 This type of attitude is demonstrated in *Brett Wotton Properties:* "It is further ordered that any party is at liberty to apply to the court should any further direction be required to enable this order to be implemented." (25)

124 In terms of which the Courts of Chancery were given the powers to award such damages, which they had not previously possessed.

125 [1979] 2 WLR 487 (HL)

126 [1977] 1 Ch 106.

127 At 322.

128 At 327.

129 Supra n 95 and text. See Burrows op cit at 107 et seq.

130 The dictum of Cooke J in *Borthwicks* with regard to injunctions seems equally applicable to specific performance of positive obligations.

131 At 22.

obligations.[132] Any residual discretion which the court may have to exercise here would seem to be of comparatively rare application; it would have to be proved that the hardship would in fact amount to injustice.[133]

Although it has sometimes been stated that the plaintiff claiming specific performance must act promptly, it has been held that delay by itself is not sufficient to bar the remedy. Quilliam J stated in *Hickey* v *Bruhns*[134] that the reason for this limitation is the impression given to the other party that the contract has ceased to exist or that some breach has been ignored. This, said the court, could sway the balance of justice.[135] Such use of an equitable discretion cannot be faulted; it is only fair to allow a defendant to proceed on the basis of reasonable expectation and it really amounts to an election of remedy on the part of the plaintiff. As far as mutuality is concerned, the English courts have held that this does not affect the jurisdiction to grant specific performance although it may still influence the discretion.[136] Mutuality itself is something of a chimera; it has only arisen because of the courts' self imposed refusal to grant specific performance in certain classes of cases. Once it is accepted that the plaintiff must be willing and ready to perform[137] or to have performed already then the whole mythical beast begins to fade away. The court has to concern itself with the most appropriate remedy in the *instant* case, not with some possible future enforcement of the other party's obligations. If it is accepted that the whole enforcement process centres essentially on the willingness of parties to abide by it, then this concern is of little moment. The chief purpose of the doctrine of mutuality, it seems, is to provide a hook on which the unscrupulous may attempt to hang their defences.[138]

The position can be summarised, then, by stating that although the plaintiff prima facie has a right to specific performance of the contract, there may be circumstances which, because of the unfair effect the granting of the order would have, render it inappropriate; in such cases the court will exercise its discretion against the plaintiff. It seems, however, that no rigid categorisation is necessary or desirable and that the situations which demand this response will be relatively uncommon.

(b) Unfair to Refuse the Remedy

What have been examined so far are the factors which might compel the court to refuse the remedy in its discretion. There are, on the other hand, a number of situations in which the court is predisposed to grant specific performance.

132 See *Nicholas* v *Ingram* [1958] NZLR 972.

133 *Brett Wotton Properties* at 23. An interesting case where personal hardships led to a refusal of specific performance is *Patel* v *Ali* [1984] 2 WLR 960; [1984] 1 All ER 978. In that case the court developed a doctrine which could be described as a type of "equitable frustration" in order to allow the defendant to keep her house.

134 [1977] 2 NZLR 71.

135 At 77. A similar approach can be seen in the remarks of Beattie J in *Scott* v *Goode* at 494.

136 *Price* v *Strange* supra at 370.

137 See *Gurney* v *Gurney (No 2)* [1967] NZLR 922 and the discussion infra.

138 It has also provided much room for academic debate: see Burton & Winton supra n 75 and the authorities collected there.

Where there has already been performance or part performance on the part of the plaintiff, it has been said that the court will go to any lengths it can in order to compel performance by the defendant.[139] This would certainly accord with notions of reliance or reasonable expectation but it is difficult to see why *performance* on the part of the plaintiff should be the determining factor rather than any other act of reliance, such as consequent entry into another onerous contract. This consideration seems to be based on broad notions of fairness but in the final analysis there is no reason why specific performance should not be ordered as long as the plaintiff is ready and willing to perform in due course.[140]

The other notion which has influenced the courts is that the defendant may simply be raising technical matters in order to escape from what is now perceived as a bad bargain, although originally entered into with full knowledge. This was certainly in the mind of Wild CJ in *Bonner's* case[141] and was explicitly stated in *Newton-King* v *Wilkinson:*[142]

> This is clearly a case where a vendor seeks to avoid his bargain because, ex post facto an agreed transaction, he gets a substantially better offer.

In *McLachlan* v *Taylor,* Quilliam J in the High Court expressed a similar opinion:[143]

> . . .[T]he defendant has simply tried to escape the consequence of a contract into which he was, at the time, content to enter . . .

It is impossible not to see the clear policy reasons behind these statements: the courts will not assist defendants who are not bona fide. The corollary of this, however, is that specific performance should be granted unless there is a genuine reason rendering it inappropriate. Such genuine reasons, as the cases indicate, will be few and far between.

The Court of Appeal has stated the policy towards contracts: bargains entered into by individuals should be enforced unless enforcement would amount to the maintenance of a fraud.[144] "Enforcement" here would seem, however, to include compensation for breach. It is submitted that public policy goes further and requires primarily the *specific* enforcement of contracts, damages being only a second best. Such a policy could be said to have been consistently displayed, if not always voiced, in the New Zealand courts during the period under review and it is submitted that it should

139 *Price* v *Penzance Corporation* (1844) 4 Hare 506 at 508. This attitude was also adopted in *Upper Hutt Arcade* v *Burrell & Burrell Properties* supra at 703.

140 See *Gurney* supra. The position is obviously different where performance by the plaintiff is a condition precedent to the defendant's performance. In such situations questions of mutuality may also arise: see supra.

141 At 1027.

142 [1976] 2 NZLR 321 at 326.

143 At 284; it would appear that the Court of Appeal tacitly accepted this as correct.

144 See the judgment of McMullin J in *Couch* v *Branch Investments (1969) Ltd* [1980] 2 NZLR 314 at 336. Although this case dealt specifically with compromises, the principles stated by the court were phrased in very general terms. They are clearly subject to exceptions in the case of mistake, frustration, illegality, etc.

be acknowledged, regardless of unfortunate historical developments in the past.

IV Conclusions

New Zealand has had a unique opportunity to cast off the shackles which have arisen on the courts' power to grant the most appropriate remedy in order to redress a breach of contract. The common law has been bedevilled by the late interference of equity and even later unification of equitable and common law jurisdictions; the unity of jurisdiction in New Zealand has, however, created the potential for a rational development of remedies in line with public policy. By and large this development has occurred naturally; all that remains is for the courts to abandon the pretence of following the old common law distinction between the jurisdictions.