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To Order Specific Performance?

by

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Reprinted from
(2010) 76 *Arbitration* 467–473

Sweet & Maxwell
100 Avenue Road
Swiss Cottage
London
NW3 3PF
(Law Publishers)

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1. INTRODUCTION

In 2006 I wrote an article describing my first two appointments as arbitrator in construction-related disputes.[1] This is the story of my 12th such appointment.

2. THE PARTIES AND THE CLAIM

The claimant was a private individual and the respondent was a building company. The claimant entered into a contract with the respondent for an extension to his property. He heavily amended the contract; for example, he all but deleted the clauses concerning variations, delay and disruption, extension of time and ownership of materials or goods. He had ticked almost every word that had been deleted and both parties had signed each and every amendment and deletion to the contract.

During the course of the work the claimant considered various changes, e.g. a second garage and the drainage layout: nothing seemed to be set in stone. He made planning applications for some of the proposed changes and asked the builder to prepare estimates for several of them.

The builder soon realised that, if the claimant wanted to carry out the proposed changes, then some of the building work already undertaken would be redundant. Some of the "completed" building work had also not been carried out in accordance with the contract; for example, the first-floor window was out of alignment, the roof light was out of position and different materials than specified had been used.

The claimant wanted all the work to be carried out "exactly" as stated in the contract drawings and specification, even if the respondent had used an equal or better alternative if he had been unable to find precisely the same material as specified.

3. THE DISPUTE AND MY APPOINTMENT

Following allegations by the claimant that the works were incomplete and had not been constructed in accordance with the contract, a dispute arose between the parties concerning the completion and rectification of the works.

The contract was the Federation of Master Builders' Plain English Domestic Building Contract. The claimant contacted the Federation of Master Builders (FMB) and asked it to help resolve his dispute with the respondent. The FMB liaised with both parties for over a year but the parties remained at odds.

The contract did not provide for arbitration, but with the parties' agreement I was appointed as arbitrator.

[1] Robert J. Gemmell, "Baptism of Fire?" (2006) 72 *Arbitration* 354.

4. THE PARTIES' REQUEST FOR SPECIFIC PERFORMANCE

The parties could not agree on the original scope of work, what work remained outstanding and what work was not built in accordance with the contract. The claimant wanted the respondent to complete the outstanding work and rectify all the alleged defects. The respondent wanted to complete the works, but did not agree on the scope of work to be completed or the extent of the alleged defects.

The claimant and respondent asked me to decide what work remained incomplete and what work had not been completed in accordance with contract. They also asked me to make an order for the completion of any outstanding work, and for the rectification of any work that had not been completed in accordance with the contract. Both parties represented themselves.

5. MY CONSIDERATIONS

I needed to satisfy myself that it was correct for me to proceed with the arbitration when both parties had agreed that I should make an order for specific performance. I understood that specific performance was an equitable remedy but that, ordinarily, the courts will not grant specific performance where damages are an adequate remedy.[2] In relation to building contracts, this seemingly simple statement has resulted in controversy. It has been said that in some cases specific performance is not generally available as a remedy.[3] At other times, the courts have readily granted the order.[4] The most contentious issue appears to be the ability and willingness of the court to supervise the carrying out of the contract.

The characteristic outcome for this type of dispute would be an award of "cost to complete" damages. This allows the claimant to pay a third party to complete the work, i.e. it is specific performance by a third party, it avoids supervision problems and is generally the wisest choice.

To put the supervision point in context, it can easily happen in cases of substantially defective performance that either specific performance or damages on a "cost to complete" basis would considerably exceed damages quantified on the normal "diminution in value" basis. The courts' relative preparedness to make a "cost to complete" award in construction cases is therefore something of a departure from the normal damages rules, a point made by Professor David Campbell, Durham Law School, in his discussion with me on the subject of specific performance and this article.

However, an arbitrator is empowered to make an order for specific performance under the Arbitration Act 1996 s.48:

> "(1) The parties are free to agree on the powers exercisable by the arbitral tribunal as regards remedies.
>
> (2) Unless otherwise agreed by the parties, the tribunal has the following powers.
>
> …
>
> (5) The tribunal has the same power as the court—
>
> (a) to order a party to do or refrain from doing anything;
>
> (b) to order specific performance of a contract (other than a contract relating to land)."

[2] Lord Redesdale in *Harnett v Yielding* (1805) 2 Sch. & Lef. 549 at 553; *Storer v Great Western Ry Co* (1842) Y. & C. Ch. 48 at 53; *Wilson v Northampton & Banbury Junction Ry Co* (1873–74) L.R. 9 Ch. 279 at 284 (Lord Selbourne); *Wolverhampton Corp v Emmons* [1901] 1 Q.B. 515 at 523; *Redland Brick v Morris* [1970] A.C. 652 at 655 (Lord Uphohn); *Co-operative Insurance Society Ltd v Argyll Stores* [1998] A.C. 1; [1997] 2 W.L.R. 898 (Lord Hoffman).

[3] *Wilkinson v Clements* (1872–73) L.R. 8 Ch. App. 96; *Errington v Aynesly* (1788) 2 Bro. C.C. 341; *Ryan v Mutual Tontine Westminster Chambers Assoc* [1893] 1 Ch. 116 at 128.

[4] *Wolverhampton Corp v Emmons* [1901] 1 Q.B. 515 at 524 (Lord Collins).

In this case, the Construction Industry Model Arbitration Rules (CIMAR rules) were incorporated into the contract; cll.12.6 and 12.7 state:

> "12.6 The arbitrator has the powers set out in Section 48 (3), (4) and (5) (Remedies).
> 12.7 Where an award orders that a party should do some act, for instance carry out specified work, the arbitrator has the power to supervise the performance or, if he thinks it appropriate, to appoint (and to reappoint as may be necessary) a suitable person to supervise and to fix the terms of his engagement and retains all powers necessary to ensure compliance with the award."

So under the Arbitration Act 1996 s.48(5)(b) and cl.12(7) of the CIMAR rules I had the power to make an award for specific performance, but should I do so? I consulted some authoritative textbooks on the matter, noting that the comments by Harris, Planterose and Tecks[5] and Rutherford and Sims[6] on orders for specific performance.

Harris, Planterose and Tecks:

> "[48F] Specific performance—Subs.(5)(b) Orders for specific performance are not usually made in the context of contracts for building work, for example, because they would require a high degree of specification of what precisely the respondent contractor had to do and a high level of supervision over a long period of time to ensure that he complied with the order. In addition, monetary compensation would usually be an adequate remedy since the claimant could use the money to pay a different contractor to carry out the work."

Rutherford and Sims:

> "48.7 … The power to order specific performance is one to be used with caution. The arbitrator should be careful not to put himself in a position where he may effectively become a certifier as to satisfactory performance. For example, an arbitrator may award that certain work under a building contract is incomplete and should be completed by the builder; but then what is the building owner's remedy if the completion work is unsatisfactory? The arbitrator may consider that the answer is to make a partial award for specific performance of the completion work and to make a final award when it has been completed.
>
> However, if by doing so he gives himself the responsibility of deciding whether or not the completion work is satisfactory and in accordance with the contract, he may effectively be making himself an expert certifier and possibly no longer protected by the immunity conferred by s.29. A possible answer may be for the arbitrator to direct that the completion work be supervised or inspected by an independent surveyor or architect and to make a final award on the basis of the supervisor's certificate that the work is satisfactory."

I also noted that Cato[7] says this:

> "The following are important facts which the arbitrator should bear in mind when drafting his award:
> 1. The relief [specific performance] is discretionary, not arbitrary, and must be exercised in accordance with the established legal and equitable principles.

[5] B. Harris, R. Planterose and J. Tecks, *The Arbitration Act 1996, A Commentary*, 3rd edn (London: Blackwell, 2003).

[6] M. Rutherford and J. Sims, *Arbitration Act 1996, A Practical Guide* (London: FT Law & Tax, 1996).

[7] D.M. Cato, *Arbitration Practice and Procedure, Interlocutory and Hearing Problems*, 3rd edn (London: Informa Finance, 2002), p.1387.

2. Specific performance is not an alternative to damages, and is applicable only where damages alone would not be an adequate remedy ….
3. The arbitrator must specify a time for performance, otherwise the claimant may not be able subsequently to take enforcement proceedings.
4. An order for performance of a contract involving continuous acts of supervision is not appropriate ….
5. It is usually not appropriate to make an order for performance of part of a contract ….
6. An arbitrator should only make a specific performance award that is capable of being monitored by him."

I therefore considered the following nine questions:

(1) Could I set out in my award a suitable specification of the work to be carried out by the respondent? If not, then I should not proceed.
Answer: I considered I could use the contract specification as the basis for my award. My view was that the contract drawings and specification were sufficiently clear in this regard, and the general approach of the courts seems to be that, provided the specification of the work is sufficiently clear (ignoring the question of whether damages are an adequate remedy), specific performance will be ordered.

(2) Could I give instructions for adequate supervision to ensure that the respondent complied with my directions? If not, then I should not proceed.
Answer: I considered that the parties could agree on a building inspector and that, if they could not, I could appoint one.

(3) Could I avoid putting myself in the position of being a certifier of satisfactory performance? If not, then I should not proceed.
Answer: I decided that I could direct that any outstanding or remedial work would be supervised and inspected by an independent building inspector and that I could make a final award on the basis of the inspector's certificate.

(4) Could I specify a time for performance so that the claimant would be able to take enforcement proceedings if necessary? If not, then I should not proceed.
Answer: I considered I could ask the respondent how long it would take to complete the work and that I could then review the original programme and form a view on how long the work would take. If necessary I could exercise my power under the Arbitration Act to appoint an assessor to advise me.

(5) Would a continuous act of supervision be required? If yes, then I should not proceed.
Answer: I considered that no such supervision would be required, that the respondent was capable of carrying out any work I directed unsupervised and that the completed works could be independently certified.

(6) Could I make an award that I would be capable of monitoring? If not, then I should not proceed.
Answer: I considered I could make such an award and that I could instruct a building inspector to visit the site as and when necessary.

(7) Could I award monetary compensation so that the claimant could pay a different contractor to carry out the work? (Academic, as the parties had agreed to an order for specific performance and the claimant had not asked for compensation.)
Answer: The claimant had not requested compensation and was only interested in having the building works completed by the original builder. The respondent had clearly stated that it wanted to complete the works. Both parties had therefore acquiesced in granting specific performance. I believed that I did not have jurisdiction to make an award of compensation.

The extent to which the parties acquiesced in the granting of specific performance (as opposed to either or both parties insisting on damages) affects the court's decision whether or not to award specific performance but has not often been before the court. In *Storer v Great Western Ry Co*[8] Knight Bruce V.C. (*arguendo*) considered it important that in *Franklyn v Tuton* [9] the defendant was not opposed to specific performance.

In the context of arbitration, although the Arbitration Act 1996 s.48(5)(b) gives the tribunal the same powers to award specific performance as the courts, the CIMAR rules para.12.7 gives the tribunal powers to make a satisfactory order for specific performance greater than those laid down by the courts.

However, I wonder whether a court would be prepared to enforce an arbitrator's order for specific performance by analogy with seeking the court's assistance to secure payment of an arbitrator's monetary award. Professor David Campbell suggests that a court would be wholly unprepared to do this because it would either have to place complete trust in the arbitrator's judgment that specific performance was possible or have itself to re-hear the arguments for specific performance (at least in regard to its practicality). If Professor David Campbell is correct, there would therefore be an effective prohibition on use of the Arbitration Act 1996 s.48(5)(b).

(8) Could I exercise the relief in accordance with established legal and equitable principles? (Academic, as the parties had agreed to an order for specific performance.)

Answer: It follows from the answer to question 7 above that I could do so.

(9) Would specific performance awarded as an alternative to damages and/or damages alone be an adequate remedy? (Academic, as the parties had agreed to an order for specific performance and the claimant had not asked for compensation.)

Answer: Since the parties had agreed to granting specific performance, I did not need to consider this question.

I therefore decided that I could and should proceed to make an interim award for specific performance.

6. ARBITRATION PROCEDURE

Directions

I set out my directions for the conduct of the arbitration in my Order for Directions No.1. The claimant submitted his claim and the respondent submitted its defence two weeks later. The claimant submitted his reply to the defence a week after that.

Meeting on site

Having received the claim, defence and reply, I decided to conduct a meeting and site visit to seek certain clarifications from the parties in respect of the submissions made and to conduct an inspection of the works.

[8] *Storer v Great Western Ry Co* (1842) 2 Y. & C. Ch. 48 at 51.
[9] *Franklyn v Tuton* 5 Madd. 469.

After the meeting and site visit I decided that, because of the extent of the alleged building defects, I needed to exercise my power under the Arbitration Act 1996 s.37 to instruct my own independent expert to inspect the works. Both parties agreed that I should instruct an independent expert building surveyor to prepare a written report, providing an expert opinion in respect of:

- Whether the works were undertaken and completed by the respondent in accordance with the contract.
- If any of the works were incomplete or not completed by the respondent in accordance with the contract, to advise me what rectification and/or completion works would be required to complete the contract.
- To determine, if at all possible, the extent of the damage caused to the property as a result of roof leaks.

Expert's survey and report

I immediately instructed a chartered building surveyor to conduct an inspection and I received his report a few weeks later. I sent the parties a copy, directing them to provide such comments as they might have. I then gave each party an opportunity to respond to the other's comments.

Interim award (award no.1): specific performance

My award for specific performance was an interim award. A final award was to be published on satisfactory completion of the works—or so I thought!

With regard to drafting awards of specific performance Mustill and Boyd[10] state:

> "The power conferred by this section does not, however, give the award the same force as an order of the High Court: it is still necessary to bring an action on the award or to apply for an order under section 26 of the Act for leave to enforce the award in the same manner as a judgment or order, before an award of specific performance can be enforced by sequestration or committal.
>
> Since the award must be in a form capable of enforcement as a judgment, an award which requires a person to do an act must specify the time within which the act is to be done, unless the order is for the payment of money, possession of and, or delivery of goods."

In my award, I set out the work that had to be carried out, the timescale for performance and the sanction if the respondent failed to perform satisfactorily within the timescale. The sanction was "damages to be assessed".

Interim award on costs (award no.2)

I made an order for directions in respect of the costs of the arbitration up to and including my interim award on costs (award no.2). Once I had received the parties' submissions on costs I made my interim award on costs (award no.2).

Interim award (award no.3): Non-compliance with award for specific performance

My interim award (award no.1) had been taken up on April 3, 2007. I had set the time for performance of the work, and the work should have been completed on or before August 21, 2007. Once that date had passed, I directed the parties to advise me whether the works

[10] M.J. Mustill and S.C. Boyd, *Commercial Arbitration*, 2nd edn (London: Sweet & Maxwell, 1991), p.389.

were complete. They confirmed that the works had not even started! I therefore published my interim award no.3 to the effect that the works had not been carried out, or even started, by the respondent in accordance with my interim award (award no.1).

Final award on costs (award no.4)

After I had received the parties' submissions on costs for the period from my interim award no.2 until the end of the arbitration process, I made my final award on costs. The arbitration was at an end and I was functus officio.

7. EFFECT OF THE ORDER FOR SPECIFIC PERFORMANCE

In the end, the respondent simply ignored my interim award no.1, i.e. the order for specific performance. In December 2009, when I decided to view the property from a distance, just to satisfy my own curiosity, it was obvious that the building works were still not complete.

8. CONCLUSION

With the benefit of hindsight, whilst I am not entirely surprised by the difficulties encountered and the eventual outcome, I still consider that I was correct to make the order for specific performance. The parties were in agreement that I should do so, and how was I to know that the builder simply would not carry out the works in accordance with my order for specific performance? Who am I to refuse the parties' wishes? At the preliminary meeting, I did emphasise my concerns about making an order for specific performance and hinted that the parties might wish to take advice on this matter; neither party did and they both agreed that I should continue. However, I can only emphasise just how hazardous it is to elect specific performance in such circumstances; just how real is the arbitrator's power to award it? From the claimant's point of view, how he probably wishes he had claimed damages instead!