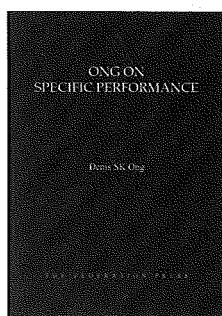


The Reading List

Book reviews for Society members,
by Society members

Ong on Specific Performance



Denis SK Ong

August 2013

The Federation Press

RRP \$125

What is the role of contract law in remedying a breach? The question of the appropriate legal remedy — specific performance, as opposed to damages — has been the subject of academic debate over the years.

If a contract is breached, a party may seek specific performance, but whether it is granted is a matter for the court. If damages are adequate to compensate a party, the court will not issue an order for specific performance. Specific performance is governed by a set of strict principles and rules to avoid arbitrary enforcement. It is a discretionary remedy which is dependent on the individual facts of each case. Courts will consider factors such as whether damages would be adequate, or whether an order for specific performance would cause hardship to the party in breach, and the type of contract, before deciding whether specific performance is an appropriate remedy.

Ong's text contributes to the debate by closely examining a number of leading contract cases dealing with such issues as: the requirements for making an order of specific performance; cases where the remedy of specific performance was not granted and the doctrine of part performance and "hardship".

Lord Selbourne LC in *Wilson v Northampton and Banbury Junction Railway Junction* (1874) LR 9 Ch App 279 observed that:

[T]he Court gives specific performance instead of damages, *only when 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 than by leaving the parties to their remedy in damages, is not one which the Court will specifically perform.

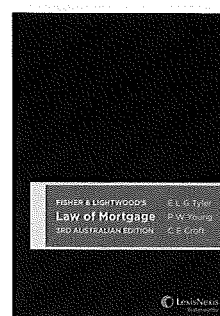
Alan Schwartz from Yale Law School, asserted in "The Case for Specific Performance" (1979) *Faculty Scholarship Series Paper 1118*, that specific performance is the most accurate way to achieve the goal of compensation — namely, the promisee is *neither* under- nor over-compensated because she gets the precise performance for which she contracted.

However, the debate about whether specific performance can be a means of "perfect justice" is ongoing. Some commentators argue that an order for specific performance can cause undue hardship on a party. In some cases, applicants for an order of specific performance may have no incentive to mitigate their losses and this could lead to overcompensation.

Ong's contribution to the debate draws upon careful analysis of the case law and he poses a number of conundrums for the reader to consider. Ong's volume is detailed and thought-provoking.

Jane Grace, Australian Communications and Media Authority

Fisher & Lightwood's Law of Mortgage



Professor Edward (Ted) Tyler, Peter Young AO & The Hon Justice Clyde Croft

2013

LexisNexis

RRP \$285

This book was first published in Britain in 1856. Since the first Australian edition of 1995, this textbook has been the reference point for legal practitioners, judges and academics in the field.

It incorporates updates to the case law since 2005 and covers the *Personal Property Securities Act 2009* (Cth) (PPSA), which brought a dramatic change to personal property securities in Australia. The textbook carefully details those interests which are affected by the PPSA in Chapter 5 and those which are not in Chapter 6. The book also examines the practical effect of the PPSA on personal property securities.

The authors note the area of forged mortgages appears to be the most prolific since the previous 2005 edition. Accordingly, commentary regarding forged mortgages, and the new case law which has developed, is incorporated throughout. The textbook continues to practically set out and examine the remedies available, and the present law is set out individually on a state or territory basis.

Without hesitation, I recommend *Fisher & Lightwood's Law of Mortgage* as a key reference textbook. Written by authors well-qualified in the field, it eloquently captures the law of mortgage in Australia.

Rahul Bedi, Maliganis Edwards Johnson