University of Dayton Law Review

Volume 7 | Number 1 Article 3

1981

Judicial Attitudes toward Specific Performance of Construction Contracts

Eliot L. Axelrod
Baruch College

Follow this and additional works at: https://ecommons.udayton.edu/udlr

Recommended Citation
Axelrod, Eliot L. (1981) "Judicial Attitudes toward Specific Performance of Construction Contracts," *University of Dayton Law Review*: Vol. 7: No. 1, Article 3.
Available at: https://ecommons.udayton.edu/udlr/vol7/iss1/3

This Article is brought to you for free and open access by the School of Law at eCommons. It has been accepted for inclusion in University of Dayton Law Review by an authorized editor of eCommons. For more information, please contact mschlangen1@udayton.edu, ecommons@udayton.edu.

JUDICIAL ATTITUDES TOWARD SPECIFIC PERFORMANCE OF CONSTRUCTION CONTRACTS

*Eliot L. Axelrod**

I. Introduction

Specific performance has long been recognized in contract law as the fundamental alternative to monetary relief, when such relief is deemed inadequate. Historically, however, the general rule has been to deny decrees for specific performance when a contract to construct or repair is involved. Reasons traditionally advanced for these denials include the availability of damages as an adequate remedy at law, the lack of sufficient contractual details necessary to fashion a meaningful decree, and the practical difficulties underlying supervision of the contract by the court. Some modern courts, on the other hand, have suggested that the difficulties envisioned by the traditionalist courts are more imagined than real, and have routinely granted specific performance even when rather complex building contracts are at issue.

This article will explore the development of these two conflicting approaches and the rationales advanced to support them. Following an examination of the relevant historical context which shaped the traditionalist approach into its present form, the methods and reasoning of both views will be analyzed with the objective of determining which is more properly suited to serve the needs of a highly industrialized modern society. To the extent that the roots of the traditionalist approach are grounded in the history of the High English Court of Chancery, the concerns advanced during that period as reasons to deny specific performance of construction contracts are largely without foundation today. This article will conclude, therefore, that a more liberalized view toward construction contracts and specific performance is both warranted and desirable in order to serve more adequately and efficiently the needs of an increasingly complex society.

II. A Struggle for Domain

One may trace the origins of many of the principles and doctrines of modern equity to the English High Court of Chancery, as it existed during the Middle Ages. Therefore, to aid in understanding precisely

* B.S., New York University 1964; J.D., New York Law School 1968; Associate Professor Baruch College The City University of New York.

Published by eCommons, 1981

how the traditional model regarding specific performance of construction contracts was developed, a brief historical survey describing the remedial justice system of Medieval England is presented.

Following the Norman Conquest in 1088, William the Conqueror decided to retain the local Saxon Courts then in existence.[1] The county, hundred, borough and manner courts continued to be the tribunals of first resort for ordinary disputes.[2] Supreme judicial authority, however, remained vested in the King, who exercised his prerogative power with the assistance of his King's council or Curia Regis.[3]

Originally, the Curia Regis was a single itinerant entity which followed the King in his journeys across England.[4] It was composed of the King's tenants in chief, certain royal officials such as the chancellor, treasurer, chamberlain and sheriff, and anyone else whom the King chose to summon.[5] It appears that the council assembled on two principal types of occasions. On important occasions, it was a large assembly composed of all the leading landowners and officials of the country.[6] It was such an assembly as this which decided important and extraordinary Constitutional matters.[7] The ordinary work of government, however, was performed by a small body of officials who met continuously.[8] Gradually, the functions of these two assemblies became formally separated;[9] the large assembly, or special council, which later became Parliament, became advisors to the King on legislative and judicial matters,[10] while the small assembly, or ordinary council developed into the judicial center of the Kingdom, not because it was a court *per se,* but rather because in it resided the supreme judicial power of the Kingdom.[11] Out of this ordinary council, three courts eventually arose: the Court of the King's Bench, the Court of Common Pleas and the Court of the Exchequer.[12]

1. G. BISPHAM, BISPHAM'S PRINCIPLES OF EQUITY 3 (9th ed. 1921) [hereinafter cited as BISPHAM]; J. POMEROY, 1 POMEROY'S EQUITY JURISPRUDENCE 14 (5th ed. 1941) [hereinafter cited as 1 POMEROY'S EQUITY JURISPRUDENCE].

2. *See* note 1 *supra.*

3. BISPHAM, *supra* note 1, at 4.

4. W. HOLDSWORTH, 1 A HISTORY OF THE ENGLISH LAW 35 (7th ed. 1956) [hereinafter cited as 1 HOLDSWORTH].

5. J. BALDWIN, THE KING'S COUNCIL DURING THE MIDDLE AGES 3 (1965) [hereinafter cited as BALDWIN]; 1 HOLDSWORTH, *supra* note 4, at 35.

6. 1 HOLDSWORTH, *supra* note 4, at 35.

7. *Id.*

8. *Id.*

9. BALDWIN, *supra* note 5, at 3; 1 HOLDSWORTH, *supra* note 4, at 35.

10. BISPHAM, *supra* note 1, at 4.

11. *Id.* at 4, 5.

12. *Id.* at 5-7. It appears that the Court of the King's Bench arose out of a desire to insure proper administration of the law and also to increase the royal influence.

https://ecommons.udayton.edu/udlr/vol7/iss1/3

Closely affiliated with the royal council was the office of the Chancellor. This office existed before the Conquest, and, as with the local Saxon courts, was retained by William.[13] The Chancellor was characterized as the "King's natural prime minister,"[14] and, through his office of the Chancery, performed a variety of judicial and administrative functions.[15] One of his most important functions was to authorize complainants, by means of the issuance of writs, to bring their claims before one of the three King's courts.[16] This was not an insignificant function, for without the Chancellor's authorization, no action could be brought in the King's court excepting those directly concerning the King.[17]

These writs were, however, strictly construed. If a plaintiff's cause of action could not fit into one of these existing writs, he had no remedy at law. In such circumstances, the plaintiff's exclusive recourse

---

BISPHAM, *supra* note 1, at 6. Justices from the council went out into the counties and held county courts. *Id.* Before a case was tried, however, the justice met with his fellow jurists to settle the exact factual matters in dispute and to determine any questions of law that were involved. *Id.* at 7. The justices who met for this purpose came to be known collectively as the King's Bench. *Id.*

The Court of Common Pleas developed because of the ambulatory nature of the King and the council. POMEROY'S EQUITY JURISPRUDENCE *supra* note 1, at 15. In early times, the council accompanied the King in his journeys and judicial business was conducted wherever the King was holding court. *Id.* at 16. The transitory nature of this court caused great inconvenience to common suitors, in that they often had to pursue the King great distances to obtain justice. *Id.* This problem was remedied by the Magna Carta, which provided in one of its articles that "Common Pleas shall no longer follow the King." *Id.* Justices were appointed to hear purely civil matters (common pleas) and this new tribunal, the Court of Common Pleas, was fixed at Westminster. *Id.*

The Exchequer was originally an office that dealt only with revenue matters. In arranging his government, William the Conqueror established a board of high officials to superintend and manage the royal revenues, and a number of barons, with the chief justiciary, were required to attend the sittings of this board, in order to decide any legal questions which might arise. *Id.* In time, this board's jurisdiction was expanded through the use of legal fictions and it eventually developed into the Court of the Exchequer. *Id.*

13. POMEROY'S EQUITY JURISPRUDENCE, *supra* note 1, at 16.
14. T. TOUT, PLACE OF EDWARD II IN ENGLISH HISTORY 58 (1920).
15. The Chancellor's duties included:
    (1) the issuing of original writs so that suitors could have their suits heard before one of the three royal courts;
    (2) the reviewing of all treaties with foreign states;
    (3) the reviewing of all royal grants;
    (4) serving as chief adviser to the King; and
    (5) serving as the absolute proprietor of a prodigious mass of eccliastical patronage.

1 HOLDSWORTH, *supra* note 4, at 396-97.

16. BISPHAM, *supra* note 1, at 7; 1 HOLDSWORTH, *supra* note 4, at 398.
17. BISPHAM, *supra* note 1, at 7.

Published by eCommons, 1981

was to apply for relief directly to the council, which still retained its general and supreme authority.[18] In considering these applications, the advice of the Chancellor would naturally be followed, as the office of the Chancery determined whether the case fell under one of the existing writs.[19] Eventually, these cases were referred directly to the Chancellor himself, probably because the council believed it should deal exclusively with the more pressing matters of government.[20] Thus, the chancellor became renowned as the official who could pursue justice, regardless of whether or not a remedy existed at law.[21]

This dilatation in the scope of the Chancellor's influence was also hastened by several problems which existed with the common law court system during this time. First, the results obtained under the common law were often harsh and unreasonable. This problem was, at its foundation, largely due to the tendency of common law judges to adhere rather blindly to precedent.[22]

> The frequent occurrence of cases in which risks of law produced manifest injustice, and of cases to which the legal principles as settled by precedents could not apply, and the unwillingness of the judges to allow any common law modification of the doctrines once established by their prior decisions, furnished both the occasion and the necessity for another tribunal which should adopt different methods and exhibit different tendencies.[23]

Second, since the form of the existing writs was so rigid and precise, there were a number of injuries for which no remedy at law existed.[24] The complainant either had to torture the language of his writ in hope of fitting it into the existing "pigeonholes," or suffer a wrong without legal redress. Third, the court system was quite simply not designed nor equipped to fulfill the legal needs of a rapidly developing society, as England evolved from feudalism into a more modern social and industrial structure.[25] A final and perhaps more collateral factor was that an ambitious Chancellor, who desired increased influence for his of-

18. *Id.* at 8.
19. *See* 1 HOLDSWORTH, *supra* note 4, at 403.
20. *Id.*
21. *See* 1 HOLDSWORTH, *supra* note 4, at 402-03.
22. 1 POMEROY'S EQUITY JURISPRUDENCE, *supra* note 1, at 21.
23. *Id.*
24. *Id.* at 31. This lack of remedial instruments was chiefly felt in the area of personal actions. No contract could be enforced unless it created a certain debt, or unless it was embodied in a sealed writing. No means was given for the legal redress of a wrong to person or property, unless the tortious act was accompanied by violence. *Id.*
25. *Id.* at 28-29.

https://ecommons.udayton.edu/udlr/vol7/iss1/3

fice, would naturally be inclined to employ his own extraordinary jurisdictional power than to direct that a writ should issue in order to bring the cause before the courts.[26] Therefore, several structural deficiencies combined with an element of human nature tended to accelerate the Chancellor's increasing influence.

This increase did not go unnoticed by the common law courts. Power abhors a vacuum, and any dilatation of the Chancery's power often was indicative of a corresponding contraction of the common law court's domain. The ensuing struggle for supremacy between the court of chancery and the court of law was marked, from the reign of Richard II (1377-1399), by numerous petitions presented by the Commons alleging various abuses against the Chancellor, and by several acts of Parliament recognizing and, to some extent, regulating the latter's jurisdiction.[27] As the Chancellor's influence increased, louder and more frequent complaints were heard from the common lawyers as well. In fact, the question was so fundamental that it occasioned a literary controversy.[28]

This struggle climaxed during the reign of James I (1603-1625). At the close of the fifteenth century, the Chancellor had initiated the practice of issuing injunctions to prevent parties from proceeding at law, or if they had already done so, from enforcing judgment.[29] These injunctions were issued not only against the parties, but also against their counsel.[30] Predictably, the common law judges were hostile to such treatment, and did not receive the injunctions warmly. They believed, quite legitimately, that their supremacy was at stake.[31] Lord

---

26. BISPHAM, *supra* note 1, at 9.

27. Hohfeld, *The Relations Between Equity and Law*, 11 MICH. L. REV. 537, 548 (1912).

28. 1 HOLDSWORTH, *supra* note 4, at 460. The controversy appeared in the Doctor and Student, a Dialogue between a Doctor of Divinity and the Student of the common law, authored by Christopher St. Germain in about 1523. *Id.* Germain discussed the relation between law and equity with a bias in favor of equitable jurisdiction. *Id.* It was answered by a sergeant, who, taking the strict common law line, stated: "I marvail much what authority the Chancellor has to make such a writ [a writ for an injunction] in the King's name, and how he dare presume to make such a writ to let the King's subjects to sue his laws; the which the King himself cannot do right wisely. . . ." *Id.* He also argued that the equity of the Chancellor was "wholly uncertain and arbitrary" and that the Chancellors thought the common law needed amendment, only because they were eccliastics and "knew not its goodness." *Id.*

29. *Id.* at 459.

30. *Id.*

31. *See, e.g.*, Throckmorton v. Finch, Third Instit. 124 (1598) where the court stated:

> If the party against whom judgment was given, might after judgment was given against him at common law, draw the matter into Chancery, it would tend to the

Published by eCommons, 1981

Coke decided in several cases that imprisonment for disobedience of the injunctions issued by the chancery was unlawful.[32]

Thus, this conflict over the jurisdictional domain of the chancery and the common law courts continued. Throughout this conflict, the chancery courts believed it imperative that their dignity and influence be maintained.[33] They were quite sensitive and somewhat wary of any request for relief that could not be strictly enforced, for any order issued by the chancellor about which he could not be certain of complete enforcement would jeopardize that dignity.[34] Thus developed the Chancery's increasing reticence with respect to decrees involving complex details which had to be supervised closely by it.[35] This had the result of the Chancellor generally refusing to grant decrees for specific performance in cases which required several acts to be performed. Supervision, it was thought, of multiple or continuous acts was too difficult, and consumed an excessive and unwarranted amount of the court's time.[36]

Further, in keeping with the court's interest in maintaining its dignity, specific performance was also denied when the court believed that proper enforcement of the decree would require a particular skill or expertise which it did not possess.[37] This attitude of denying specific performance based on the court's belief that the decree would require "prolonged supervision which its ordinary means and instrumentalities might not be able to carry out"[38] resulted in the formulation of a general rule: specific performance would not be granted in any contract involving building or repair.

The historical background for equity's bias against granting specific performance in certain cases raises one immediate difficulty. One must question just how valid that attitude is now that the jurisdictional dilemma raised by English courts' conflict is no longer a major

---

subversion of the common law, for that no man would sue at the common law, but originally begin in Chancery, seeing at last that he might be brought thither. *Id.* at 128.

32. 1 HOLDSWORTH, *supra* note 4, at 461. *See, e.g.*, Heath v. Rydley, Cro. Jac. 335 (1614) where Lord Coke stated: "If any court of equity doth intermiddle with any matters properly triable at the common law, or which concern freehold, they are to be prohibited."

33. Pound, *The Progress of the Law - Equity,* 33 HARV. L. REV. 420, 434 (1919).

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id. See also* Paxton v. Newson, 2 Sm. & Giff. 437, 65 Eng. Rep. 470 (1854); Mosely v. Virgin, 3 Ves. 184, 30 Eng. Rep. 959 (1794); Errington v. Aynesley, 2 Bro. C. C. 341, 29 Eng. Rep. 191 (1788).

https://ecommons.udayton.edu/udlr/vol7/iss1/3

concern. Or, again, the argument could be stated syllogistically: equity courts once hesitated to grant specific performance largely because they were in conflict with common law courts; that conflict no longer exists; therefore, courts should be more willing to grant specific performance of construction contracts. Lest this argument be attacked as based exclusively upon an historical perspective, perhaps other reasons existed for the American traditional approach that adopted many of the same reasons for denying specific performance that were advanced by the Chancery courts in England.

III. Traditional Approach

Traditionally, American courts have followed the reasoning of the older English chancery cases in refusing to grant decrees for specific performance of construction contracts.[39] The nature of the difficulties

39. *See, e.g.*, Marble Co. v. Ripley, 10 Wall U.S. 339 (1870); Oregonian Ry. Co. v. Oregon Ry. & Nav. Co., 37 F. 733 (Cir. 1885); Crane v. Roach, 29 Cal. App. 584, 156 P. 375 (1916); Robinson v. Luther, 134 Ia. 463, 109 N.W. 775 (1906); Madison Athletic Ass'n v. Brittin, 60 N.J. Eq. 160, 46 A. 652 (1900). For an exhaustive list of cases where specific performance of a construction contract was denied, *see* J. POMEROY, POMEROY'S SPECIFIC PERFORMANCE OF CONTRACTS, 61-62 nn. § 23(1) and § 23(a) (3d ed. 1926).

Exceptions to the general rule exist, though they are not very sharply defined. One court has stated that a decree for specific performance of a building contract will be granted if:

> (1) The building was to be done upon the land of the person who agreed to do it. (2) The consideration for the agreement, in every instance was the sale or conveyance of the land on which the building was to be erected, and the plaintiff had already by such conveyance on his part, executed the contract. (3) In all of them the building was in some way essential to the use or contributory to the value, of adjoining land belonging to the plaintiff.

Ross v. Union Pac. Ry. Co., 20 F. Cas. 1245, 1249 (C.C.D. Kan. 1863) (No. 12,080). The English case of Mayor of Wolverhampton v. Emmons, 1 Q.B. 515 (1901) (quoted by Professor Williston in his treatise as the authority for the exceptions to the general rule; *see* S. WILLISTON, 11 WILLISTON ON CONTRACTS 765 (3d ed. 1968)) states the requirements as follows:

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

1 Q.B. at 525. Professor Williston notes, however, that "not all decisions where relief has been granted fulfill the third requisite, which seems merely one illustration of where the second requisite is filled. 11 WILLISTON at 765.

Thus, it appears that the instances where specific performance of a building contract will be granted are not clearly defined. Professor Corbin's explanation of this phenomena is probably the most satisfactory. He states that:

Published by eCommons, 1981

inherent to such decrees was expressed in an early New York case where a lessee sought to compel his lessor to reconstruct a leased building:

> The court must first adjudge what repairs are to be made and the time within which they are to be done. When this is accomplished more serious difficulties remain. The idea that a court can appoint a receiver to take possession of the property and cause the work to be done, with money furnished by the defendant, would be, in the language of Lord Worthington, absurd. The mode, if undertaken, must be for the court first specifically to determine what shall be done, and when and how, and then to enforce performance by attachment, as for contempt in case of alleged disobedience. Then will arise not only the question, whether there has been substantial performance, and if found not, whether the defendant had any such excuse therefore as will exonerate him from the contempt charged, and in case of performance, but not in as beneficial a manner adjudged, the compensation that should be made for deficiency. It is obvious, that the execution of contracts of this description, under the supervision and control of the court, would be found very difficult if not impractical. . . It is for these reasons that such powers have never been exercised in this country.[40]

Certainly, in some cases, the concerns expressed by the *Beck* court are legitimate, and "[i]t is clear that a decree for specific performance should not be granted if the court is going to be unable to enforce it effectively or to pass intelligent judgment on the question of whether its order has been obeyed in good faith."[41] But, "it is equally clear that in some cases the Chancellors and their present successors on the bench have been too timorous and too doubtful of their own competency and of the effectiveness of the means of enforcement at their command."[42]

This rather conservative judicial attitude concerning court supervision of construction contracts was demonstrated by the court in *Besinger v. National Tea Co.*[43] Besinger, a landowner, sought specific

---

> [S]ometimes the specific case has been held to be within some alleged exception to the general rule and various special requirements have been suggested. Probably the best that can be said of these cases is that some courts are more liberal than others in their willingness to decree specific performance and less fearful of the difficulties. The greater the hardship of the plaintiff's case, the clearer the extent of the public interest, the more likely it is that specific performance will be decreed.

A. CORBIN, 5A CORBIN ON CONTRACTS 265-67 (1964).

40. Beck v. Allison, 56 N.Y. 366, 370-71 (1874).

41. A. CORBIN, 5A CORBIN ON CONTRACTS 257 (1964) [hereinafter cited as CORBIN].

42. *Id.*

43. 75 Ill. App. 2d 395, 221 N.E.2d 156 (1966).

https://ecommons.udayton.edu/udlr/vol7/iss1/3

performance of a lease contract which provided that the lessee was to construct a supermarket on the leased premises.[44] The building to be constructed was described as:

> a fully improved commercial building having a fully enclosed area of not less than ninety-three thousand square feet and suitable for use as a food supermarket or discount store. The building shall be of as good or better quality and workmanship as the commercial building recently constructed for and a portion of which is presently operated by lessee as a food supermarket in Rolling Meadows, Ill.[45]

The Chancellor held that he could not decree specific performance because "under settled law and the circumstances of the case he was not authorized to supervise the detailed planning and construction of the fully improved commercial building which the lease required National Tea [the lessee] to build."[46]

Besinger's subsequent appeal was based upon two major contentions. First, he argued that a decree of specific performance would not entail extensive supervision by the court, to the extent that the essential details (e.g., that the building was to be 93,000 square feet, and of "as good or better quality" as Rolling Meadows supermarket) were actually in the lease.[47] Besinger emphasized that National was constructing the building for its own use for a period of at least 15 years.[48] Further, the building plans and specifications (which required the lessor's approval)[49] "would be approved as long as they [were] for a building of the type and size specified in the lease."[50]

---

44. Besinger had entered into negotiations with National Tea to lease his property. As a result of these negotiations, Besinger subsequently mailed a written commitment. Besinger prepared a draft lease and submitted it to the company for their signature, but they refused to sign. This refusal resulted in Besinger's present action. The Appellate Court, however, chose to frame the issue not merely as a "judicial determination of the existence of a lease agreement" but as a question of "which form of relief is available to plaintiff." 75 Ill. App. 2d at ____, 221 N.E.2d at 158.

45. 75 Ill. App. 2d at ____, 221 N.E.2d at 157. The lease further provided that:

> Prior to the time that Lessee shall commence construction of the Building, Lessee shall submit the plans and specifications for the Building to the Lessor for Lessor's approval. Lessee shall also provide, furnish and maintain a parking lot area suitable for the operation of the Building to be constructed by Lessee, and any and all outbuildings, service areas, driveways and all other structures necessary and suitable for the conduct of Lessee's business.

Id. at ____, 221 N.E.2d at 157.

46. 75 Ill. App. 2d at ____, 221 N.E.2d at 157.

47. *Id.* at ____, 221 N.E.2d at 158.

48. The term of the lease was to be for 15 years, with three options of renewal for terms of five years each. *Id.* at ____, 221 N.E.2d at 157.

49. *See* note 44 *supra.*

50. 75 Ill. App. 2d at ____, 221 N.E.2d at 158.

Published by eCommons, 1981

Besinger's second argument was more theoretical than his first. Notwithstanding the admitted need for some degree of judicial supervision, Besinger pointed out that the modern tendency was for equity to decree specific performance when the amount of supervision necessary is not excessive and damages are inadequate.[51]

The Appellate Court, nevertheless, affirmed the Chancellor's denial, believing that "[d]ue to the absence of specifications and plans, the Chancellor would be unable to order the construction of a particular building or be able to determine that the resultant building constituted no greater burden on the defendant than it had assumed."[52] The court added that "even if the plans and specifications had been agreed upon, it is doubtful whether specific performance would be available, for the decree would necessitate constant and prolonged judicial supervision of the construction operations."[53]

The attitude of the *Besinger* court is in many ways typical of those courts which adhere stubbornly to the traditional approach, and refuse to attempt even slight supervisory effort when a construction contract is involved.[54] Significantly, although the *Besinger* court acknowledged that the type of building, its purpose, minimum enclosed area, and standard of quality and workmanship were all specified and agreed upon, it nevertheless concluded that there was an absence of "specifications."[55] While it is true that there existed lack of specificity with respect to certain details of plumbing, heating, the number and location of service areas, and driveways,[56] these details were similar to those present in the Rolling Meadows store.[57] Also, National's food stores were recognized nationwide by their distinctive designs.[58] This factor alone would make the criteria for the project less subjective, and more independent of strict judicial supervision. Finally, Besinger's own admission that the specifications would be approved by him so long as they were generally for a building of the type and size specified in the lease indicates a degree of flexibility within the lease itself which would further reduce the extent of court involvement.[59]

---

51. *Id.*
52. *Id.*
53. *Id.* at ____, 221 N.E.2d at 159.
54. *See* note 38 *supra*.
55. 75 Ill. App. 2d at ____, 221 N.E.2d at 158.
56. *Id.* at ____, 221 N.E.2d at 158.
57. *See* text accompanying note 44 *supra*.
58. 75 Ill. App. 2d at ____, 221 N.E.2d at 158.
59. The *Besinger* decision has been cited as an example of the "judiciary's lack of concern for administering justice and its steadfast adherence to precedent." Note, *Specific Performance of Construction Contracts - Archaic Principles Preclude Necessary Reform*, 47 NOTRE DAME LAW. 1025, 1030-31 (1971). This characterization would

https://ecommons.udayton.edu/udlr/vol7/iss1/3

Some more enlightened courts have not focused exclusively on inherent difficulties of supervising specific performance decrees. They, on the other hand, tend to examine whether the difficulties of enforcing and supervising the execution of a decree would outweigh the "importance of specific performance and the inadequacy of damages," as well.[60] While those courts which employ this balancing test are decidedly more progressive than courts which unresponsively adhere to the general rule and its rigid exceptions,[61] it appears that a number of them have given disproportionate weight to the difficulties of supervising the decree, and thereby denied specific performance.[62]

One court that gave undue weight to the alleged difficulty of enforcement decided *Northern Delaware Industrial Development Corp. v. E.W. Bliss Co.*[63] In that case, the defendant-contractor, pursuant to a contract with the plaintiff, was to furnish all labor, services, materials, and equipment necessary to expand the premises of the plaintiff's steel mill.[64] As a result of the defendant's failure to comply with the work schedule requiring two shifts of workers per day at certain specified times, plaintiff sought a decree for specific performance.[65] His decree directed the defendant to requisition at least 300 additional construction workers.[66] The Court refused to grant the decree, stating that specific performance was "inappropriate in view of the: impracticability if not impossibility of effective enforcement by the Court of a mandatory order designed to keep a specific number of men on the job at the site of a steel mill which is undergoing extensive modernization and expansion."[67]

---

seem to be valid because although Besinger cited four cases where specific performance of a building contract was decreed, the court stated that he had found no Illinois case where specific performance of a building contract was granted. 75 Ill. App. 2d at ____, 221 N.E.2d at 158-59.

60. *See* City Stores v. Ammerman, 266 F. Supp. 766 (D.D.C.), *aff'd. sub nom* Ammerman v. City Stores, 394 F.2d 950 (D.C. Cir. 1968); Northern Delaware Indus. Dev. Corp. v. E.W. Bliss Co., 245 A.2d 431 (Del. Ch. 1968); Zygmunt v. Avenue Realty Co., 108 N.J. Eq. 462, 155 A. 544 (1931).

61. *See* note 38 and accompanying text *supra.*

62. *See* Northern Delaware Indus. Dev. Corp. v. E.W. Bliss Co., 245 A.2d 431 (Del. Ch. 1968); Edelen v. Samuels, 126 Ky. 295, 103 S.W. 360 (1907); DiCataldo v. Harold Corp., 15 N.J. Super. 471, 83 A.2d 545 (1951).

63. 245 A.2d 431 (Del. Ch. 1968).

64. *Id.* at 432.

65. *Id.*

66. Northern Delaware reasoned that since defendant, at the time of filing of the complaint, was operating one shift per day which ranged in size from 192 to 337 workers, an appropriate remedy would be a court order directing Bliss to employ not less than 300 construction workers on each of two shifts, seven days per week. *Id.*

67. *Id.* at 433.

Published by eCommons, 1981

As one commentator has concluded, the court probably misconstrued the role it would have played if it had granted the decree for specific performance.[68] The court did not seem overly concerned with directing Bliss to requisition the requested 300 workers, but rather with the ramifications of trying to keep them on the job.[69] The court probably exaggerated this concern, as the 300 workers would probably have been more than willing to remain on the job, so long as Bliss was willing to pay them. Thus, the genuine task was compelling Bliss to hire and pay the workers, and not, as the court believed, compelling the individual workers to stay on the job.

Logic similar to that of the *Northern Delaware* court was employed in *DiCataldo v. Harold Corp.*[70] In that case, the court refused to grant specific performance of a construction contract which required the defendant to construct a house on a lot that was to be conveyed by the defendant to the plaintiff because of the "practical inability of the court to compose a judgment or decree embracing with precision the specifications of the work to be done and to supervise its performance,"[71] notwithstanding the fact that the contract included many of the terms associated with the construction and sale of the building.[72]

Cases such as *Besinger* and *Northern Delaware* demonstrate that many courts tend to give undue emphasis to the supposed difficulties of construction contract supervision, and, in so doing, tend to ignore the basic theory underlying equity.[73] Courts sitting in equity have tradi-

68. *See* Note, *Specific Performance of Construction Contracts - Archaic Principles Preclude Necessary Reform,* 47 NOTRE DAME LAW. 1025, 1029 (1971).

69. In considering plaintiff's motion for reargument, the court stated that requiring the defendant to hire the 300 workers would "run afoul of the well established principle that performance of a contract for personal services even of a unique nature, will not be affirmatively and directly enforced. . . ." 245 A.2d at 434 (citations omitted).

70. 15 N.J. Super. 471, 83 A.2d 545 (1951).

71. *Id.* at 478, 83 A.2d at 548.

72. *See Id.* at 474, 83 A.2d at 546.

73. One commentator has criticized the court's approach in the three cases noted in the text, claiming that these courts "placed the judiciary's interest in maintaining an orderly and tranquil justice system before the plaintiff's interest in receiving that which he bargained for." Note, *Specific Performance of Construction Contracts - Archaic Principles Preclude Necessary Reform,* 47 NOTRE DAME LAW. 1025, 1031 (1971). He further stated that

> [I]f equity is to resume its position as a force which gives shape to the ideal of decent and honorable conduct in the relations of man with man, courts must examine all the circumstances in each case and render decisions founded upon principles conducive to the promotion of the business world and not to the judicial system.

Id. (quoting Newman, *What Light is Cast by History on the Nature of Equity in Modern Law?*, 16 HAST. L.J. 677, 681 (1965)).

https://ecommons.udayton.edu/udlr/vol7/iss1/3

tionally sought to administer and fashion a remedy for the plaintiff who otherwise would be without relief at law. This is not to say that courts should become architects or foremen. It merely imposes upon the courts an obligation to take a more practical and realistic approach when appraising the underlying problems raised in a particular instance when a specific performance decree is sought. Due, therefore, in large part to these practical and theoretical objections to the traditional approach, and with an objective of returning to the true purpose of equity, another, more liberal view of specific performance has developed.

IV. Liberal Approach

Although the general or traditional rule denying specific performance of construction contracts is engrained in the common law,[74] there is a growing trend among modern courts to grant decrees for specific performance of these agreements, even when the circumstances do not fit under one of the rule's recognized exceptions.[75] The apparent forerunner of this increasingly liberalized attitude was the decision by the Massachusetts Supreme Court in *Jones v. Parker.*[76]

Jones involved a lease covering part of a building which was under construction. The lease required defendant-lessor to deliver possession of the leased premises to plaintiff-lessee upon completion of the structure, and to reasonably light and heat the premises.[77] Defendant failed to construct the apparatus necessary to supply the required light and heat, and the plaintiff filed a bill in equity seeking specific performance of the lease provision.[78] Defendant demurred to plaintiff's bill, and the trial court sustained the demurrer.[79] On appeal, however, the Massachusetts Supreme Court reversed. The opinion, written by Mr. Justice Holmes, reasoned that "[t]here is no universal rule that courts of equity will never enforce a contract which requires some building to be done.[80] They have enforced such contracts from the earliest days to the present time."[81] The court found that the lease was not uncertain

74. "[T]he old notion [of denying specific performance of construction contracts] intrenched in text books and encyclopedias, dies hard." POUND, *supra* note 32, at 432.

75. *See* note 39 and accompanying text *supra*.

76. 163 Mass. 564, 40 N.E. 1044 (1895).

77. *Id.* at 565, 40 N.E. at 1045.

78. *Id.*

79. *Id.* at 566, 40 N.E. at 1045.

80. *Id.* at 567, 40 N.E. at 1045.

81. *Id.* One commentator, however, has criticized the truth of this statement as being more than doubtful. *See* J. POMEROY, POMEROY'S SPECIFIC PERFORMANCE OF CONTRACTS, 65 n. § 23(d) (3d ed. 1926).

Published by eCommons, 1981

in meaning, that a court of equity was able to supervise the required construction, and, therefore, granted specific performance.[82]

Despite the description of Holmes' opinion as "characteristically sensible,"[83] many courts have refused and continue to refuse to abandon the general traditional rule and its exceptions.[84] Nevertheless, the *Jones* approach has been expanded.

The first case to expand *Jones'* reasoning was *Zygmunt v. Avenue Realty Co.*[85] The controversy arose out of a contract in 1926 wherein defendant Avenue Realty agreed to convey to Zygmunt a section of land, and to cut a street through the land, and lay sidewalks within one year of the conveyance.[86] Avenue Realty conveyed the land, but after one year, had still not furnished the street or sidewalks.[87] Zygmunt sued for specific performance of the lease provision which imposed upon Avenue Realty the duty to furnish the street and sidewalks.[88]

The New Jersey Court of Chancery granted the decree.[89] In its opinion, the Court pointed out that building contracts are generally specifically unenforceable because of the court's inability to see that the work is properly carried out.[90] The court believed that "the jurisdiction [of an equity court] does not depend upon the nature of the contract nor the subject matter. . .,"[91] and went on to add that "[i]n cases involving building and construction contracts, the court usually weighs, on the one side, the difficulties of enforcing and supervising the execution of a decree, and on the other side of the balance, the importance of specific performance to complainant and the inadequacy of an action for damages."[92] The court believed that the work required no particular skill and could be completed in a couple of weeks, the difficulty of supervising and enforcing a decree for specific performance was not formidable.[93] The court permitted, therefore, specific performance as an appropriate remedy in this case, even though the circumstances of the construction contract did not come under one of the exceptions to the traditional rule.

---

82. 163 Mass as 566-69, 40 N.E. at 1045-47.
83. POUND, *supra* note 33, at 432.
84. *See, e.g.*, Besinger v. National Tea Co., 75 Ill. App. 2d 395, 221 N.E.2d 156 (1966); DiCataldo v. Harold Corp., 15 N.J. Super. 471, 83 A.2d 545 (1951).
85. 108 N.J. Eq. 462, 155 A. 544 (1931).
86. *Id.* at 462-63, 155 A. at 544.
87. *Id.* at 463, 155 A. at 544-45.
88. *Id.* at 462, 155 A. at 544.
89. *Id.* at 468, 155 A. at 547.
90. *Id.* at 463, 155 A. at 545.
91. *Id.* at 464, 155 A. at 545.
92. *Id.* at 464, 155 A. at 545.
93. *Id.* at 468, 155 A. at 547.

https://ecommons.udayton.edu/udlr/vol7/iss1/3

One might argue that the simple construction of some sidewalks and a road may not have been found to be especially difficult, even by some of the traditionalist courts. Recently, however, some courts have granted decrees for specific performance, even though the enforcement of such decrees, required them to undertake more complex supervisory duties than those in *Zygmunt.* One such case was *In the Matter of Grayson-Robinson Stores and Iris Construction Corp.*[94]

Grayson-Robinson arose out of a contract which required the defendant to erect on his land a building which was part of a shopping center to be rented by defendant Iris to plaintiff Grayson-Robinson Stores for a term of 25 years with certain renewal provisions.[95] After the plans and specifications for the building were completed, a public ground-breaking ceremony was held, and excavation commenced.[96] Defendant, claiming difficulties in securing mortgage money, refused to do any further work, unless plaintiff agreed to a rent increase.[97] Plaintiff refused, and submitted the "claim to arbitration (pursuant to the terms of the contract) to compel defendant to complete the building."[98] The arbitrator ordered Iris to "proceed forth with the improvements of the leased premises in accordance with the terms of the said lease. . . ."[99] Iris refused to comply with the aribitrator's decision, and plaintiff brought a suit to confirm the arbitrator's award granting specific performance.[100] The Court of Appeals of New York affirmed the arbitration award for Grayson-Robinson.[101] Perceiving that the "trend is toward [the granting of] specific performance,"[102] and noting the absence of any "binding rule that deprived equity of jurisdiction to order specific performance of a building contract,"[103] the decree was confirmed. Finally the court found nothing "extraordinary about this ordinary building contract."[104] Granting the decree,

94. 8 N.Y.2d 133, 202 N.Y.S.2d 303, 168 N.E.2d 378 (1960).
95. *Id.* at 136, 202 N.Y.S.2d at 303, 168 N.E.2d at 378.
96. *Id.* at 136, 202 N.Y.S.2d at 305, 168 N.E.2d at 378.
97. *Id.* at 137, 202 N.Y.S.2d at 305, 168 N.E.2d at 378.
98. *Id.* at 136, 202 N.Y.S.2d at 305, 168 N.E.2d at 378.
99. *Id.*
100. *Id.* at 136, 202 N.Y.S.2d at 304-05, 168 N.E.2d at 378.
The New York arbitration statute provides for confirmation of the award by motion to the court. N.Y. CIV. PRAC. ACT. § 1461. Upon such motion, an award must be confirmed, vacated or modified on the grounds provided in the statute. *Id.* at §§ 1458, 1461-62(a). Nevertheless, the arbitration contract itself may be set aside on such grounds as exist at law or in equity for the revocation of any contract. *Id.* at § 1148.
101. 8 N.Y.2d at 138, 202 N.Y.S.2d at 307, 168 N.E.2d at 379.
102. *Id.* at 138, 202 N.Y.S.2d at 306, 168 N.E.2d at 379.
103. *Id.*
104. *Id.* at 138, 202 N.Y.S.2d at 307, 168 N.E.2d at 379.

Published by eCommons, 1981

therefore, was a relatively simple task for the court in *Grayson-Robinson.*

Similarly, in *City Stores v. Ammerman,*[105] a modern court was willing to grant a decree for specific performance, even where some of the contract's terms were missing. In *Ammerman,* plaintiff City Stores sought specific performance of a unilateral contract giving it the option of leasing space in defendant Ammerman's proposed shopping center as one of its major tenants "with rental and terms at least equal to that of any other major department stores in the center."[106] It was uncontested that were plaintiff to accept a lease tendered by the defendant in accordance with the contract, there would be numerous complex details to be worked out, including details of design, construction, and the price of the building to be occupied by the plaintiff.[107] But, the court in *Ammerman* held as a matter of law that the mere fact a contract contains some terms subject to future negotiations will not necessarily be fatal to a decree for specific performance.[108] According to this court, at least, the essential criterion was not the contract's subject matter, but whether "the difficulties of supervision outweigh the importance of specific performance to the plaintiff."[109] In other words, the *Ammerman* court was at least more willing to engage in the kind of balancing which is so typical of a court sitting in equity.

This liberalized attitude toward specific performance of construction contracts has not gone unnoticed by recent commentators.[110] The attitude also seems to parallel a more general trend toward more liberal application of specific performance of other contracts, as well.[111] And, while the letter of the Second Restatement reflects the traditional position that "Specific performance or an injunction will not be ordered if damages would be adequate to protect the expectation interest of an

105. 266 F. Supp. 766 (D.D.C.), *aff'd. sub nom.* Ammerman v. City Stores, 394 F.2d 950 (D.C. Cir. 1968).

106. *Id.* at 770.

107. *Id.* at 774.

108. *Id.* at 775-76. For some other recent cases granting specific performance of a construction contract, *see, e.g.*, Home Am. Inc. v. Atkinson, 392 So.2d 268 (Fla. App. 1980) (specific performance of a home building contract granted when home was found to contain construction deficiencies); Floyd v. Watson, 254 S.E.2d 687 (W. Va. 1979) (specific performance for building of a wall which was merely an extension of an existing wall to be located on the property).

109. 266 F. Supp. at 775.

110. S. WILLISTON, 11 WILLISTON ON CONTRACTS 780 (3d ed. 1968); CORBIN, *supra* note 41, at 263.

111. *See, e.g.*, Farnsworth, *Legal Remedies for Breach of Contract*, 70 COLUM. L. REV. 1145, 1156 (1970); G. GILMORE, THE DEATH OF CONTRACT 83 (1974); VAN HECKE, CHANGING EMPHASIS IN SPECIFIC PERFORMANCE, 40 N.C.L. REV. 1 (1961).

https://ecommons.udayton.edu/udlr/vol7/iss1/3

injured party,"[112] Comment *a* to that section seems to indicate that, in spirit, specific relief should be available whenever it is more effective than damages in protecting that same expectation interest of the injured party.[113]

V. Conclusion

The increasing complexity of our economic and social structure should be a factor in any court's decision as to specific performance decrees. With increasing sensitivity to these concerns, courts such as *Ammerman* recognize that the plaintiff's injuries may not be limited to the cost of having the project repaired or building completed. Other indirect costs, such as loss of potential earnings, may also result. While the values of dignity and integrity were justifiably significant to the Chancery courts of England, courts of today's society must be willing to undertake more complex supervisory roles as that society concurrently becomes more complex and highly industrialized.

---

112. RESTATEMENT (SECOND) OF CONTRACTS § 359(1)(1981).

113. Comment *a* to RESTATEMENT (SECOND) OF CONTRACTS § 359 states that

> Adequacy is to some extent relative, and the modern approach is to compare remedies to determine which is more effective in serving the ends of justice. Such a comparison will often lead to the granting of equitable relief. Doubts should be resolved in favor of the granting of specific performance or injunction.

Published by eCommons, 1981