

7.5 Specific performance

1. A plaintiff may seek the equitable remedy of specific performance that a defendant be ordered to perform its contractual obligations as opposed to paying damages for breach of contract.
2. The dominant principle is that specific performance will only be granted if under all the circumstances it is just and equitable to do so.

Stickney v Keeble [1915] AC 386 at 419 (HL)

3. Specific performance is a discretionary remedy and is not available as of right.

Stickney v Keeble [1915] AC 386 at 419 (HL)

4. A court will exercise its discretion in a principled way.

Attorney General for England and Wales v R [2002] 2 NZLR 91 at 120 (CA)

Co-operative Insurance v Argyll Stores Ltd [1998] AC 1 at 16 (HL)

5. Specific performance will not usually be granted where damages would be an adequate remedy.

Attorney General for England and Wales v R [2002] 2 NZLR 91 at 120 (CA)

Damages will be likely to be an inadequate remedy and specific performance available if the subject matter of a contract is unique, such as land.

6. Specific performance will be granted instead of damages only where it can by that means do more perfect and complete justice.

Wilson v Northhampton & Banbury Junction Rly Co (1874) LR 9 Ch App 279 at 284 (HL)

7. On application for specific performance a court will consider the following factors and likely exercise its discretion against a decree:

- (a) If a contract has been procured by means that vitiate the contract (such as duress or undue influence) or even if the means are merely viewed by equity as unfair.

Attorney General for England and Wales v R [2002] 2 NZLR 91 at 121 (CA)

- (b) Where the conduct of the party seeking an order for specific performance disqualifies it from relief. Such conduct could include delay or acquiescence by a plaintiff.

Attorney General for England and Wales v R supra at 121

- (c) Where although the consideration is sufficient at law, it materially disadvantages the defendant in the eyes of equity.

Attorney General for England and Wales v R supra at 121

- (d) Where there is a lack of mutuality, such that a court could not order specific performance against the plaintiff if the contractual default had been by that party.

Attorney General for England and Wales v R supra at 121

- (e) Where there is difficulty in drafting a court order with sufficient precision to avoid wasteful litigation regarding future compliance with a decree.

Co-operative Insurance v Argyll Stores Ltd [1998] AC 1 at 13 (HL)

- (f) Where the contractual obligation sought to be enforced lacks sufficient clarity.

Co-operative Insurance v Argyll Stores Ltd supra at 14, 16–17

- (g) Where continued supervision by the court would be required, even if only to determine whether the court order had been breached.

Co-operative Insurance v Argyll Stores Ltd supra at 12–13

- (h) Where the contract is for personal services or services which otherwise involve relationships of mutual co-operation and confidence, though a court may grant a decree, for example where:
 - (i) A contract provides for arbitration machinery to resolve future disputes; and,
 - (ii) The agents or employees of the parties in a long term commercial trading contract could carry out the day to day operation of the contract without dispute.

Thomas Borthwick v South Otago Freezing Co Ltd [1978]
1 NZLR 538 at 549–551 (CA)

- (i) Where the contract is to carry on an activity such as operating a business, much less an unprofitable business.

Co-operative Insurance v Argyll Stores Ltd [1998] AC 1 at 13, 17–18 (HL)

Conversely a court is more likely to order that a defendant specifically perform (remedial) works to achieve an ascertainable result (such as repair of a leaky building).

Co-operative Insurance v Argyll Stores Ltd supra at 13
Downer Construction NZ Limited v Silverfield Developments Ltd [2007] 1 NZLR 785 at 801 (HC)

- (j) Where the loss to the defendant by having to comply with an order for specific performance would be greater than the plaintiff would suffer by the contract being breached.

Co-operative Insurance v Argyll Stores Ltd [1998] AC 1 at 15 (HL)

- (k) Where the court's means of ensuring compliance with a court order for specific performance are limited to imprisonment or a fine for contempt.

Co-operative Insurance v Argyll Stores Ltd supra at 12–13