IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2005-404-6800

IN THE MATTER OF	an appeal under Article 5(1)(c) of the Second Schedule to the Arbitration Act 1996
BETWEEN	DOWNER CONSTRUCTION (NEW ZEALAND) LTD Plaintiff
AND	SILVERFIELD DEVELOPMENTS LTD (FORMERLY REDWOOD GROUP NO 8 LTD) Defendant

Hearing: 22 March 2006

Appearances: David Williams QC and Christopher Booth for Plaintiff
Tom Weston QC and Christine Meechan for Defendant

Judgment: 11 May 2006

JUDGMENT OF HARRISON J

In accordance with R540(4) I direct that the Registrar endorse this judgment with the delivery time of 3.30 p.m. on 11 May 2006

SOLICITORS
Kensington Swan (Auckland) for Plaintiff
Bell Gully (Auckland) for Defendant

COUNSEL
David Williams QC; Tom Weston QC

See para 90 for "stigma"

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Introduction

[1] This appeal raises an issue of general importance to the construction industry: did an arbitrator err in ordering a contractor to specifically perform its warranty to construct watertight dwellings by repairing its defective workmanship in circumstances where, first, the principal no longer owns or has possession of the property and, second, the principal's only losses to date are investigation expenses and an exposure to claims by purchasers of the dwellings.

[2] The issue arises in this way. Downer Construction (New Zealand) Ltd designed and constructed a substantial townhouse complex in Auckland for Silverfield Developments Ltd pursuant to a contract between them. Silverfield has since completed sales of all units but many now suffer from water damage to varying degrees. Silverfield has requested Downer to carry out the necessary remedial work, estimated to cost up to $4 million, at its own expense but Downer refuses.

[3] The parties referred this and other disputes for determination by an arbitrator, Mr Tómas Kennedy-Grant QC. He has issued three partial awards. Materially he has declared that Downer breached its contractual obligations by constructing units which were not watertight. He has also ordered specific performance on terms. This Court has granted Downer leave to appeal the order on a question of law.

Background

[4] It is necessary to outline in more detail the relevant contractual provisions, the history of contractual performance and the material terms of the arbitrator's awards before I consider the relevant question of law. I have derived considerable assistance in carrying out this exercise from the background summary provided by Downer's counsel, Messrs David Williams QC and Christopher Booth.

[5] The parties entered into a detailed written contract for Downer to design, construct, complete, deliver and maintain a 65 townhouse complex at 3 Wagener

Place, St Lukes, Auckland on 9 August 2000. The development was known as Silverfield Terraces. The contract included (among its general conditions) the Conditions of Contract for Building and Civil Engineering Construction NZS 3910:1987. It provided for novation to Downer of design work and obligations previously performed by Silverfield's consultants and became, by this means, an orthodox design and build contract. It also provided for all disputes or differences to be referred to arbitration.

[6] The contract included (Fourth Schedule) a Contractor's Guarantee in these terms:

> 1. The Contractor warrants and covenants with the Principal that …
>
> (e) the completed Contract Works shall be watertight.
>
> 2. For the purposes of this Deed:
>
> (a) the expression 'defect' shall extend to and include all defects, faults, omissions, shrinkages, undue deterioration and other faults which are due to materials or workmanship not being in accordance with the contract and/or warranties contained in clause 1 …
>
> 3. The Contractor shall at its own expense:
>
> (a) repair all defects in the Contract Works.
>
> 4. If the Contractor does not repair any defect or make good any damage or loss within 14 days of receiving notice of that defect, damage or loss in accordance with clause 3, the Principal may carry out the work … and recover all expenses thereby incurred from the Contractor…

[7] The contract also provided (clause 7.1.2) that:

> Except as otherwise provided the Contractor shall indemnify the Principal against –
>
> (a) any loss suffered by the Principal which may arise out of or in consequence of the construction or maintenance of the Contract Works;
>
> (b) any liability incurred by the Principal in respect of … damage to property which may arise out of or in consequence of the construction … of the Contract Works.

[8] Downer carried out the building work between August 2000 and July 2001. Silverfield had pre-sold most of the townhouses off the design plans. The engineer to the contract issued a practical completion certificate on 12 July 2001. A responsible building certifier issued interim code compliance certificates for all units on 21 September 2001. Silverfield was then able to settle all agreements for sale and purchase.

[9] Shortly afterwards unit owners began reporting water ingress. Silverfield engaged an expert, Alexander & Co Ltd, to investigate. Alexander provided a report on 15 April 2002 following a detailed inspection of 14 townhouses. It concluded that water ingress was widespread, and that substantial remedial works were necessary. Immediately afterwards the engineer's representative under the contract provided Downer with a copy of Alexander's report. He instructed the contractor (GCC 6.4.6):

> ... to remove and re-execute or make good any works not in accordance with the Contract.

Downer has failed to comply with the engineer's instruction.

[10] The engineer issued progress payment certificate number 13 on 3 March 2003 for work performed by Downer to 27 February. He certified that Silverfield had overpaid the contractor by $978,806. This sum represented the net result of the engineer's deduction of $1,239,572 being "the estimated contract value of defective works". Downer disputed the engineer's subsequent formal decision.

[11] A dispute also arose about the nature, scope and cost of any remedial works carried out by Downer. Auckland City Council advised the contractor that it would not issue a building consent for remedial works unless a cavity system and H3 treated framing timber were incorporated. Downer sought an instruction from the engineer to vary the contract accordingly. But the engineer declined.

[12] The parties referred the two disputes to arbitration on 2 May 2003 and appointed the arbitrator in October 2003.

[13] Before leaving this part of the narrative, I record that counsel contested whether or not the contract remains alive for the purposes of remedial work. Mr Tom Weston QC and Ms Christine Meechan for Silverfield contend that the contractual regime specifically contemplated Downer's obligation to return and remedy work which had been done defectively. On the other hand, Messrs Williams and Booth submit that Downer's remedial obligation is at an end; they say the contractor's obligation to remedy defects in workmanship or material is limited to the expiry of the maintenance period (clause 10.2.1). However, the question of law formulated for determination does not encompass this issue.

Arbitration

[14] Downer commenced the arbitration process by filing a statement of claim on 12 January 2004 seeking rulings relating to the engineer's two formal decisions. Silverfield's statement of defence and counterclaim filed on 12 March 2004 alleged the contractor's defective workmanship leading to water ingress and sought these remedies:

> (a) A declaration that Downer has breached its obligations pursuant to the contract by constructing the units in such a way so as they are not watertight;
>
> (b) An order for specific performance requiring Downer to remedy such defects at its cost or in the alternative judgment for such sum as the arbitrator determines is the reasonable cost of carrying out such remedial work;
>
> (c) Costs; and
>
> (d) Such further and other relief as the arbitrator deems just.

[15] Downer responded with an application to strike out Silverfield's counterclaim on two grounds: first, the arbitrator had no jurisdiction because the counterclaim did not fall within the terms of the submission or was not the subject of the engineer's formal decision, a necessary prerequisite to referral; and, second, Silverfield had sold all the townhouses and thus had no right to claim for damages for the cost of remedial work or for specific performance.

[16] The arbitrator ruled that he had jurisdiction on 23 August 2004. Winkelmann J dismissed an appeal to this Court against the arbitrator's ruling on 26 October 2004. The arbitration hearing took place in November 2004 and April 2005. Silverfield advised the arbitrator on 3 May 2005 that it abandoned its alternative claim for damages but that, if the arbitrator was not prepared to order specific performance, it sought an inquiry into damages.

[17] The arbitrator then issued three partial awards.

(a) First Award

[18] The arbitrator's first partial award issued on 26 August 2005 ran to 87 pages and covered a wide range of technical issues. Materially to this appeal, the arbitrator found, among other things, that the project architect's contract had been novated from Silverfield to Downer with the result that the latter assumed total responsibility for design and any deficiencies in it; that substitution of a different design for the original defective design could not be made by way of variation, and accordingly the change required by council did not constitute a variation; that Silverfield had proved 115 defects of design or workmanship in townhouses within the development; and that by a process of extrapolation seven identified categories of defects 'exist or are likely to exist throughout the development or, at the very least, in a significant number of units in the development'. Consequently there had been or was likely to be water ingress and resultant damage in those townhouses.

[19] The arbitrator held Silverfield was entitled to a declaration that to the extent identified in his reasons:

> Downer has breached its obligations pursuant to the contract by constructing the units in such a way that they are not watertight.

[20] The arbitrator did not then determine Silverfield's consequential claims for substantive relief but gave the parties:

> ... an opportunity to confer and, hopefully, agree on a course of action which will resolve this and others.

[21] The arbitrator explained that he was adopting this course because Silverfield had not led evidence to enable assessment of the reasonable cost of remedial work. (He did not refer to its earlier abandonment of its alternative claim for damages.) However, Silverfield's primary claim for specific performance remained alive. The arbitrator adjourned the hearing on relief for four weeks to allow the parties to confer. He invited them to file a joint memorandum advising whether they had been able to agree on the terms of a programme for remedial work.

(b) Second Award

[22] The parties filed a joint memorandum on 23 September 2005 advising the arbitrator of their inability to agree. He considered the question of relief and published his second partial award on 3 November 2005. The reasons for this award are the source of Downer's appeal.

[23] After reciting his relevant factual findings made in the first partial award, the arbitrator divided his inquiry into a sequential consideration of the availability and suitability of specific performance by reference to Downer's submissions to the contrary (paras 18-19). At the first stage of availability he made these material findings:

(a) Silverfield does not have possession of the land on which the complex was constructed (para 24);

(b) Silverfield has suffered a direct loss as a result of Downer's breaches of contract in the nature of 'considerable expense in endeavouring to determine the nature, extent and effect of those defects' and also because 'it is inconceivable that none of the owners whose units have been affected by defects will sue Silverfield; and the fact that they have not done so to date is not an indication that they will not sue in the future' (para 34);

(c) Silverfield has no right to sue for the loss suffered by unit owners because of the existence of their rights to sue Downer separately in tort (para 35);

(d) Silverfield has a right to seek an order for specific performance in view of his finding that it has in fact suffered loss (para 37).

[24] At the second stage of suitability the arbitrator adopted as his starting point a lengthy obiter passage from the judgment of Hammond J in *Butler v Countrywide Finance Ltd* [1993] 3 NZLR 623 at 631-3 (a claim for specific performance of an agreement for sale of chattels associated with a motel business). He also relied upon Lord Selborne LC's statement that (*Wilson v Northampton & Banbury Junction Railway Co* (1874) 9 Ch. App. 279 at 284):

> The principle which is material to be considered in the present case is that the Court gives specific performance instead of damages, only where it can by that means do more perfect and complete justice. An agreement, which is not so specific in its terms or in its nature as to make it certain that better justice will be done by attempting specifically to perform it and by leaving the parties to their remedies in damages, is not one which the Court will specifically perform.

[25] The arbitrator applied the test of which remedy, specific performance or damages, would best do justice between the parties (para 40). He was primarily influenced in adopting the former by the parties' substantial interests in Downer remedying the defective work (paras 41-42). In this respect he made two relevant factual findings. First, Silverfield has experienced and is likely to continue to experience difficulty in obtaining other contractors to do the work. Second, Downer has already undertaken a considerable amount of design and other preparation relevant to the necessary remedial work, and should therefore be able to proceed with that work sooner, quicker and more efficiently than any other contractor.

[26] The arbitrator relied on three other subsidiary grounds: namely, that the unit owners' interests will be best served by an early commencement of the remedial work and its speedy and efficient performance by Downer; an order for specific performance can be expressed in terms which are clear and enforceable; and such an order does not bear unfairly on Downer (para 41).

[27] The arbitrator concluded (para 44):

> An order for specific performance in the terms set out in the schedule ... is, in my view, clear and capable of being complied with by Downer and, if necessary, enforced by Silverfield. The defects referred to in the proposed orders are, of course, those found to exist or to be likely to exist [in the first partial award] ... In order to ensure that the proposed orders set out in the schedule ... are clear and complete, I propose to give the parties an opportunity to consider the same and draw to my attention any lack of clarity or completeness ...

[28] The arbitrator separately dismissed Silverfield's application for further or other relief including an order for an inquiry into damages (para 50).

(c) Third Award

[29] The arbitrator published his third award on 16 November 2005. He recorded that Silverfield had responded to his invitation to make submissions on the clarity and completeness of the draft order but that Downer had declined to participate. A memorandum filed by its counsel on 10 November 2005 advised that Downer "... does not consider it appropriate to make submissions ..." given its intention to apply for leave to appeal the order for specific performance. I shall return to this subject later.

[30] The arbitrator made an order for specific performance in the form attached to the schedule. He noted that its draft terms had been amended in accordance with Silverfield's suggestions. The schedule provided that:

> 1. [Downer] is ordered to remedy all examples of the following defects in the following units together with all damage to the structure and building components of such units resulting from such defects and the remediation of those defects, **so as to render the units in question watertight** [extensive particulars are given].
>
> 2. [Downer] shall notify the engineer to the contract and/or the engineer's representative in writing, not later than two working days prior to commencing work on any unit, of the location of all examples of each of the defects in that unit.
>
> ...

6. The terms of the contract entered into by the parties on 9 August 2000 shall apply in all respects to the work to be carried out by [Downer] in terms of orders numbered 1-5.

7. Leave is reserved to either party to apply on 24 hours written notice, for rulings in respect of any issues arising from [Downer's] performance, non-performance or manner of performance of its obligations under orders number 1-6.

8. Orders number 1-7 shall lapse if, or to the extent that, [Silverfield] is unable, within the period of one calendar month from the date on which these orders are made, to provide [Downer] with written consents from individual unit owners to [Downer] and the engineer to the contract and/or the engineer's representative entering upon the relevant unit for the purpose of carrying out their roles under, and in terms of, those orders.

[My emphasis]

[31] Paras 3, 4 and 5 of the schedule provide a mechanism and timetable for identifying and carrying out opening up of examples of defects in the townhouses. In the event that the process discovered damage to the structure and building elements of the units resulting from a defect for which Downer was responsible it "... shall remedy the defect and resulting damage at its own cost" (para 4). However, in the event that no defect was found, "... the work involved in opening up and closing the 'defect' shall be a variation" (para 5).

Question of Law

[32] On 13 February 2006 Randerson J granted Downer leave to appeal the arbitrator's second award on this question of law:

> In the particular circumstances of this case did the Arbitrator err in law in making an order for specific performance in the terms set out in the Schedule to the Third Partial Award in that:
>
> (i) [Silverfield] did not have possession of the land which was the subject of the specific performance order (Second Partial Award, para 24);
>
> (ii) [Silverfield] had no right to sue for the loss suffered by the individual unit owners in respect of defects in their units and resulting damage (Second Partial Award, para 35);
>
> (iii) The only losses suffered by [Silverfield] were:

(a) an unquantified 'considerable expense' in endeavouring to determine the nature, extent and effect of defects in the development;

(b) an exposure to potential claims by the unit owners of the development in respect of defects.

(Second Partial Award, para 34)

[33] In view of the scope of Downer's argument on the substantive hearing of the appeal on 22 March, it is necessary to recite some background to the question's formulation by Randerson J.

[34] Downer's notice of application dated 20 January 2006 for leave to appeal the second award raised six discrete questions of law. The second, third and fourth questions are faithfully replicated in parts (i), (ii) and (iii) of the formulated question. The other three raised, first, the arbitrator's excess of jurisdiction in reserving his decision on whether to revise payment certificate 13; second, adoption of the incorrect test for entitlement to an order for specific performance of which remedy will best do justice between the parties; and, third, incorrectly exercising a discretion to make an order for specific performance.

[35] On this final discretionary question, Downer relied on the premises that (a) building contracts will not generally attract an order for specific performance because damages are likely to be an adequate remedy and it is difficult to determine precisely what must be done under the contract; (b) Courts do not normally grant specific performance in cases of contracts involving personal services, trust or skill; (c) neither party had a substantial interest in having the contract performed or the defective work remedied; (d) early commencement of remedial work, its speedy and efficient performance by Downer and the question of how the townhouse owners' interests might best be served were not matters relevant to the exercise of his discretion; and (e) it was impossible for an order for specific performance to be expressed in terms which were clear, certain and enforceable.

[36] Downer's notice of application dated 23 January 2006 for leave to appeal the third award identified one question of law arising; namely, whether the arbitrator erred in making an order for specific performance in the terms set out in the schedule

having regard to the errors of law identified in his second award, amendments made to the draft schedule as a result of Silverfield's submissions, and lack of clarity, certainty or enforceability of the terms of the order.

[37] Randerson J heard argument on Downer's applications as a matter of priority on 8 February 2006. He delivered a reserved decision on 13 February 2006 granting leave in the terms set out above. The bulk of his judgment was devoted to rejection of Silverfield's preliminary submission that Downer's applications were out of time (paras 3-24).

[38] Randerson J noted that:

> [25] A number of points of law were raised but, during the course of argument, they have narrowed to the following question of law arising out of the second partial award...
>
> [27] I also intend to grant leave to appeal in relation to the first and third partial awards. But I record the acknowledgement made by Mr Williams QC for [Downer] that there are no separate questions of law arising in relation to the first and third partial awards. Leave will therefore only be granted to the extent that those awards are or may be consequentially affected by the determination of the question of law identified in relation to the second partial award.

[39] Mr Williams' submissions in reply at the substantive hearing confirm that:

> After [Randerson J] had engaged in extensive exchanges with counsel the case was adjourned at lunchtime and the parties [were] invited to return with an agreed formulation of the questions of law or alternatively, if they could not agree, their own specific formulations. **The Downer formulation was adopted by the Judge.**
>
> [My emphasis]

[40] Downer's formulation of the question shows it has abandoned its other allegations of errors of law in the second and third awards. They were clearly the 'number of points of law' set out in Downer's two applications which Randerson J recorded had been 'narrowed' to the formulated question. Nevertheless, Mr Williams did not confine argument on appeal to the findings nominated in (i), (ii) and (iii) of the formulated question. He submitted that they were some of "the particular circumstances of this case" within the introductory words of the question but there were a number of others; and that this Court's appellate jurisdiction when

determining the formulated question extends generally to reversing the exercise of the arbitrator's discretion if he erred in principle, gave weight to extraneous or irrelevant factors, failed to take account of relevant considerations or made a mistake of fact.

[41] On this premise Mr Williams mounted an all out assault on the terms of the second award. For example, he submitted that the arbitrator erred by adopting the test of the appropriateness of the remedy within the context of overall justice, instead of starting his analysis by examining the principle of compensation and its applicability to this case. This submission restated the fifth question identified in Downer's application for leave to appeal the second award but abandoned before Randerson J. He submitted also that the decision to grant specific performance was plainly wrong, pointing to substantial gaps in the arbitrator's reasoning process which he described as simplistic and unprincipled.

[42] I do not accept Mr Williams' arguments. Downer's right of appeal is limited to "any question of law arising out of [the] award" (Art 5(1), First Schedule, Arbitration Act). It is not a general right of appeal against the award as such. It necessarily requires a degree of specificity of the arbitrator's alleged error, which must also be material to the result (Art 5(2)). The formulated question of law arises out of three findings made in the second award, referenced to specific provisions. On that basis Randerson J granted leave (Art 5(1)(c)); that is, he was satisfied the question arose out of the award.

[43] I agree with Mr Weston. The Court's power on appeal is confined to the terms of the question. Its reference to "the particular circumstances of this case" is by way of preamble. That phrase encompasses the core or undisputed factual material which provides background context to determining the particular question of law, including where appropriate identification of the parties, the relevant contractual terms, the history of construction and the arbitration process. This phrase does not entitle Downer to rely on additional alleged errors which it originally raised and then abandoned and which are not specified in the question.

[44] I am satisfied that my appellate jurisdiction is circumscribed by the express terms of the question, formulated by Downer, and is restricted to determining whether or not the arbitrator erred in law in ordering specific performance in view of his findings that Silverfield had no rights of possession or of suit for third parties and that it had suffered limited loss. The Court of Appeal's recognition of the judicial bias towards finality of arbitrator's awards, which could only be destroyed for truly compelling reasons, and of Parliament's intention to limit judicial intervention in reviewing and setting aside awards where the parties have chosen arbitration supports this approach (*Gold and Resource Developments (NZ) Ltd v Doug Hood Ltd* [2000] 3 NZLR 318, paras 43 and 52). I agree with Mr Weston that Downer cannot use the statutory appeal process as a carte blanche to attack the arbitrator's award.

[45] Against this background I will now consider the formulated question of law.

Specific Performance of Building Contracts

[46] Mr Williams' primary argument treated as prescriptive in this case Romer LJ's statement in *Wolverhampton Corporation v Emmons* [1901] 1 QB 515 at 524-525 that:

> There is no doubt that as a general rule the Court will not enforce specific performance of a building contract, but an exception from the rule has been recognised. It has, I think, been for some time held that, in order to bring himself within that exception, a plaintiff must establish three things. The first is that the building work, of which he seeks to enforce the performance, 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 the 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 the contract by damages. The third is that the defendant has by the contract obtained possession of land on which the work is contracted to be done. The rule on this subject is stated by Fry LJ in his work on Specific Performance, 3rd ed., pp 44, 45, in substantially the same terms as those in which I have just stated it.

[47] Mr Williams submitted that New Zealand Courts have adopted Romer LJ's statement as establishing general principles. He said there is now a practice in New Zealand just as in England not to award specific performance of building

contracts other than in truly exceptional cases. In support he cited decisions of this Court in *Mayfield Holdings Ltd v Moana Reef Ltd* [1973] 1 NZLR 309 and *Fu Hao Construction Ltd v Landco Albany Ltd* [2005] 1 NZLR 535.

[48] Mr Williams' submission appears to revive two of Downer's abandoned questions of law – the arbitrator's adoption of the incorrect test for entitlement and mistake in exercising a discretion to grant specific performance. However, Mr Weston accepted that this point was arguable within the realm of a challenge to the arbitrator's discretion if Downer was able to show that he acted on a wrong principle or was plainly wrong (*Harris v McIntosh* [2001] 3 NZLR 721 (CA) at para 13). Also, Romer LJ's statement in *Wolverhampton* is relevant to two of the arbitrator's three findings nominated in the question of law. Thus, it is appropriate to determine Mr Williams' submission.

[49] The English Court of Appeal in *Wolverhampton* affirmed Wills J in granting a decree of specific performance to an urban sanitary authority. The corporation had, in the course of carrying out an improvement scheme, transferred land to a purchaser. He covenanted in the agreement for sale and purchase to demolish the existing building and construct eight new houses in its place. He performed the first but not the second part of his bargain.

[50] Wills J found that, in consideration of the local authority giving further time, the purchaser agreed with it a year later to erect without delay the eight dwellings on the land. On that occasion the authority approved his plans for construction including details of elevation, form, materials and other particulars. Thus, there were, critically, two separate agreements. A jury assessed damages at £50 if specific performance was not available.

[51] AL Smith MR delivered the leading judgment in *Wolverhampton*. The question, he said, was whether the case was one in which an order for specific performance should be made, even though the jury had assessed damages. He started from the affirmative premise that specific performance ought to be ordered where a person has contracted to erect buildings on a piece of land according to

clearly specified plans, and has obtained title as a result. He asked rhetorically (522-523):

> ... Why should he be allowed to turn round and refuse to perform the contract, especially where damages will not compensate the person with whom he has contracted?

[52] The Master of the Rolls questioned the weight to be given to the traditional objection against specific performance in this area – that a Court cannot superintend the relevant works. He was satisfied that, while the original agreement did not specify the building work, the plans referred to in the subsequent agreement were sufficiently defined to enable the Court to make an order. He recognised that it was not in the local authority's interests to leave this piece of land vacant. Its interests required that houses be built upon it which may be the subject of assessment to rates. He concluded (523), even though the jury had assessed damages, that:

> ... the value [of the local authority's] right to have houses erected by [the purchaser] on the piece of land conveyed to him cannot adequately be estimated by pecuniary damages, and that such damages would not be adequate compensation to [the authority] for the breach by [the purchaser] of his contract.

[53] Collins LJ agreed. He briefly outlined his opinion that Courts of equity had inconsistently approached the question of specific performance of building contracts. On his assessment the current trend was in favour of the remedy providing the contract works were specified in a sufficiently definite manner. He agreed with AL Smith MR's reasoning (523-524).

[54] Romer LJ delivered the third judgment. His statement of the law, set out above, was couched in more negative terms than the other two Judges who did not expressly assent to his reasoning. However, he subjected the facts to careful analysis, before establishing satisfaction of his three principles or pre-conditions. He noted that the purchaser had not advanced a good reason against a decree for specific performance, emphasising that the purchaser knew or ought to have known '... what he was binding himself to do when he entered into the original covenant ...' (527).

[55] Both counsel referred to textbook commentary on Romer LJ's statement. Mr Williams relied upon *Fry on Specific Performance*, 6th ed., published in 1921,

endorsing a view that the Court will assume jurisdiction to grant a decree of specific performance where Romer LJ's three principles are present (para 108). With respect, this observation is unsurprising, given that Romer LJ founded himself upon the third edition of the same textbook. Mr Weston stressed a contrary, contemporary view by *Spry: The Principles of Equitable Remedies*, 6th ed., published in 2001, that Romer LJ's analysis was "too rigid to accord with equitable principles ..." (p114).

[56] The issue then is whether the two New Zealand authorities cited by Mr Williams establish, by adoption of Romer LJ's statement in *Wolverhampton*, a general principle of granting specific performance of building contracts in this country only in exceptional cases. It is true that in *Mayfield* Mahon J observed that Romer LJ "... set out three separate conditions which were necessary in order to justify specific performance of a building agreement ..." and that "... damages in almost every [building] case must be an adequate remedy ..." (321). In that case a property owner had engaged a contractor to erect a motel complex but shut it out of the site after it had carried out most of the building work. The owner instructed a new contractor to complete. The original builder and its subcontractors then resumed possession of the site and recommenced work notwithstanding the owner's objection. The Judge issued an interim injunction, granting the owner possession of the site and restraining the contractor from taking any steps to interfere with completion of the building work.

[57] Mahon J's observation in *Mayfield* on the effect of Romer LJ's judgment in *Wolverhampton* was made in the very different context of determining whether the builder or licensee could rely on a negative covenant to resist the owner's application for possession of the site (320-322). In direct contrast to this case, the owner was implacably opposed to the contractor's return or resumption of work. With respect, Mahon J's decision to grant injunctive relief was hardly controversial. As Mr Weston pointed out, it followed inexorably from his own rhetorical question (319):

> Must the owner be compelled to stand by while his action for breach awaits trial, and watch the building being completed in a manner which may ultimately be decided to have been in breach of the contract?

[58] In *Fu Hao* Baragwanath J granted an application by a purchaser under an agreement for sale and purchase for an order that its caveat should not lapse. The subject property was a large area of land which required subdivisional approval from the local authority. Argument at the interlocutory stage centred round whether or not the agreement was validly cancelled. The purchaser submitted that its rights could be specifically enforced following trial of the substantive issue. Baragwanath J agreed, citing *Wolverhampton* affirmatively as an example of an appropriate case where the Court would order specific performance of a building contract (paras 42 and 44).

[59] Counsel were apparently unaware that the Court of Appeal has since reversed Baragwanath J (*Landco Albany Ltd v Fu Hao Construction Ltd* (2006) 5 NZ Conv C 194, 234 (Anderson P, Hammond and William Young JJ)). The Court held that the purchaser had no realistic prospect of obtaining specific performance at trial (para 40), principally because the vendor was not wholly in control of performance of the contract. Critically, the local authority had stated its unwillingness to consent to the vendor's scheme plan of subdivision which accorded with the subject matter and obligations of the agreement (paras 10-13, 41 and 42); Anderson P observed that the Court would not compel performance of a contract on terms materially different from those agreed. In any event, the purchaser's interest in the land was purely commercial, easily quantifiable and damages would be an adequate remedy (para 43).

[60] *Wolverhampton* has been referred to in one other New Zealand case. In *R Savory Ltd v Hafele (New Zealand) Ltd* (CP38/98, Auckland Registry, 26 March 1998 (unreported) at 8-9) Barker J cited the decision, but not Romer LJ's statement, when dismissing an application by a land development company, the vendor under an agreement for sale and purchase of industrial land, for an interim injunction restraining the purchaser from entering into a building contract with any party other than the vendor. The Judge did not subject *Wolverhampton* to analysis, emphasising that his brief remarks about the availability of specific performance were tentative. He dismissed the application on the traditional ground that an award of damages would provide an adequate remedy.

[61] I am not satisfied that Romer LJ's statement in *Wolverhampton* is of universal or prescriptive application or that the decisions in *Mayfield* and *Fu Hao* stand as authority for the proposition that there is, based upon that statement, a general principle applicable in New Zealand at least that specific performance of building contracts should not be awarded other than in truly exceptional circumstances. Mahon J's citation of Romer LJ's statement in *Mayfield* was obiter in a case where the issue was whether to injunct a builder from taking steps to interfere with the contractual relationships between other parties, not whether the Court should order specific performance of a building contract. His comment that '... damages must in almost every [building] case be an adequate remedy ...' (321) is also obiter and, with respect, is too wide and does not conform with modern authority.

[62] Baragwanath J's reference to *Wolverhampton* in *Fu Hao* was for the affirmative purpose of illustrating that specific performance is available for building contracts. The same point was made, without limitation to exceptional circumstances, by Lord Hoffmann in *Co-operative Insurance Society v Argyll Stores (Holdings) Ltd* [1998] AC 1 at 13-14. The Court of Appeal's decision in *Fu Hao* shows the different considerations which may govern the availability of specific performance in agreements for sale and purchase of land where damages are easily quantifiable and thus a more appropriate remedy.

[63] In my judgment all these cases illustrate the obvious. Specific performance is an equitable and thus fact specific and discretionary remedy. Its exercise is governed by well settled principles which are flexible and adaptable to achieve the ends of equity; that is, to 'do more perfect and complete justice' between the parties than leaving them to their common law remedies (*Argyll Stores* at 9F-G). Building contracts present special features "of a practical nature" (*Argyll Stores* at 11H) in the areas of sufficient particularity and superintendence of work. But provided the Court is satisfied they can be accommodated by the imposition of appropriate terms within the order, as the arbitrator was here, there is no principled reason why such contracts should not be the subject of awards for specific performance.

[64] The arbitrator did not err by exercising his discretion to order specific performance of a repair covenant in a building contract. I shall now determine whether the arbitrator erred in law within the terms of the formulated question.

(1) Rights of Possession

[65] First, is Silverfield disqualified from claiming specific performance by virtue of the arbitrator's finding that it does not have possession of the subject land?

[66] The arbitrator expressly considered *Wolverhampton* in the context of Downer's submission that Silverfield's loss of possession of the land was a bar to granting specific performance (paras 24-29). He recorded Downer's submission in this way:

> The third requirement [listed by Romer LJ] is that Silverfield must have obtained possession of the land on which the work is contracted to be done. Silverfield does not have possession of the land. The 65 units are owned by individuals on unit titles and by the body corporate. The rationale for requiring that a party seeking specific performance has possession of the land is to avoid a situation where access to the land for the purpose of carrying out the work ordered to be specifically performed could be defeated by the failure of those having possession of the land to enable the work to proceed...

[67] The arbitrator rejected Downer's submission. He expressed the view, with which I respectfully agree, that Romer LJ was "not seeking to establish principles that would be applicable to all construction contracts" (para 27). He accepted that the issue of access to the property was relevant but found that it was not determinative against Silverfield.

[68] Mr Williams repeated on appeal Downer's submission before the arbitrator that, in Romer LJ's words, "possession" is essential in these cases. But he did not identify which party's possession is essential or develop a principled argument in support. Instead he confined himself to noting Silverfield's difficulties in obtaining consent from unit owners to have the work undertaken on their properties.

[69] The order for specific performance was expressly conditional upon Silverfield obtaining owners' consents. It is axiomatic that without them Downer

could not secure temporary possession to carry out the remedial work (*Carpenter's Estate Ltd v Davies* [1940] Ch 160 at 164-165). Mr Williams did not question Mr Weston's advice that all 65 owners have consented but relied upon a letter from Kensington Swan, Downer's solicitors, dated 7 February 2006, alleging that 14 consents "... are invalid and/or do not meet the requirements of the arbitrator's order". As Mr Weston observed, Kensington Swan has given no reason, then or since, for this so-called invalidity; I can infer that the point was raised for the purpose of reserving a right to argue that the order has lapsed for those 14 units. Downer's cause was not advanced by this argument.

[70] I should add that in *Wolverhampton* Romer LJ's third pre-condition was that the purchaser had obtained possession by virtue of its original agreement with the local authority. Possession was a material factor in *Wolverhampton* because the local authority had parted with title to its land to the purchaser in consideration for his agreement to build. Thus it was unable to erect the buildings itself. By contrast, Downer's argument before the arbitrator was directed to Silverfield's rights of possession. The question of law is to the same effect. *Wolverhampton* was concerned with the very different issue of the purchaser's possession to the vendor's exclusion.

[71] Moreover, as the arbitrator correctly found, rights of access to the townhouses, not of possession of the land, is the relevant factor in this case. It is essentially a practical question, not one of principle, and the unit owners' consent to Downer's access has pre-empted any problems. In my judgment, Downer's challenge on this ground is misconceived.

(2) Right to Sue

[72] Second, is Silverfield disqualified from claiming specific performance because it has no right to sue for the loss suffered by third parties?

[73] The arbitrator's second award suggests that Downer defended Silverfield's counterclaim for relief on the ground that it was not for its own loss but for losses allegedly suffered by individual owners (para 31(a)). The arbitrator considered two

separate rights of claim and types or categories of loss. First, he was satisfied that Silverfield had suffered a direct loss as a result of Downer's breach, which I shall discuss later. Second, he found that Silverfield was not entitled to sue for loss suffered by unit owners. He concluded (para 35(g)):

> The existence of a right on the part of individual unit owners to sue Downer in tort takes this case outside the *Albazero* exception, with the result that Silverfield has no right to sue for the loss suffered by individual unit owners.

[74] In my judgment the arbitrator's unchallenged legal finding that Silverfield had no right to sue for losses suffered by purchasers is not germane to whether or not he erred in granting specific performance. It is a neutral factor. The question is whether Silverfield, not the purchasers, has suffered a loss for which the remedy of specific performance is available. Their losses are not at issue.

(3) Damages

[75] Third, do the arbitrator's findings that the only losses suffered by Silverfield are (a) an unquantified 'considerable expense' in attempting to determine the nature, extent and effect of defects and (b) an exposure to potential claims by unit owners disqualify its claim for specific performance?

[76] These findings were the focus of Downer's main challenge. Mr Williams submitted that the arbitrator failed to apply the compensatory principle to relief, leading to a major injustice. The arbitrator, he submitted, started from the unprincipled premise that, as Silverfield had led no evidence on remedial costs which were thus unquantified, it was prima facie entitled to specific performance unless Downer could show otherwise. He emphasised the arbitrator's reliance on Silverfield's actual losses in the form of investigation costs, which he described as relatively minor, and the absence of a finding that remedial costs were impossible to quantify.

[77] By comparison, Mr Williams submitted, the arbitrator has ordered Downer to carry out remedial work which might cost more than $4 million. On this basis, the financial consequences for Downer are grossly disproportionate to Silverfield's

losses. The existing order enables Silverfield to secure in money terms much more than its actual liability and is unjust.

[78] Mr Williams cited extensively from Lord Hoffmann's speech in *Argyll Stores* to support his submission on remedial disproportionality. The second award does not refer to or discuss this authority. Mr Williams confirmed the inference arising from the arbitrator's summary of Downer's argument (para 19) that it gave little if any prominence to this argument of injustice before him.

[79] The facts in *Argyll Stores* are far removed from these. The owner of a shopping mall complex sought an order for specific performance of a lease covenant by its head tenant, a loss making supermarket, to keep its premises open for retail trade for the remaining 19 years of its lease. The trial Judge refused to grant a decree but was reversed by a majority of the Court of Appeal (Millett LJ dissenting). The House of Lords allowed an appeal, restoring the trial Judge's decision.

[80] With respect, Lord Hoffmann's speech in *Argyll Stores* contains an invaluable modern summary of the availability of the remedy of specific performance. A large part is devoted to drawing a distinction between orders which require a party to carry on activities, on the one hand, and those which require it to achieve results, on the other. He explained the reasons for judicial reluctance to order specific performance for cases in the first category which did not, by contrast, apply to the second. He identified building contracts and repair covenants within this second category. He cited *Wolverhampton* as an example of cases where the Courts have "in appropriate circumstances" ordered specific performance of such obligations (13F-G).

[81] Lord Hoffmann discussed the concept of disproportionality in *Argyll Stores* in the context of the carrying on business category. He endorsed Millett LJ's statement in the Court of Appeal that an order for specific performance "... may cause injustice by allowing the plaintiff to enrich himself at the defendant's expense" (15C). That would arise where the loss which the defendant might suffer through being forced to comply with the contract may be much more than the plaintiff might suffer from breach. Lord Hoffmann stated (15G-H):

> It is true that the defendant has, by his own breach of contract, put himself in such an unfortunate position. But the purpose of the law of contract is not to punish wrongdoing but to satisfy the expectations of the party entitled to performance. **A remedy which enables him to secure, in money terms, more than the performance due to him is unjust.** From a wider perspective, it cannot be in the public interest for the Courts to require someone to carry on business at a loss if there is any plausible alternative by which the other party can be given compensation.
>
> [Emphasis added]

[82] I appreciate the principle underlying Lord Hoffmann's statement, even if made in a very different context; a remedy which unjustly enriches the principal at the contractor's expense is unfair and inequitable. At first blush the arbitrator's findings on loss lend credence to Mr Williams' argument. Downer's expenditure of $4 million on remedial work would be grossly disproportionate to Silverfield's investigative costs to date. I accept they are relatively minimal and the arbitrator's reliance on this head of loss to justify an order is, with respect, unsustainable. I suspect, though, that it reflected his adoption of an argument by Silverfield which did not feature strongly on appeal.

[83] There are, I think, two alternative answers to Mr Williams' argument. First, on 26 August 2005 the arbitrator declared that Downer had breached its warranty to build watertight dwellings. That event triggered the contractor's liability to repair all defects at its own expense. On the arbitrator's findings, the defects are widespread. Downer had promised to repair them. This was the remedy stipulated by the parties for the very contingency which has arisen. Downer cannot argue disproportionality where the arbitrator has simply enforced its undertaking to perform the agreed remedy and satisfy Silverfield's 'expectation' of the same result (*Argyll Stores* at 15H). The remedy of repair is the agreed means of ensuring achievement of the contractual objective of constructing watertight dwellings. The order simply carries into effect precisely what the parties contemplated would occur.

[84] Downer's contractual duty to repair is conditional only upon proof of defects. It is not conditional upon Silverfield's proof of loss; its right to sue for performance is personal, and does not depend on ownership of the land. Quantification of loss would only assume relevance if Silverfield exercised its option of carrying out the remedial works at its own cost following Downer's default. In that event the

developer would be entitled to reimbursement. However, I repeat that the primary object of the contract was to secure the stated result of watertightness, and the default provision is no more than a form of security for it *(Shiloh Spinners Ltd v Harding* [1973] AC 691 per Lord Wilberforce at 723G-H). What Silverfield bought and paid for was a watertight complex of dwellings, not a right to damages (to adapt Baron Pollock's informal dictum cited in *Jones & Goodhart : Specific Performance*, 2nd Ed. at p4, note 8), and what Downer warranted was to deliver a complex in that condition and repair at its cost any defective workmanship.

[85] Mr Williams pointed to the absence of a finding by the arbitrator that the cost of remedying the defects is impossible to quantify. He said that Silverfield could have led evidence of an estimate from a quantity surveyor. However, in my judgment the developer's inability to prove repair costs is beside the point, except to the extent that it establishes the inadequacy of damages. The arbitrator's unchallenged finding is that Silverfield has experienced and is likely to continue to experience difficulties in finding a replacement contractor. This factor constituted, as the arbitrator rightly held, Silverfield's 'substantial interest' (*Wolverhampton* per Romer LJ at 524-525) in having the contract performed.

[86] An assessment of costs, based on a quantity surveyor's estimate and undertaken in a vacuum, would be of no remedial utility in this case. The developer could only objectively quantify loss by agreeing upon a price with a substitute contractor. But without one, Silverfield could neither settle a price nor rectify Downer's defects. And, if and when the circuit was broken by the developer attracting the interest of a substitute contractor, its quote or tender would be influenced by a range of market factors additional to standard construction costs of the type estimated by a quantity surveyor. Silverfield's inability to prove loss, not because substantial damage does not exist but because a replacement contractor cannot be engaged to provide an objective measure of repair costs and carry out the work, is a decisive factor in favour of specific performance.

[87] Second, if I am wrong and loss is a relevant consideration, I am satisfied that there is no element of disproportionality. In reliance on Lord Hoffmann in *Argyll*

Stores, Mr Williams submitted that the order offends the compensatory principle because it secures much more than the loss Silverfield has actually suffered. With respect, this submission confuses the nature of the developer's loss arising from the contractor's breach with quantification of its liability to third parties.

[88] Lord Hoffmann spoke of remedial injustice where specific performance enables the wronged party "... to secure, in money terms, more than the performance due to him" (*Argyll Stores* at 15H). Performance of Downer's promise to repair secures no more nor no less than what is contractually owing to Silverfield. The developer performed its obligation of paying a price of $6.5 million for Downer's promises, first, to construct a complex of 65 watertight dwellings and, second, to repair any defects. That was its bargain. Downer has failed to perform both promises; in orthodox terms, there has been a failure of consideration. Silverfield is entitled to enforce its loss of bargain without proof of actual damage (*Beswick v Beswick* [1968] AC 58 per Lord Upjohn at 102C), especially where there has been performance on its part but not by Downer (*Beswick* per Lord Pearce at 89B-D).

[89] In this case, though, Silverfield has suffered actual damage. Its existence illustrates the purpose and benefit to Silverfield of the contractor's covenants of watertightness and repair. A developer owes a duty in tort to a purchaser to exercise proper skill and care in building a dwelling; it cannot be avoided by delegation to an independent contractor (*Mt Albert Borough Council v Johnson* [1979] 2 NZLR 234 (CA)). Arguably the same duty would arise by implication from the terms of the agreement for sale and purchase. A purchaser's cause of action accrues when the elements necessary to support its claim are in existence (*Invercargill City Council v Hamlin* [1996] 1 NZLR 513 (PC)).

[90] Alexander's confirmation of damage to dwellings provides the necessary foundation for claims. As a result of Downer's breach of its warranty of watertightness, Silverfield is now at risk to all purchasers in tort or contract; its engagement of a contractor to design and build the complex will not afford relief from direct liability to third parties. Downer's covenants of watertightness and repair serve two obvious purposes. One is to protect or, as Mr Weston said, make Silverfield inviolable from this direct exposure. The other is to save it from the

indefinite financial uncertainty, inconvenience, commitment of resources and stigma arising from contingent claims.

[91] Silverfield has lost these promised benefits. Its value is not presently capable of quantification. But Silverfield's indirect loss is already substantial and is likely to escalate. The arbitrator's forecast that unit owners will sue the developer must be correct. Its direct loss in terms of contingent third party liability could equate to the same figure of $4.2 million emphasised by Mr Williams for Downer's repair costs. Difficulties in proving loss of a promised benefit in such circumstances do not deter a Court from concluding that the benefit was of real value (*Walsh v Kerr* [1989] 1 NZLR 490 (CA)).

[92] However, I repeat that proof of Silverfield's loss is neither relevant nor determinative in this context. In my judgment, Downer's submission of remedial disproportionality validates the arbitrator's conclusion that an order for specific performance would do more perfect and complete justice between the parties than an award of damages. Downer's plea of injustice rings hollow where its breach of warranty of watertightness is responsible for the damage to the units and its breach of the obligation to repair is responsible for Silverfield's financial vulnerability. The arbitrator's enforcement of Downer's performance of its repair covenant simply affirms the method which it agreed was the appropriate remedy for its own breach of warranty.

Imprecision

[93] I shall deal briefly with Mr Williams' additional arguments in case I am wrong in concluding that my jurisdiction on appeal is limited to the three findings identified in the question of law. I have already discussed his submission that the arbitrator was plainly wrong when considering the discrete question of loss. Ultimately Mr Williams' residual challenge came down to a criticism of imprecision in the terms of the order.

[94] A great deal of Mr Williams' written submission was devoted to assessment and analysis of the arbitrator's factual findings about particulars of defects made in

his first partial award. Randerson J's judgment on the application for leave (para 27) recorded Mr Williams' concession that no separate questions of law arose from the first and third awards. Nevertheless, his written argument subjected the provisions of the schedule to the third partial award to detailed and critical analysis.

[95] Mr Williams identified imprecision or uncertainty in each paragraph, submitting that the extent of the remedial work required is totally unknown; that the procedural machinery for identifying and dealing with defects is "totally unsatisfactory and unworkable"; that the opening up process "raises even more questions and imponderables"; and that "the specific performance order does not require Downer to perform the works in accordance with a defined set of contract specifications and drawings which tell Downer what it must do". In summary, if Mr Williams is right, it is difficult to imagine a more flawed order whose problematic consequences are compounded by the ultimate sanction of contempt for breach.

[96] It is now too late for Downer to complain. Its argument verges on an abuse of process. The arbitrator invited both parties to make submissions on the terms of the order but Downer consciously declined to participate. It elected to waive its right and must live with the consequences. The contractor cannot use its carefully limited right of appeal, with leave, to the High Court as a backdoor forum for reviving rights which were to be exercised elsewhere.

[97] In any case, in *Wilson v Northampton & Banbury Junction Railway Co* (supra) Lord Selborne LC at 33 said that the Court "... would struggle with any amount of difficulties in order to perform the agreement ...". Lord Hoffmann's statement in *Argyll Stores* at 14(B-E) is to the same effect:

> Precision is of course a question of degree and the Courts have shown themselves willing to cope with a certain degree of imprecision in cases of orders requiring the achievement of a result in which the plaintiffs' merits appeared strong; like all the reasons which I have been discussing, it is, taken alone, merely a discretionary matter to be taken into account... It is, however, a very important one.

[98] The principal term of the order requires Downer:

> ... to remedy all examples of the following defects in the following units together with all damage to the structure and building components of such units resulting from such defects and the remediation of those defects, **so as to render the units in question watertight.**
>
> [My emphasis]

[99] I agree with Mr Weston. This provision requires Downer to achieve a result; that is, to render the units watertight. Its terms are self contained and explicit. It has many features in common with the cases requiring a tenant to perform a repairing covenant. In *Jeune v Queen's Cross Properties Ltd* (1974) Ch 97, Pennycuick VC made an order by reference to the specified result of repairing a balcony, describing it as "the appropriate relief" in view of the tenant's repair covenant and "much more convenient" than an award of damages requiring the landlord to do the work (98-99). The Vice-Chancellor was also satisfied that the tenant knew exactly what work was necessary.

[100] Lord Hoffmann cited *Jeune* in *Argyll Stores* with apparent approval (13G) after earlier noting (13C-D):

> Even if the achievement of the result is a complicated matter which will take some time, the Court, if called upon to rule, only has to examine the finished work and say whether it complies with the order.

[101] The balance of the order provides a mechanism for Downer for compliance and achievement of its result. The engineer and his or her representatives have an important part to play. The final term, para 7, provides a continuing role for the arbitrator if required. He is *functus officio* on the disputes he has determined. But the terms of the order which Downer did not challenge specifically empower him to exercise the ongoing function of determining "any issues arising from [Downer's] performance, non-performance or manner of performance of its obligations under orders no. 1-6".

[102] I am in no doubt that the terms of the order are sufficiently specific and precise to enable this Court or the arbitrator "... to satisfy itself, *ex post facto,* if the covenanted work has been done ..." *(Shiloh Spinners Ltd* per Lord Wilberforce at 724). The machinery is ample for this purpose, both within the original contract (including the engineer's participation) and the additional terms of the order.

[103] Precision or sufficient specificity is, in truth, one of the discretionary factors for the Court to take into account when deciding whether or not to order specific performance (*Argyll Stores* at 14). The arbitrator considered it expressly. He concluded that the terms of the order were "... clear and capable of being complied with by Downer and, if necessary, enforced by Silverfield" (para 44). Apart from Downer's familiarity with the project as a result of its original contractual obligations, the arbitrator found that it had carried out a considerable amount of design and other preparation for the remedial work. It is a question of fact, not of law, whether the builder knows what it must do (*Morris v Redland Bricks Ltd* [1970] AC 652, per Lord Upjohn at 666). In my judgment the arbitrator's factual finding put an end to this argument.

Conclusion

[104] I am not satisfied that the arbitrator erred in law in making an order for specific performance in view of his three findings set out in the question. I dismiss Downer's appeal. The arbitrator's three awards, which are registered as judgments of this Court, are now enforceable against Downer.

[105] I order Downer to pay Silverfield's costs and disbursements. I assume that counsel will be able to reach agreement. I provisionally agree with Mr Williams that category 2B for two counsel is appropriate. However, if counsel are unable to agree, I reserve leave to Silverfield to file a memorandum by 12 June 2006 and for Downer to file a memorandum in answer by 26 June 2006.

Rhys Harrison J