Agreements to Specifically Perform Contractual Obligations

Robyn Carroll
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Can party agreements for specific performance or injunction or agreements that damages will not be an adequate remedy for breach of contract serve any purpose other than delusion or wishful thinking? Even when they are included as a term of a contract, remedial preference in the face of breach and commercial pragmatism coupled with orthodox legal advice is likely to weigh heavily against party reliance on these terms. This article examines what legal purpose, if any, is served by parties expressly stipulating for specific performance of their contractual obligations, including by injunction. While acknowledging that party agreements of this nature cannot oust or bind the exercise of judicial discretion, it argues that both theoretical and practical considerations indicate that these terms should be a significant factor in the decision whether or not to order specific performance or to grant an injunction for breach of contract.

1 Introduction: Equity and Freedom of Contract

The law allows for freedom of contract in many ways. Parties are free to contract on terms of their choice and courts do not inquire into the terms of their bargain including the adequacy of the consideration provided by each party. Choice of terms includes remedies for breach of contract. The common law supports party choice through enforcement of self-help remedies including debts and agreed damages. Even when a contract meets the common law requirements for formation and enforceability, however, Equity may still limit the freedom of contracting parties to enforce terms on which they have agreed. The ability of parties to enforce agreed damages clauses, for example, is limited by Equity’s attitude to penalties. Again, the parties may also have agreed that the written terms are the entire terms of their contract yet a term of this type might not withstand equitable relief through promissory estoppel.¹ These are just two illustrations of where Equity limits the freedom of parties to enforce their agreed terms.

Equity’s ‘intervention’ in contracts will be stimulated by concerns arising at various points of time in the life of a contract. Concerns may arise about misrepresentation, mistake, duress, unconscionable conduct and undue influence at the time of formation. These and other concerns are addressed

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The author wishes to acknowledge and thank participants at the Seventh Remedies Discussion Forum held at the University of Aix-Marseille III, Aix en Provence, France on 8–9 June 2011 and the Obligations Group Contract Workshop, University of Melbourne Law School, Melbourne, Australia, 1–2 December 2011 and Jeff Berryman and Natalie Skead for their valuable comments on earlier versions of this article.

¹ In this instance Equity can better be described as ‘trumping’ contract, as distinct from ‘intervening’ in contract. See, eg, N Seddon, ‘Can Contract Trump Estoppel?’ (2003) 77 ALJ 126.
through a variety of equitable principles which allow for relief by one party from enforcement by the other of the contract or some of their agreed terms. Equity is also called upon at times to assist in the enforcement of contractual obligations, most often by a party asking the court to exercise its equitable discretion to grant specific relief in the form of an injunction or specific performance. This role of Equity is the subject of this article. It continues a line of questioning by contract scholars about the proper balance between party autonomy to agree to remedies other than damages and Equity’s limits on that autonomy. Specifically, this article examines what legal purpose, if any, is served by parties expressly stipulating for specific performance of their contractual obligations, including by injunction. The means by which parties might do this are identified in Part 3.1 below.

Not surprisingly, agreements for specific relief are not common in contracts. Even when they are included in a contract, remedial preference in the face of breach and commercial pragmatism, coupled with orthodox legal advice, is likely to weigh heavily against party reliance on these terms. I am not aware of any empirical data as to the incidence in contracts of party agreements for specific relief and whether parties actually rely on them. With that in mind, the article asks what a court is likely to make of a contractual agreement for specific relief through analysis of cases and academic commentaries. The response to this question is usually brief, if not dismissive. Parties to a contract cannot bind a court to exercise equitable jurisdiction in a predetermined way, either to refuse or to grant specific relief in the form of specific performance or injunction. To do so would be to oust the jurisdiction of the court and there is ample authority to the effect that attempts to do this will fail.

Given that parties cannot by agreement mandate the outcome of an exercise of equitable jurisdiction, Carter and Tilbury conclude that:

The fact that contracts sometimes contain clauses conferring jurisdiction to order specific performance merely illustrates the wishful thinking of those who draft contracts.

Is there scope for wishful thinking to be developed into plausible argument? Seddon and Ellinghaus regard the question whether the remedy of specific performance can be the subject of agreement between the parties as an 'unexplored issue'. While there is some truth in that comment, there is judicial and academic opinion on the subject. In this article I examine this commentary, the role that agreements for specific relief have played in decided cases and their potential significance in determining the outcome of an action for breach of contract.

An inquiry into the reasons why agreements for specific relief are not

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2 While the agreement to specific performance is the primary focus of this article, reference is also made to other ways that parties seek to bind themselves to specific relief, eg, by stipulating that damages will not be inadequate. The assumption is made throughout the discussion that there is no other basis for the intervention by Equity, for example on grounds of unconscionable conduct or undue influence.


enforced is connected to a number of other inquiries:

1. In what circumstances will and should courts exercise their jurisdiction to grant or refuse specific relief;
2. Whether specific performance, rather than damages, should be the primary, or presumptive, remedy for breach of contract;
3. Whether, despite the unenforceable nature of agreements for equitable relief, party agreements to this effect can influence judicial decision-making when granting relief.

Although this article is mostly concerned with the third inquiry all three are inextricably linked. There is well developed case law and scholarship on the first two questions and for obvious reasons, far more has been written about the availability of specific performance and injunctions as a judicial remedy for breach of contract than as an agreed remedy. In asking the third question, I draw on this scholarship but do not attempt a comprehensive analysis of the field. My inquiry is also primarily directed at how an Australian court might give effect to an agreement between contracting parties that they will perform their express contractual obligations. This is likely to be predictive for other common law jurisdictions, particular the United Kingdom and Canada. I do not directly advance the argument made by some commentators that specific performance should be the presumptive remedy for breach of contract6 though some of the arguments made in support of that view are relevant to the conclusions presented here. In the next Part, I provide a brief overview of the approach of Australian courts and courts of other common law jurisdictions to specific enforcement of performance obligations and arguments about this as the primary remedy for breach of contract. This provides a basis for the discussion in the following Parts of contractual agreements for specific relief.

2 Specific Performance and Injunctions as Remedies for Breach of Contract

2.1 The Modern Approach to the Exercise of Equitable Jurisdiction to Grant Specific Relief — a Brief Overview

Specific performance refers to the enforcement in specie of any contractual obligation to perform an act, whether by settling or defining the rights of the parties, or by enforcing those rights in any way.7 It is the only remedy that actually enforces the obligation to perform as promised,8 though it is possible in some circumstances to obtain an order analogous to specific performance in respect of individual obligations under a contract if a contract has been partly

6 See, eg, R Jukier, ‘Taking Specific Performance Seriously: Trumping Damages as the Presumptive Remedy for Breach of Contract’ in R Sharpe and K Roach (Eds), Taking Rights Seriously, Canadian Institute for the Administration of Justice, Ottawa, 2009, p 85. While advocating for specific performance as the presumptive remedy for breach of contract at common law, Jukier recognises that specific relief may not be available or appropriate for a myriad of reasons ‘including personal liberty concerns, abuse of rights or the parties’ own bargained intention to prioritize the remedy of damages’: p 117.


8 Seddon and Ellinghaus, above, n 5, p 1129.
performed by the party seeking to enforce the obligation.\textsuperscript{9} Importantly, failure to perform as ordered constitutes a contempt of court and renders the party in breach liable to punishment.\textsuperscript{10}

Specific performance and injunctions to enforce contractual obligations are not available as of right. They are remedies available in the auxiliary jurisdiction of equity when the available legal remedies are shown to be inadequate and where there are no other reasons why the relief should not be granted. Although there are circumstances in which specific relief to enforce contractual obligations is likely to be granted almost as a matter of course, the inadequacy of damages or any other common law remedy to remedy a breach of contract is a jurisdictional requirement to the exercise of the court’s equitable jurisdiction.\textsuperscript{11} This orthodoxy has recently been reiterated by the NSW Court of Appeal in Lucas Stuart Pty Ltd v Hemmes Hermitage Pty Ltd.\textsuperscript{12}

Spry notes that there has been a growing tendency for courts to regard it as unnecessary to treat adequacy of damages as a jurisdictional or threshold question when specific performance is sought.\textsuperscript{13} Tilbury goes further to argue that the authorities support the conclusion that inadequacy is ‘merely one of the discretionary factors affecting the availability of specific performance’\textsuperscript{14} and that the availability of equitable relief on a discretionary basis is supported by the award of injunctions as a primary remedy in some cases.\textsuperscript{15} Similarly, on the basis of a review of recent Australian cases in which applications for urgent and interim injunctions were sought, Aitken has concluded that the rigidity once afforded to the primacy of the common law remedy of damages is breaking down.\textsuperscript{16}

Aitken refers by way of example to the approach taken by Warren J in

\textsuperscript{9} Bridge Wholesale Acceptance Corporation (Australia) Ltd v Burnard (1992) NSWLR 415 at 423–4.
\textsuperscript{10} Witham v Holloway (1995) 183 CLR 525 at 534.
\textsuperscript{11} J C Williamson Ltd v Lukey (1931) 45 CLR 282 at 299–300 per Dixon J; Dalgety Wine Estates Pty Ltd v Rizzon (1979) 141 CLR 552 at 560 per Gibbs J; 573–4 per Mason J; 26 ALR 355. Where parties have agreed to negative stipulations the courts are willing to grant equitable relief but the High Court has rejected any suggestion that the words of Lord Cairns in Doherty v Allman (1878) 3 App Cas 709 at 720 (to the effect that an injunction will always issue to restrain a breach of a negative term in a contract) might mean that an injunction is always available as of right in these circumstances. Other factors will need to be considered in exercising the equitable discretion, see J C Williamson Ltd v Lukey and Maltholland (1931) 45 CLR 282 at 299–300 per Dixon J. (‘If . . . a clear legal duty is imposed by contract to refrain from some act, then, prima facie, an injunction should go to restrain the doing of that act’) and Dalgety Wine Estates Pty Ltd v Rizzon (1979) 141 CLR 552 at 560 per Gibbs J, 573–4 per Mason J; 26 ALR 355.
\textsuperscript{12} [2010] NSWCA 283 at [5] per Campbell JA (Lucas Stuart): (‘It is important for the conceptual structure of the law governing the present case that inadequacy of the legal remedy is the foundation of equity’s jurisdiction to grant an injunction to enforce a negative contractual provision.’) and at [62] per Young JA, (‘The only justification for equity ever involving itself in providing a remedy for breach of a common law obligation is if the remedy provided by the common law is inadequate’).
\textsuperscript{13} Spry, above, n 7, p 60. Dr Spry concludes that courts are now more likely to simply ask as the ultimate question whether it would be more just to grant specific performance than to award damages. He supports this as the approach that should be applied ‘save in the rare cases where damages and specific performance provide identical benefits’.
\textsuperscript{14} M J Tilbury, Civil Remedies, Vol I, Butterworths, Sydney, 1990 p 286.
\textsuperscript{15} Above, n 14, pp 284–5.
Axcess Australia Pty Ltd v Primus Telecommunications (Aust) Pty Ltd and her Honour’s statement that the balance of convenience will favour the granting of an injunction where it ‘is otherwise just in all the circumstances to do so’\(^{17}\) as an indication that at an interlocutory stage courts are more willing than before to compel performance of contractual obligations. While this observation may be correct, in both Axcess Australia and Lucas Stuart the court specifically addressed the question of adequacy of damages as a separate issue in deciding whether to grant an interlocutory injunction.\(^{18}\)

It is settled law in Australia that the test for whether an interlocutory injunction should be granted is whether there is a serious question to be tried, and whether the balance of convenience favours the grant of the injunction.\(^{19}\) Notwithstanding the tendency for some courts more than others upon such applications to treat the adequacy of damages question as ‘essentially intertwined’ with the balance of convenience question,\(^{20}\) the courts are required to address adequacy of damages courts as discrete issue. This article proceeds on the basis of the orthodox view that an order for specific performance and an injunction to enforce a negative stipulation in a contract will only be awarded when the court is satisfied that damages will not provide an adequate remedy for breach and there are no other discretionary reasons to deny the relief.\(^{21}\)

In Zhu v Treasurer of the State of New South Wales\(^{22}\) the High Court affirmed the statement by Windeyer J in Coulls v Bagot’s Executor & Trustee Co Ltd\(^{23}\) that damages are inadequate if they cannot satisfy the demands of justice, and justice to a promisee requires that a promisor perform the promise.\(^{24}\) The issue of adequacy of damages is closely tied to the uniqueness of the subject matter of the contract, on the basis that monetary compensation may not enable the promisee to obtain substitute performance. Although the most common application of the remedy of specific performance is to contracts involving the sale of land, usually regarded as unique in character, the High Court adheres to the view that there is no fixed category of cases in

\(^{17}\) [2000] VSC 64 at [33] (Axcess Australia).


\(^{19}\) Murphy v Lush (1986) 60 ALJR 523 at 524 per Gibbs CJ, Mason, Brennan, Deane and Dawson JJ; Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia (1998) 195 CLR 1 at 24 [21]; 153 ALR 643 at 652 [21] per Brennan CJ, McHugh, Gummow, Kirby and Hayne JJ.

\(^{20}\) Axcess Australia [2000] VSC 64 at [21] per Warren J. Compare Lucas Stuart Pty Ltd v Hemmes Hermitage Pty [2010] NSWCA 283, where Campbell JA, at [6], referred to the necessity when the claimed final relief is a permanent injunction to restrain a breach of a negative stipulation in a contract for any inquiry at the interlocutory stage into whether there is a serious question to be tried to include an inquiry whether there is a serious question to be tried concerning whether the common law’s remedy or remedies for the claimed breach will be inadequate, citing Varley v Varley [2006] NSWSC 1025 at [19]–[25] in support.

\(^{21}\) In doing so it is acknowledged that the views advanced by Spry and Tilbury that the question for the court, ultimately, is whether it would be more just to grant specific relief than to award damages may well afford a more significant role to party agreements for specific performance, discussed in 4.3 below.

\(^{22}\) (2004) 218 CLR 530; 211 ALR 159.


\(^{24}\) Zhu v Treasurer of the State of New South Wales (2004) 218 CLR 530 at 574–5 [128]; 211 ALR 159 at 192–3 [128].
which the remedy is available.\textsuperscript{25} While there are some well-established circumstances in which it will usually be considered appropriate to grant specific performance it will not be ordered if it would be unjust in all the circumstances. Discretionary factors that may render it unjust to make an order include hardship to the defendant or a third party, fraud, mistake, acquiescence and delay, lack of mutuality and the absence of clean hands.\textsuperscript{26}

As with specific performance, an injunction to restrain a breach of contract will not be granted if the order would not be just in all the circumstances. More generally, it has been held that an injunction will not be ordered, for example, if its enforcement would require continuous supervision,\textsuperscript{27} where the enforced obligation cannot be stated with sufficient precision\textsuperscript{28} or where the effect of the injunction would be to force the promisor to remain in a contract of personal service.\textsuperscript{29} The effect of the multiple considerations that bear on the exercise of the discretion associated with equitable relief is that relief still can be refused even when damages would be inadequate.

This will occur, for example, when a court concludes that difficulties associated with supervision or enforcement of an order for specific performance justifies refusal to order that relief notwithstanding numerous other factors that might justify an order. The decision in\textit{Co-operative Insurance Society v Argyll Stores (Holdings) Ltd}\textsuperscript{30} provides an illustration of this. The decision in this case has attracted considerable attention from scholars and raises many issues only some of which I will touch on here. In this case, the parties entered into a long term commercial lease in which the tenant, Argyll Stores, agreed in cl 4(19) to keep open their supermarket during the usual hours of business in the locality. Argyll Stores was the ‘anchor tenant’ in the plaintiff society’s shopping complex. Following a review of all its business undertakings Argyll decided to close down its store in the plaintiff’s complex along with 26 other loss making or marginally profitable stores. The plaintiff sought specific performance of the covenant in cl 4(19) and/or damages. The trial judge refused to grant specific performance. The Court of Appeal by majority allowed an appeal by the plaintiffs and ordered specific performance. The House of Lords allowed the defendant’s appeal against the order.

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\textsuperscript{25} Coulls v Bagot’s Executor and Trustee Co Ltd (1967) 119 CLR 460 at 503 per Windeyer J:

There is no reason today for limiting by specific categories, rather than by general principle, the cases in which orders for specific performance will be made. The days are long past when the common law courts looked with jealousy upon what they thought was a usurpation by the Chancery Court of their jurisdiction.

\textsuperscript{26} The position under Australian law is similar in general terms to the law in England as stated in\textit{Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd}\textsuperscript{[1998]} AC 1 at 11 by Lord Hoffmann, ‘[t]he principles upon which English judges exercise the discretion to grant specific performance are reasonably well settled and depend upon a number of considerations, mostly of a practical nature, which are of very general application’.

\textsuperscript{27} J C Williamson Ltd v Lukey and Mulholland (1931) 45 CLR 282. The High Court has since stated ‘constant supervision by the Court’ . . . is no longer an effective or useful criterion for refusing a decree of specific performance’:\textit{Patrick Stevedores Operations (No 2) Pty Ltd v Maritime Union of Australaia} (1998) 195 CLR 1; 153 ALR 643; 153 ALR 643 at [79].

\textsuperscript{28} J C Williamson Ltd v Lukey and Mulholland (1931) 45 CLR 282.

\textsuperscript{29} Curro v Beyond Productions Pty Ltd (1993) 30 NSWLR 337.

\textsuperscript{30} [1998] AC 1 (Argyll Stores).
Lord Hoffmann, with whom the other Lords concurred, clarified that the concern relating to specific performance of contracts where the order would require ‘constant supervision’ is the possibility of the court having to give an infinite number of rulings in order to ensure execution of the order. The possibility and serious consequences of a finding of contempt underlies this concern. Lord Hoffmann also drew a distinction between orders which require a defendant to carry on an activity, such as running a business, and orders that require him to achieve a result. The latter are said to be more amenable to an order for specific performance than the former, although in both cases it may be difficult to state the terms of the order with sufficient precision to avoid it being inevitable that the defendant will commit contempt. His Lordship referred to the difficulties that could hypothetically arise should the defendant fail to observe the decree and concluded that the present case was not suitable for an award of specific performance.

Another reason Lord Hoffmann considered important for refusing specific performance in *Argyll Stores* was the power that the decree would give the plaintiff to extract from the defendant the gains it would make from the breach and the resultant injustice of the plaintiff being thereby enriched at the defendant’s expense. In other words, one reason for refusing specific performance is that it allows a plaintiff to recover the equivalent of a gain based award of damages. At that time in England and to date in Australia, courts have steadfastly refused to adopt the defendant’s gain as a measure of damage for breach of contract.

Based on the reasoning in *Argyll Stores* and the House of Lord’s confirmation of the ‘settled practice’ in cases of its kind a landlord will face difficulties enforcing ‘keep open’ or ‘carry on clauses’ in commercial leases and distinguishing the facts of that case which, as Tettenborn and others have argued, were highly meritorious. This is notwithstanding the fact that commercial entities may have willingly undertaken obligations which, on an individual basis, might be sufficiently certain to avoid the problems identified by Lord Hoffmann.

The following case illustrates the difficulty facing a landlord attempting to enforce keep open and similar clauses. In the Canadian case *AL Sott Financial (Newton) Inc v Vancouver City Savings Credit Union*, Esson JA, for the

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34 Since *Argyll Stores* in England for circumstances in which a gain based remedy for breach of contract may be available see *Attorney-General v Blake* [2001] 1 AC 268 and subsequent case law. In Australia see *Hospitality Group Pty Ltd v Australian Rugby Union Ltd* (2001) 110 FCR 157.
35 Tettenborn, above, n 33 at 38. See also Spry, above, n 7, p 672; D Pearce, ‘Remedies for Breach of a Keep-Open Contract’ (2008) 24 JCL 199; Jukier, above, n 6, p 117. Note however that specific relief was granted where the facts were considered to be sufficiently distinguishable, see, *Diagnostic X-Ray Services Pty Ltd v Jewel Foods Stores Pty Ltd* (2001) 4 VR 632.
36 Tettenborn, above, n 33, at 31.
37 2000 BCCA 143.
court, reflected that in seeking an injunction to enforce a continuous-operation clause in a contract of lease the plaintiff in the matter before him was ‘swimming against a strong stream of authority since the decision of the House of Lords in Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd’. His Honour observed that the courts of England and Ontario have been consistent in refusing to make orders requiring a business to be carried on and in holding damages to be an adequate remedy. Justice Esson went on to say, however, that ‘I should not be taken as saying that it is the law of British Columbia that an order of that kind cannot be granted’. His Honour’s view that an order for specific performance of a carry on business or keep open clause is not precluded as a matter of law is consistent with the case law in Australia and other common law jurisdictions.

2.2 Arguments For and Against Specific Relief as the Primary Remedy for Breach of Contract

There is scholarship in common law jurisdictions that examines the circumstances in which specific performance is regarded as an appropriate remedy in particular types of cases or indeed in a particular case. Often this will reveal differences in opinion based on the doctrinal and practical considerations relied upon by the judges in reaching their decision. Another line of scholarship advocates more generally for specific performance as the primary (and sometimes presumptive) remedy for breach of contract on the basis that this is the best way to protect the parties’ right to performance. In this context, ‘presumptive’ is not synonymous with ‘always’. Even in civil law jurisdictions, where specific performance is the presumptive remedy, there are circumstances where the remedy will not be available.

Jukier, a proponent of specific performance as the presumptive remedy for breach of contract, presents the arguments for and against specific performance as
‘theoretical arguments’ and ‘practical advantages’. This is a useful framework to overview the arguments for and against specific performance as the primary remedy for breach of contract and I adopt it here.\textsuperscript{43}

\textbf{2.2.1 Theoretical arguments}

There are various contract law theories that can be relied upon for support for specific performance as the primary remedy for breach of contract. The will theory, influential during the nineteenth century, identifies a contract as an expression of the will of the contracting parties that should be respected and enforced by the courts.\textsuperscript{44} Contract law has also been explained by promise theory by which the moral basis for contracts is to keep promises that have been made,\textsuperscript{45} and by consent theory, by which the moral justification for enforcing contractual obligations is the consent of a party to the transfer of their legal entitlements.\textsuperscript{46} Contracts have also been explained as legal obligations assumed by the parties rather than imposed by law, and this reasoning has been used to explain and guide contract doctrine without looking for external justification for the existence of contracts and contract law.\textsuperscript{47} These and other theories\textsuperscript{48} provide a basis for understanding why the law enforces contracts and, to varying degrees, provide a conceptual basis for doctrinal reasoning, including factors that affect remedies for breach of contract.

Even though each of these theories can be called upon to support the enforcement of contracts, they are not able to answer the question in any particular case whether to enforce performance of a particular obligation and they do not determine the remedy for breach. It can be argued that the principle that damages for breach of contract are to place the promisee in the same position he or she would have been in had the contract been performed\textsuperscript{49} justifies granting specific performance when a promisee claims it.\textsuperscript{50} Despite

\textsuperscript{43} Jukier, amongst others, argues that the civil law approach that regards specific performance as the presumptive remedy for specific performance is to be preferred because it is more likely to ensure that rights to performance are enforced; see Jukier, above, n 6, pp 90–3.


\textsuperscript{49} Robinson v Harman (1848) 1 Ex 850; Parke B at 855. This principle has been affirmed by the High Court of Australia on numerous occasions, eg, in \textit{Commonwealth v Amann Aviation Pty Ltd} (1991) 174 CLR 64; 104 ALR 1.

\textsuperscript{50} E A Farnsworth, ‘Legal Remedies for Breach of Contract’ (1970) 70 \textit{Columbia L Rev} 1145 at 1150; (‘Although damages will, in some cases, permit the injured party to arrange an adequate substitute for the expected benefit, specific relief is clearly the form better suited to the objective of putting the promisee in the position in which he would have been had the
this, as we have seen above, this view has not been taken up within Anglo-American contract law, which has adopted the view that damages are available as of right but that specific performance is an exceptional remedy. 51

From a broader theoretical standpoint, a rights based analysis of contractual obligations also supports the remedy of specific performance because this supports the presumption that valid contractual obligations should be performed. 52 An order of specific performance ensures that the plaintiff receives what they were promised. At the same time, as Smith explains, a rights based theory of contract recognises that the law limits the circumstances in which specific performance will be awarded because of concerns that the remedy intrudes on personal liberties. It is argued that for this reason it is appropriate that a plaintiff seeking specific performance is required to show 'that their application does not raise such concerns and/or that the alternative of a monetary order will fail to provide satisfactory compensation'. 53 This balancing of competing rights of contracting parties is well illustrated by cases in which equitable relief is refused against an employee in breach of their employment contract because an order for specific performance would interfere with the employee’s freedom of future action and offend the principle against self-enslavement. 54

Economic theory has also been significant to the debate about the relationship between specific performance and damages for breach of contract. This inquiry is based on ascertaining which remedy will result in the most economically efficient outcome. As Berryman observes however, proponents both for and against specific performance are able to defend their position on efficiency grounds. 55 As a result, while analysis of the economic efficiency of damages and specific performance provides important insights into the economic consequences of remedial choice, it does not provide a...
comprehensive theory for this area of law.  

While not strictly a theoretical difficulty, another justification given for limiting the circumstances in which the remedy of specific performance is available arises out of concerns about the nature of discretionary decision-making. The importance of exercising the discretion available to a court in its auxiliary jurisdiction in equity consistently with previous cases in the interests of predictability and to avoid the unconstrained exercise of judicial discretion leads to calls for close adherence to settled practice by the courts.

2.2.2 Practical advantages and disadvantages

Possibly the most significant practical advantage to the plaintiff of an order for specific performance is that the plaintiff is not put to the difficulty of proving the quantum of their damages. In addition, a plaintiff who receives the agreed performance is not restricted to a substitutionary damages remedy that is limited by considerations of remoteness, mitigation and forms of non-recoverable loss. The disadvantages of specific relief are reflected in large measure in the factors taken into account by a court in exercising its discretion. There are concerns about restraints on the liberty of parties that are not confined to contracts of employment, and that the contempt backed nature of specific performance can result in severe consequences for a defendant.

Other disadvantages of an order for specific performance relate to the possibility that courts will be drawn into supervision of the order, resulting in costs and inefficiencies from an administration of justice perspective. As we have seen in the previous section, these and other concerns have been the basis for refusing specific relief even in cases where damages may be inadequate.

3 Agreements for Specific Relief

When are parties most likely to agree on a specific relief clause? One obvious and possibly cynical answer is, when they have not had good legal advice. Another answer, consistent with Carter and Tilbury’s comment above is, when the drafter seeks to capture the wishes of the parties, however impractical. It is a paradox not lost on some that the more liberal the courts’ attitude to

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56 ‘The final verdict on the efficiency of damages as opposed to specific performance is far from unanimous with many equally prominent and thoughtful theorists espousing the contrary view’; see Jukier, above, n 6, p 99.

57 See, eg, D Jensen, ‘The Rights and Wrongs of Discretionary Remedialism’ [2003] Singapore Journal of Legal Studies 178 at 184 and 208. The exercise of remedial discretion and the meaning of ‘discretionary remedialism’ has attracted much debate that need not be rehearsed in this article. The key point in the context of awards of specific performance and injunctions to enforce contractual obligations is to recognise that a court has the discretion to grant or withhold these forms of relief. In part, as Waddams notes, this is because of the immediate and drastic nature of these orders, and in part because there are often good reason for doing so ‘but it is not possible to state all of these reasons fully and precisely in advance, and therefore the court retains a power to withhold its orders in appropriate circumstances.’ It is in this sense that equitable remedies are referred to as ‘discretionary’, (Waddams, above, n 51, p 180).

specific performance the less necessary it will be for parties to resort to contractual provisions governing granting of the remedy.\textsuperscript{59}

Another way of addressing the question ‘when might these clauses be useful’ involves looking at the type of contractual obligation that parties might want to enforce by specific performance. This is likely to lead to the answer; ‘when damages are unlikely to be adequate to compensate for breach’. In these cases, the agreed remedy might address this concern. At the same time, the agreed remedy cannot address prospectively other requirements that need to be satisfied before a court will grant specific relief such as clean hands and the absence of hardship or restrictions on future freedoms. This is the very reason why a stipulation for specific performance is not enforceable. The contract drafter faces a conundrum: the more likely that damages will be inadequate for breach and the contractual obligation is one that is likely to be enforced by an order for specific performance the less point there is including a term to that effect in the contract. But where damages are likely to be inadequate and the nature of the obligation is such that the remedy is almost certain to be refused there is even less to be gained by including the term. In other words, the term has the least legal value to the parties in circumstances where they agree it might have the most practical value to them. In the next section I set out the types of agreed remedies clauses used by parties to achieve performance of contractual obligations and provide examples from the few reported cases there are in which agreements for specific relief have received judicial attention.

3.1 Agreements Relating to Self Help and the Remedy of Specific Performance

Unlike some stipulated remedies, an agreement to specifically perform a contractual obligation, by its nature, is not a self help remedy. Specific performance and injunctions are remedies that only have force as judicial orders. Parties can consent to agreements to perform their original contractual agreement, but specific relief akin to specific performance will be required to enforce that consent agreement. In many instances equitable principles will limit the autonomy expressed through the agreed remedy. There are other practical and legal limits on parties’ freedom to self determine the outcome of a breach of contract, including common law, equitable and statutory restrictions.\textsuperscript{60} Despite these limits there are a number of ways that parties have used agreed terms relating to specific performance as seen in the following examples.

3.1.1 Liquidated damages clauses

The presence of a liquidated damages clause in a contract does not prevent the plaintiff from bringing an equitable action for injunction or specific


\textsuperscript{60} D Dugdale ‘Commentary on “Remedial Choice and Contract Drafting”’ (1998) 13 JCL 39 at 40.
performance.61 Further, when a clause of this type is relied upon to recover past losses, it will not preclude a party from seeking an injunction or specific performance to prevent future loss. In this case, as noted by Berryman, the plaintiff will be required to elect between specific relief and liquidated damages to compensate for future loss in order to avoid over-compensation.62

3.1.2 Agreements that confine a party to a remedy of damages only

In addition or in contrast to agreeing to liquidated damages, parties may include a ‘damages only’ clause in their contract. This indicates that the parties intend to limit the remedies available to them to damages and to preclude specific performance. In common law jurisdictions, including Australia, to successfully exclude the remedy of specific performance parties need to use clear words in order to rebut the presumption that a contracting party does not intend to abandon any remedies for breach of contract arising by operation of law.63 This principle, stated by Lord Goff of Chievely in *Stocznia Gdanska SA v Latvian Shipping Co*64 has been applied by the High Court of Australia,65 and was recently cited by Gillard AJA for the Full Court of the Supreme Court of Victoria in *MLW Technology Pty Ltd v May*.66 Jukier reports that there is judicial support in principle in the United States for upholding damages only clauses and support for this principle amongst commentators in both civil and common law jurisdictions.67

3.1.3 Agreements for specific performance and agreed damages

In the event that a contract stipulates both for specific performance of a contract and for the payment of agreed damages in the event of breach, reliance on the former will not preclude a party relying on the latter.68 These terms will be understood to create a choice between these remedies rather than to exclude a right to damages. This conclusion is explicitly recognised by the US decision in *Stokes v Moore*69 where the court held that an agreed specific performance clause did not preclude the promisee relying on an agreed damages clause in the contract.70

3.1.4 Agreements or acknowledgement that damages will not be an adequate remedy

Clauses that contain agreements or acknowledgements to this effect serve an evidentiary purpose but are not an agreed remedy clause. It is difficult to

61 Jukier, above, n 6, p 116.
63 For case examples from England and Canada see Sharpe, above, n 59, paras [7.680]–[7.700].
64 [1998] 1 WLR at 574 at 585.
65 *Concut Pty Ltd v Worrell* (2000) 176 ALR 693 at [23] per Gleeson CJ and Gaudron and Gummow JJ.
66 [2005] VSCA 29 at [59], [60].
67 Jukier, above, n 6, pp 115–16.
68 Decisions concerning cases where parties have included negative stipulations and agreed damages clauses for breach support this conclusion, see, eg, *Warner Brothers Pictures Inc v Nelson* [1937] 1 KB 209 at 220–1.
69 (1955) 77 So 2d 331
70 (1955) 77 So 2d 331 at 335.
predict the weight that will be placed on a provision of this nature in any particular case because other discretion consideration will also be taken into account.

3.1.5 Agreement to consent to specific performance or injunction in the event of breach

There are a few reported cases, set out in the next section of this Part, in which parties have sought to rely on agreements for specific relief or to consent to specific performance or an injunction. Presumably there is no reason why a clause of this type cannot be effective against a promisor who is willing to comply with its terms and who does not seek to confine the promisee to a remedy of damages. In terms of legal enforceability and certainty of remedial outcome however, there are significant limitations on the value of clauses in which a party consents to specific forms of relief. In each case it has been held that it does not oust the court’s jurisdiction to refuse equitable relief.

3.2 Agreements for Specific Performance and to Similar Effect — Examples from Reported Cases

The author’s research has not uncovered any Australian case in which a party has sought to enforce a contractual term that stipulates specific performance as an agreed remedy. This could be because Australian courts have closely followed English courts which have made plain their unwillingness to enforce clauses that attempt to oust the jurisdiction of courts in this way. The issue more often arises in cases where a promisor is seeking to enforce an agreement for exclusive services or an agreement to carry on a business or keep open a store. Although these are not agreements for specific performance, they create obligations that would have a similar effect if enforced by the court.

In Warner Brothers Pictures Inc v Nelson, for example, the plaintiff film producers in the United States sought an injunction to restrain the defendant actress Bette Davis from breaching her exclusive service agreement by working for another film studio in the United Kingdom. Branson J referred to authorities that support the enforcement of negative stipulations in contracts for personal services other than where the effect of granting the injunction would be to drive the defendant to starvation or to specific performance of the agreement or where other circumstances provide reasons to limit the exercise of discretion to grant the injunction. In deciding this was an appropriate case to grant an injunction Branson J took into account the ‘uncontradicted evidence of the plaintiffs as to the difficulty of estimating the damages which they may suffer from the breach by the defendant of her contract’. His Lordship also referred to what was agreed to by the parties in the contract. He stated:

71 For additional cases see I Macneil ‘Power of Contract and Agreed Remedies’ (1962) 47 Cornell L Rev 495 at 522–4.
73 [1937] 1 KB 209 at 217.
74 [1937] 1 KB 209 at 220.
75 [1937] 1 KB 209 at 220.
I think it is not inappropriate to refer to the fact that, in the contract between the parties, in clause 22, there is a formal admission by the defendant that her services, being ‘of a special, unique, extraordinary and intellectual character’ gives them a particular value ‘the loss of which cannot be reasonably or adequately compensated in damages’ and that a breach may ‘cost the producer great and irreparable injury and damage’, and the artiste expressly agrees that the producer shall be entitled to the remedy of injunction.

As to the legal effect of these admissions by way of contractual agreement Branson J remarks:76

Of course, the parties cannot contract themselves out of the law; but it assists, at all events, on the question of evidence as to the applicability of an injunction in the present case, to find the parties formally recognising that in cases of this kind injunction is a more appropriate remedy than damages.

In the Canadian case Tritav Holdings Ltd v National Bank of Canada77 the defendant bank entered into a shopping centre lease that required it to carry on business continuously, diligently, and actively in the whole of the premises and for the entirety of the lease. The bank decided to close the branch in question but continued to pay the rent and seek a subtenant. The landlord sought an interim mandatory injunction to reopen the business and an interim injunction to restrain the bank from failing to reopen. The landlord relied on a term of the lease that provided for damages and other remedies for the tenant’s default, including an injunction or specific performance to restrain the tenant from defaulting and a mandatory injunction to compel the tenant to open or reopen the premises for business to the public in accordance with the lease.

In his judgment, Justice Gotlib, in the Ontario Court of Justice (General Division) (as it was then named), referred to the fact that the landlord relied entirely on the following consent provision in the clause which stated:78

The Tenant consents to the Landlord obtaining those injunctions upon the landlord establishing by affidavit or other evidence that the tenant has defaulted or that the Landlord has reasonable cause to believe that the Tenant is about to default under this Section.

Justice Gotlib identified the issue in this case as not so much whether the landlord had a remedy for damages as that was clear, but whether the tenant could properly consent to the landlord obtaining an injunction. The short answer to this was that parties cannot ‘contract out of the law’ as it exists. Notwithstanding the terms of the lease, Justice Gotlib dismissed the application for the injunctions. His Honour decided that the landlord had not shown that it would suffer irreparable harm that could not be compensated for in damages. His Honour found that the bank had continued to pay its rent, was actively seeking a subtenant and was not a key tenant. The fact that six months had passed would cause an unjustifiable hardship to the tenant if required to reopen.79 An issue of waiver raised by the tenant on the basis that the landlord

76 [1937] 1 KB 209 at 221.
77 (1996) 47 CPC (3d) 91 (Ont Gen Div).
78 (1996) 47 CPC (3d) 91 at [2].
79 (1996) 47 CPC (3d) 91 at [10].
did not come to the court with clean hands because it had ‘sat on its hands’ for two months before writing a letter after the tenant vacated did not therefore need to be decided.

Subsequent to Tritav, Justice Bauman (as he then was) of the Supreme Court of British Columbia decided a remarkably similar case, Longwood Station Ltd v Coast Capital Savings Credit Union. In this case, the landlord, Longwood, sought to enforce cl 4.4 of its contract with Coast Capital. Clause 4.4 required the tenant:

not to use or permit the premises or any part thereof to be used for any purpose other than for the operation of a credit union . . . including the offering of an insurance business . . . financial planning services, brokerage services and real estate agency services.

The tenant further agreed to remain open for business during the tenant’s normal business hours and to carry on the business for which the premises were leased. In addition, cl 4.4 stated:

The tenant acknowledges that its continued operation of the premises and the regular conduct of its business therein are of utmost importance to the landlord and to the other tenants of the land, and a failure to do so continuously will entitle the landlord to obtain an injunction or order compelling the tenant to continuously operate its business in the premises, and the tenant hereby consents to such injunction or order in addition to any other remedies to which the landlord may be entitled at law or in equity.

Consistent with the established test to be satisfied on an application for an interlocutory injunction the plaintiff landlord was required to show first, a serious question to be tried, second, that the plaintiff would suffer irreparable harm if the application were refused and finally, that the balance of convenience was in favour of granting the relief. The court found there was a serious question to be tried based on the tenant’s clear breach of the lease. As to the consent clause, while the plaintiff conceded that the proviso in cl 4.4 could not bind the court in its exercise of equitable jurisdiction, it was argued that it should weigh against Coast Capital in considering irreparable harm and in particular the balance of convenience. On the facts his Honour found the claim of irreparable harm to be ‘quite tenuous’ and this point was conceded by the landlord. As to the balance of convenience question, the conclusion on irreparable harm was significant. There was only a short time remaining on the term of the lease, the defendant would pay rent for the balance of the term and the defendant was not an anchor tenant. The court concluded that the plaintiff could mitigate its loss by seeking a new tenant. Given the difficulties of supervising a mandatory injunction in this type of case, Bauman J concluded that the balance of convenience did not favour the landlord.

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80 2007 BCSC 1564. (This is a report of the oral reasons in a matter heard in chambers).
81 Clause 4.4, 2007 BCSC 1564 at [3].
82 RJR-MacDonald Inc v Canada (Attorney-General) [1994] 1 SCR 311 at 334, referred to and applied by Bauman J in Longwood as the leading Supreme Court authority, 2007 BCSC 1564 at [5].
83 Longwood Station Ltd v Coast Capital Savings Credit Union 2007 BCSC 1564 at [8].
84 The most serious harm relied upon was the impact or potential impact of the absence of this tenant on the proposed sale of the complex. That impact was held to be very speculative and unsupported by evidence from the proposed purchaser, 2007 BCSC 1564 at [11].
In respect of the consent proviso, his Honour noted that it was ‘pretty clear’ in its terms and was freely entered into by the defendant, ‘a sophisticated commercial entity with negotiating strength’.85 One factor against giving effect to the proviso was the fact that for some time after the lease was entered into the defendant’s predecessor did not offer credit union services and had operated primarily as an insurance business. In other words, the plaintiff had not continuously required operation of the business which it was now seeking to require to be operated from the premises.86 For this reason, Bauman J considered this was a case, as in Tritav Holdings, where it could be argued a waiver arose.

The consent proviso did, however, have a bearing on the outcome of the costs order made by the court. Although costs would normally follow the event, Bauman J took the view that the consent proviso in cl 4.4, freely entered into by the defendant ‘invited this application and Longwood should have its costs’87 adding by way of comment:88

One can only imagine the Credit Union’s reaction if it was one of their customers who intentionally ignored the clear wording of one of its banking documents. Such commercial conduct, and there is a strong case that it is present here, should not be encouraged.

Costs sanction aside, this case leaves open the question whether in a suitable case, a consent agreement or stipulation for specific relief could tip the scales in favour of a finding of irreparable harm and the balance of convenience in an application for an interim injunction or final relief.

The inability of parties to fetter the discretion of the courts to grant equitable relief was confirmed in Quadrant Visual Communications Ltd v Hutchinson Telephone UK Ltd.89 In this case a contract for the sale of a portable and car telephone business provided that part of the consideration for the sale was to be deferred (and calculated on future subscriptions) and that the consideration would be ‘free from any equity, cross claim whatsoever’. The plaintiff vendor sought specific performance of the obligation on the defendant purchaser to pay the deferred consideration. Roch J refused to grant specific relief because the plaintiff had failed to disclose facts material to the terms of the deferred consideration agreement and therefore lacked ‘clean hands’. His Honour held, in any event, that the words ‘free from any equity’ did not fetter the court’s discretion with respect to equitable relief.90 In dismissing an appeal against this decision, Stocker LJ reiterated the principle that the parties cannot by agreement exclude equitable relief. His Lordship stated:

for my part I would not consider the words ‘any equity’ apt to embrace the clean hands concept. Even if it was, and could bind the parties, it could not have the effect of fettering the discretion of the court. Once the court is asked for the equitable remedy of specific performance, its discretion cannot be fettered. Once the

85 Longwood Station Ltd v Coast Capital Savings Credit Union 2007 BCSC 1564 at [13].
86 2007 BCSC 1564 at [13].
87 2007 BCSC 1564 at [20].
88 2007 BCSC 1564 at [20].
89 [1993] BCLC 442.
90 [1993] BCLC 442 (Case Digest abstract ).
assistance of the court is involved by one of the parties in a discretionary matter, that
party is bound by the general discretion of the court to grant or refuse the remedy
sought.91

The cases in this section indicate that the contracts in which parties are most
likely to include an agreement for specific performance are contracts in which
the promised performance has some unique quality about it or where there is
no ready substitute for the performance. In these cases, damages for breach are
unlikely to fully compensate the promisee.

3.3 What Types of Contractual Obligations are Suited to
Agreements for Specific Performance?

The few reported cases that exist suggest that parties are most likely to use
agreements for specific performance in contracts where one party at least has
expressly agreed to an obligation that is able, in principle at least, to be
specifically enforced. Most often this will be where a promisor has agreed to
carry on a business and/or to keep their premises open. Agreements for
specific performance are unlikely to be used in contracts involving the
provision of personal services and possibly employment cases more generally,
because the courts have made clear that they will not grant equitable relief that
would have the effect of compelling specific performance of this type of
obligation. An agreed specific performance clause in an employment contract
would need to be limited to situations that only involved obligations of a
non-personal nature, capable of being identified with certainty and not for
extended periods of time. In these circumstances, however, it could be difficult
to show that damages would not be an adequate remedy. This is the
conundrum for contract drafters referred to earlier.

The more likely it is that a court would grant specific performance of a
contract anyway, the more likely the purpose of an agreed specific damages
clause will be achieved.92 Yet in the very cases where the parties might seek
to predetermine the remedial outcome of a breach, namely, where the
predictability of a successful action for specific performance is low, the less
likelihood there is that the clause will have any effect. Based on the approach
taken in the cases referred to above and the approach of Australian courts
generally to applications for specific performance, I suggest that the types of
contracts in which agreements for specific performance have a role to play are
as follows:

(a) contracts involving obligations in which damages for breach will be
assumed to be inadequate and where specific performance is a likely,
though not presumptive remedy. This encompasses contracts for the
sale of land and unique goods. It will be most relevant where there
is doubt as to whether the court will regard the contract as one that
involves unique or irreplaceable property.93 Sharpe has also

91 1992 WL 895567 at 8 per Butler-Sloss LJ (Sir George Waller concurring).
92 Sharpe reasons that as specific performance becomes more readily available, courts are more
likely to be willing to accept party stipulation; see Sharpe, above, n 59, at [7.810].
93 The decision of the Supreme Court of Canada in Semelhago v Paramadevan [1996] 2 SCR
415 provides a good illustration of this situation.
suggested this as a rationale for a court paying careful attention to an agreement for specific performance;[^94]

(b) contracts for the lease of premises in which the tenant agrees to keep open premises and/or carry on a stipulated business. Although the approach adopted by the House of Lords in *Argyll Stores* and the decisions that have followed are not particularly encouraging, if similar facts to that case were to arise again and the parties had agreed in advance to specific relief, their remedies stipulation might be significant to the outcome; and,

(c) generally, in contracts in which parties undertake obligations relating to their property and other commercial interests and where there is a serious likelihood that damages will be inadequate,[^95] where the parties are commercial entities that have entered into the contract after arms length negotiations and there are no circumstances at the time of judgment that the parties are unlikely to have taken into account at the time of entering into the contract.

4 A Closer Look at Agreements for Specific Relief

Discretion does not necessarily exclude party choice as an important, perhaps even governing, factor and certainly does not mean that careful examination as to the weight to be attached to party stipulation is not called for.

In this quote from his looseleaf edition of *Injunctions and Specific Performance*[^96] his Honour Justice Sharpe supports giving weight to party stipulations for specific performance in appropriate cases. In his view, apart from where there are external considerations of individual liberty and unjustified increased judicial cost, where a freely bargained contract provides for specific performance and the contract has allocated the risk of the event making performance undesirable to the defendant, the stipulated remedy clause should be enforced.[^97] To similar effect, Macneil argues that the power of contract to secure adequate sanctions to protect the promisee’s interests of reliance, restitution and expectation requires that specific performance be granted where the parties have expressly provided for that relief “when there is any doubt of the efficacy of other available remedies”.[^98]

Dugdale has also questioned why the parties’ remedial stipulations should not prevail, giving a number of arguments in support of parties to a contract

[^94]: Sharpe, above, n 59, at [7.760].
[^95]: Damages were held to be inadequate, eg, in *ANZ Executors and Trustees Ltd v Humes Ltd* [1990] VR 615 because of the difficulty for the plaintiff of proving their damages. In this case, a trust deed for the issue of convertible notes required notice to be given of any meeting of convertible note holders. An injunction was granted following a failure to give the required notice. Another example of where damages might be inadequate is where courts have been willing to order specific performance of an agreement of loan or indemnity. See, eg, *Wight v Haberdan Pty Ltd* [1984] 2 NSWLR 280; *Corpers (No 664) Pty Ltd v NZI Securities Australia Ltd* (1989) ASC 58,402.
[^96]: Sharpe, above, n 59, para [7.660].
[^97]: Sharpe, above, n 59, para [7.800].
[^98]: Macneil, above, n 71, at 523 (original emphasis), where he expressly discounts the suggestion that equity should specifically perform personal services contracts or contracts difficult to supervise.
being able to spell out their own tailor-made remedies. Essentially he argues that subject to the general fetters that are placed on the parties’ autonomy to self-determine remedies, and given that contracting parties are ‘stuck with the primary obligations they create by contract’, an agreed remedy should be enforced as a right.

The arguments for and against giving effect to agreements for specific relief overlap with the theoretical and practical arguments overviewed in Part 2.2 above. A number of the arguments in support of this type of party stipulation are also applicable to other stipulated remedies, for example, liquidated damages. In the next two sections I set out some of the arguments that have been made concerning agreements for specific relief.

4.1 Arguments in Support of a Role for Agreements for Specific Performance and Injunction

We saw in 2.2 above the various arguments made for and against specific performance as the primary remedy for breach of contract. The following section draws on these arguments and suggests other reasons why the courts might want to give effect to party agreements for specific relief.

4.1.1 Enforcement of the clause vindicates the right to performance

This argument recognises that parties enter into contracts to achieve performance rather than to secure compensation in the event that performance does not occur. Exactly where the line is drawn between enforceable and unenforceable contractual obligations is open to debate and deliberation but recognition that contracts create rights to performance is a significant starting point for decisions about choice of remedy. In Zhu v Treasurer of the State of New South Wales the High Court of Australia reiterated the views expressed by Windeyer J in Coulls v Bagot’s Executor and Trustee Co Ltd that generally a promisee has a legal right to the performance of the contract.

In Zhu, the Full Court states:

subject to the established limits on the grant of specific performance and injunctions, in Australian law each contracting party may be said to have a right to the performance of the contract by the other.

In so doing the court rejects the words and argument of Justice Oliver Wendell Holmes that ‘[t]he duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it, — and nothing else’. An important rider to what the High Court says here is, of course, that their proposition is ‘subject to established limits on the grant of specific

99 Dugdale, above, n 60, at 40.
100 Dugdale, above, n 60, at 40.
102 (1967) 119 CLR 460 at 503.
103 (2004) 218 CLR 530 at 574–5 [128]; 211 ALR 159 at 192–3 [128].
104 O Holmes, ‘The Path of the Law’ (1897) 10 Harvard L Rev 457 at 462. More recently, the High Court has reiterated the importance of giving effect to a party’s right to performance in appropriate cases though an award of reinstatement damages, see Tabcorp Holdings Ltd and Bowen Investments Pty Ltd (2009) 236 CLR 272; 253 ALR 1.
performance’. Nonetheless, this statement adds support to the proposal that the right to performance should inform a court’s view as to the legal weight to be attributed to an agreed remedies clause.

Specific relief is the strongest way to vindicate a plaintiff’s right to contractual performance.\(^\text{105}\) In many cases however, and for various reasons, specific performance will not be sought by the plaintiff or available, and in this situation questions arise about the ability of contract damages to serve a vindicatory purpose.\(^\text{106}\) In other instances courts may turn to gain-based remedies in order to protect the promisee’s bargained for interest in performance. As Cunnington rightly states, protection of the promisee’s interest in performance is important both for the promisee himself and for the institution of contracting.\(^\text{107}\)

4.1.2 Party autonomy and joint party determination

Recognition of an agreed specific performance provision not only achieves a vindicatory purpose but also gives expression to the parties’ will in the event of breach.\(^\text{108}\) In this way agreed remedies clauses provide a means by which parties can secure a measure of control over the future and by doing so enhance their autonomy as individual parties and their ability together to achieve by agreement their preferred outcome upon breach. The concern that specific performance constitutes an undesirable interference with the personal freedom of the parties is arguably less pressing when that interference is countenanced and agreed to by the parties.\(^\text{109}\) There are numerous other agreed terms that are upheld by the courts by which parties allocate risk and agree to be bound by laws and processes that may impact on their rights and entitlements in the event of a breach, including exclusion clauses, choice of law provisions and arbitration clauses.

4.1.3 Efficiency arguments

Commentators point to efficiencies and savings for courts, as well as parties, of giving effect to party stipulated remedies.\(^\text{110}\) Burrows, for example, suggests that a stipulation for specific performance, like a liquidated damages clause, has the merit of saving judicial time and expense deciding between damages and specific performance.\(^\text{111}\) More generally, and consistent with arguments based on party autonomy and self determination, are efficiencies from recognising that ‘parties are in the best position to determine which remedial devices will serve their respective interests most satisfactorily’.\(^\text{112}\)

\(^\text{107}\) Cunnington, above, n 58, at 145.
\(^\text{109}\) Vranken, above, n 40, at 9.
\(^\text{110}\) For example, Saprai, above, n 54.
\(^\text{112}\) Kronman, above, n 50, at 376. See also Schwartz, above, n 50.
4.1.4 Consistent with joint party determination in dispute resolution

The Australian legal system, like many others, has embraced alternative dispute resolution processes as an integral part of the civil justice system. Negotiation and mediation along with other ‘alternative’ processes are required by legislation in some contexts and form part of the case management system of courts and tribunals. These processes are designed to assist parties to resolve their legal disputes without the need for a trial and a judgment.\textsuperscript{113} A key feature of facilitative processes is to achieve an outcome agreed upon by the parties (albeit grudgingly) rather than to have one imposed upon them. There are a number of benefits of parties determining the outcome of their dispute including party satisfaction, durability of outcomes and the ability of parties to tailor their ‘remedy’ to suit their particular circumstances.

Dispute resolution clauses have become commonplace in consumer and commercial contracts. They will be upheld by the courts provided the terms agreed to have been stated with sufficient certainty.\textsuperscript{114} Further, legislatures\textsuperscript{115} and courts\textsuperscript{116} in Australia have exhibited a clear preference for parties to resolve their disputes without recourse to courts or to a trial. There is growing recognition of the fact that judicial remedies are available to uphold and protect legal rights but these will not often result in the creative and commercially practical outcomes that parties to contractual disputes are seeking. It would be consistent with and complementary to this clear policy of joint party determination for courts to place due weight on agreed remedy clauses when exercising their remedial discretion.

4.1.5 Closer alignment with the approach to specific performance in civil law and private international law

Proponents of specific performance as the primary remedy for breach of contract within the common law point to the civil law approach as evidence that this presumptive approach does not inevitably result in inefficient outcomes or unacceptable interference with the rights of defendants.\textsuperscript{117} Additional support is drawn from the Convention on Contracts for the International Sale of Goods (CISG). The CISG gives pre-eminence to the remedy of specific performance but provides that parties may contract out of that default remedy.\textsuperscript{118} An agreement for specific performance would operate in a similar way. Parties would be free to ‘contract in’ to specific performance as the presumptive remedy for breach of their contract just as parties to

\textsuperscript{113} Common law and statutory provisions that confer privilege on settlement negotiations are another example of the law’s support for party resolution of disputes, see, eg, s 131 of the Evidence Act 1995 (Cth).

\textsuperscript{114} Aiton Australia Pty Ltd v Transfield Pty Ltd [1999] NSWSC 996.

\textsuperscript{115} See, eg, the recently enacted Civil Disputes Resolution Act 2011 (Cth) which requires parties to disputes under Federal legislation (other than where exemptions apply) to demonstrate that they have taken ‘genuine steps’ to resolve their dispute.

\textsuperscript{116} It is standard for Australian courts and tribunals to require matters to be referred to mediation or similar non-determinative processes as part of the case management process.

\textsuperscript{117} See, eg, Jukier, above, n 6.

\textsuperscript{118} CISG Art 6. Specific performance is the default remedy under Arts 46 and 62. Pursuant to Art 6 the parties can derogate from or vary this default position.
contracts under the CISG can contract out of the default remedy of specific performance. The potential safeguards would be first, that clear words would be needed to contract into specific performance as the chosen remedy for breach as is already the case in relation to 'damages only' clauses and second, the court would retain its discretion to refuse relief where it would be unjust to order specific performance. 119

It is also relevant to ask whether there would be merit for Australia to look to the CISG for default remedy provisions in the interests of modernisation of Australian contract law and harmonisation with international developments. Finn has written in support of Australian contract law embracing modernisation and harmonisation for at least two reasons; both of which are relevant to giving due weight to party agreement for specific performance. 120 First, modernisation of the common law by the courts means it is less likely that this area of the law will be regulated by statute. Second, harmonisation principles provide an opportunity to look for better ways to give effect to contracts and party intentions. 121

4.2 Arguments that Support Limiting the Effect of Agreements for Specific Performance

The arguments for limiting the availability of specific performance as a remedy similarly support limiting the use of injunctions to enforce performance of part of an agreement. The objections to specific performance on grounds of economic inefficiency also apply to the enforcement of agreements for specific relief. From a rights perspective, because the right to contractual performance is not absolute an agreement for specific performance will be unenforceable when rights to freedom of movement and future liberty will be affected. Instead, the promisor will be under a secondary obligation to pay damages. Stevens uses the example of a contractual stipulation for a penalty upon breach which would effectively leave an employee no choice but to work. 122 This, he explains, ‘would abrogate the employee’s right to freedom of movement just as ordering specific performance would’. 123 Similarly, says Stevens, allowing contracting parties absolute freedom to contract by the insertion of penalty clauses would conflict with their freedom of their future

119 The decision of the Quebec Superior Court in Construction Belcourt Ltée v Golden Griddle Pancake House Ltd [1988] RJQ 716 (CS) illustrates this potential. In that case an injunction was sought to enforce an express term of a lease agreement that stipulated for injunctions to continue a business relationship in appropriate cases. In granting the relief sought, the court made it clear that neither the fact that it is settled law in Quebec that parties to a lease are entitled to demand specific performance and injunctions to continue a business relationship in appropriate cases nor the stipulation in the lease for injunctive relief automatically created a right to such a remedy: at [39], [47]. In this way, despite the presumptive nature of specific performance in this civil jurisdiction, the court must still review the circumstances of the particular case.


121 Finn, above, n 120, pp 64–6.


123 Stevens, above, n 122, p 154.
selves. Attempts to constrain the future liberty to withdraw, he explains, are struck down for the same sort of reasons that specific performance is not ordered. Stevens’ explanation for not enforcing contractual stipulations in both these situations is that the freedom of movement and future liberty are ‘examples of rights we consider to be of greater importance’ than the right to contractual performance. This explanation accounts for why some rights are given preference over others. Even within this framework however, the question as to which right is of ‘greater importance’ in a particular set of circumstances is open to revision and development. To advance the view, as I do below, that agreed remedies provisions should be given real weight in determining what remedy will do justice in cases other than those involving personal services, penalties or insufficient certainty, this potential needs to be recognised.

Another factor likely to be significant to whether the courts will enforce an agreement for specific relief is the concern that this will enable a promisee to gain the equivalent of a gain based award. As Waddams notes, where specific performance is appropriate, a gain based remedy is also likely to be appropriate and the reverse is also true (as seen in Argyll Stores). It is therefore likely to be an underlying concern of a court that by enforcing a party stipulation for specific performance it may open the way to a measure of damages not available under Australian law.124

A remaining concern of course, less easily dismissed, is the potential for contempt proceedings to eventuate and the threat to the defendant’s personal liberty through imprisonment. As Harris, Campbell and Halson point out:125

If no court would uphold a clause which directly specified that imprisonment was to be the sanction for breach, the same result should not be achieved indirectly through a clause stipulating specific relief as the remedy.

Practical objections can also be made against agreements for specific performance. There will be concerns that every case will become a factual inquiry into party intentions and the relative merits of upholding an agreement in each particular case. The more factually based the inquiry the more it will be argued that the outcome of legal actions are unpredictable and uncertain. This may be the case for a period of time should courts give serious consideration to deciding in what circumstances it is appropriate to attach greater weight to these agreements than has been the case to date. Arguably this would not be any different to the state of affairs that exists after change to any area of law.

Another likely concern is that encouragement of agreements for specific relief will result in the proliferation of these clauses in contracts which will put promisors to more trouble in seeking relief from the term than would be the case if the default position of unenforceability were maintained. I suggest this as another example of concern based on hypothesis rather than fact. Courts are well placed to see through unmeritorious attempts to rely on clauses aimed at

124 Another question, which will not be pursued here, is whether a contractual stipulation that expressly provides for damages to be assessed by a gain based measure would be upheld and enforced by the courts.
strengthening the right to performance in suitable cases.

4.3 Unenforceable — But Still Legally Significant?

Given that an agreement to specifically perform a contractual obligation or to consent to an order for specific performance or an injunction is ineffective to oust the jurisdiction of the court and to determine in advance the outcome of an application to enforce the term, is there scope for an enhanced role for agreements for specific relief? It is argued in this Part that there are merits in the arguments that support giving some legal effect to agreements for specific performance. At the same time these arguments need to take account of why their legal effect is limited. I suggest there are at least three ways that agreements for specific relief can have legal significance while remaining unenforceable in the strict sense. The first and second are largely uncontroversial — the third less so.

4.3.1 The evidentiary role of an agreement that damages will not be an adequate remedy

This role is already recognised by the courts. In *Warner Bros v Nelson*, for example, the court took into account in deciding to grant an injunction the acknowledgment in the contract by the defendant that damages would be difficult to calculate. Another example is provided by *Syntex Ophthalmics Inc v Corneal Contact Lens Co*.[126] In this case the plaintiff obtained judgment by consent from a US state court in the form of an interim injunction to restrain importation of goods in contravention of US legislation. The plaintiff then successfully sought an interim injunction in the same terms in the Canadian province of Alberta. Prouse J was satisfied that the settlement by consent was agreement to the injunctive relief. His Honour took into account the defendant’s acknowledgement of the necessity of injunctive relief to protect the plaintiff’s interests because of the irreparable harm that would result from the defendant’s conduct and the difficulty in truly measuring the extent of that harm.

4.3.2 Costs implications of breaching an agreement for specific performance or injunction or consent to specific relief

In *Longwood Station Ltd v Coast Capital Savings Credit Union*[127] Bauman J was willing to award costs to the plaintiff who sought specific performance, albeit unsuccessfully, on the strength of the defendant’s consent clause in their contract to specifically perform the terms of their lease. This recognises that there can be costs consequences for parties of agreeing to specific performance or injunction even though the clause is not enforceable.

4.3.3 The evidentiary role of an agreement for specific performance or injunction or consent to specific relief

A clause that provides that a promisee is entitled to seek and/or obtain specific relief in the event of breach and by which a promisor implicitly or explicitly

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126 49 AR 223 (1982).
127 2007 BCSC 1564.
agrees to consent to relief of that nature is evidence relevant to the issue of adequacy of damages. It could also play a more general role as a factor, drawing on the considerations set out in Part 4.1 above, to be weighed against other discretionary considerations. There has been some commentary on the value of an agreement for specific performance.\textsuperscript{128} Some academics have expressed the view that agreements for specific relief have an evidentiary value.\textsuperscript{129} Smith, for example, concludes that equitable relief clauses are accorded a limited weight in cases where the courts are unsure whether for other reasons relief should be awarded. Aside from this evidentiary role he considers they have no effect.\textsuperscript{130} Spry considers the fact that specific performance has been stipulated tends to diminish the weight of other considerations such as hardship to the defendant, but that these other considerations will not be immaterial.\textsuperscript{131} Affording a clause of this nature an evidentiary role as to the parties’ intentions at the time of contracting on the adequacy of damages and what is regarded as the appropriate remedy for breach would appear to be uncontroversial and ultimately may be the most that will be achieved by including one in a contract.

Can a more significant role for agreements for specific relief be contemplated? Two possibilities are suggested here. First, a court might regard an appropriately drafted clause as justification for shifting the legal burden of proof on the adequacy of damages requirement from the party seeking to enforce the clause to the party opposing its enforcement.\textsuperscript{132} Under this proposal the burden would shift to the promisor to satisfy the court that the clause should not be enforced because damages would be an adequate remedy.\textsuperscript{133} Concerns about the difficulty a promisor might face in producing evidence as to the adequacy of damages can be balanced against their willingness to submit to the term at the time the contract was entered into. In any event it is likely that a promisee would want to lead evidence of inadequacy of damages in the interest of their claim to enforce the clause.

Second, and regardless of whether the burden to show inadequacy of damages were transferred or not, if damages are held to be inadequate the clause might be regarded as requiring the party in breach to satisfy the court there are other reasons that make it unjust to grant the relief sought. As there is no strict burden of proof on either party in any case, however, due to the

\textsuperscript{128} See, eg, Seddon and Ellinghaus, above, n 5, p 1131. And see commentary referred to above n 4.
\textsuperscript{129} Berryman, above, n 55, p 192.
\textsuperscript{130} S A Smith, ‘Future Freedom and Freedom of Contract’ (1996) 59 Modern L Rev 167 at 170, citing several of the cases referred to in Part 3.1 above and authors of a number of journal articles.
\textsuperscript{131} Spry, above, n 7, p 77.
\textsuperscript{132} ‘An applicant for an interlocutory injunction has the onus of establishing the foundation of the court’s jurisdiction but does not have an onus of anticipating or negating all possible discretionary defences that might be raised’; per Campbell JA in Lucas Stuart Pty Ltd v Hemmes Hermitage Pty [2010] NSWCA 283 at [7]. The same presumably applies to specific performance and a permanent injunction.
\textsuperscript{133} In using the term ‘promisor’ here I am not suggesting that an agreement for specific relief creates a separate obligation from the performance obligation the clause seeks to enforce. To do so would be inconsistent with the principle that it is the court and not the parties that grant the desired equitable relief.
discretionary nature of the decision whether or not to grant equitable relief, this is unlikely to achieve a great deal more than go to the weight attributed to the agreed remedy clause relative to other factors in the case.

Shifting the burden of proof under the first proposal would have the effect of making specific performance the presumptive remedy when parties have expressly agreed to this remedy, similar to the civil law approach. In this way a promisor would have to show why he or she should be excused from performance in this particular case even if it is settled practice that specific relief is not generally available for breach of the type of performance obligation involved. In effect an agreed specific relief clause would operate similarly to the way that Sharpe suggests negative covenants operate, namely, that damages are ‘presumed’ to be inadequate.\(^\text{134}\) It remains to be seen however, whether an Australian court would contemplate developing a legal rule that the burden of proving inadequacy of damages is shifted when the parties have a contractual agreement for specific relief.

A potential concern with these proposals is that they might lead to a proliferation of agreements for specific relief notwithstanding their unenforceability. Due credit (or at least the benefit of the doubt) should be given to contracting parties and their lawyers that they will not include clauses in their contracts when they could serve no valuable purpose given the nature of their contractual obligations and their circumstances. In any case the promisee would not be precluded from electing for damages as their remedy of choice. Just because a contractual term stipulates specific relief does not mean it will be relied upon by a promisee.

Is the proposal to shift the burden of proof in response to agreement for specific relief simply an exercise in semantics? Possibly not. Jukier argues that a shift by the common law to specific performance as the presumptive remedy for breach of contract would have a practical effect on the outcome in individual cases by helping common law judges to abandon their inherent prejudice against the remedy.\(^\text{135}\) In a similar way, but without advocating for a change to the default common law approach, this proposal gives greater recognition to party choice of remedy and to the right to performance of contractual obligations.

5 Conclusion: Agreement for Specific Performance — A Factor in the Balance

In common law jurisdictions like Australia specific performance is an equitable remedy only available once a court has decided that damages would be an inadequate remedy for breach and no other factors would make it unjust or inequitable to compel the defendant to perform their agreement. Although the courts have made clear that there are no fixed categories of cases in which specific performance will or will not be granted, the types of contractual

\(^{134}\) Sharpe, above, n 59, para [7.240]. Note that while this may reflect the position in Canadian law, the High Court has referred only to a ‘prima facie’ right to specific relief of negative stipulations: \(J \text{ C Williamson Ltd v Lukey} (1931) 45 \text{ CLR} 282\) at 299–300 per Dixon J; and see \(Tabcorp Holdings Ltd and Bowen Investments Pty Ltd\) (2009) 236 \text{ CLR} 272; 253 \text{ ALR} 1 n 11 (the Court).

\(^{135}\) Jukier, above, n 6, p 117.
obligations that will be specifically enforced can be identified in advance according to settled practice. In this sense the exercise of judicial discretion is both settled and constrained. It is tempting to describe the courts as exhibiting a general reluctance to compel parties to perform their contractual obligations but statements by the High Court and decisions relating to specific relief, in Australia at least, do not necessarily support this conclusion. It appears that in each case courts have regard to the particular facts and weigh up the factors supporting the justice of an award of specific relief against those that favour the award of damages. Against this background of constrained and fact based discretionary decision-making, this article asks whether party agreements for specific performance or injunction and agreements that damages will not be an adequate remedy for breach of contract can serve any purpose other than delusion or wishful thinking. While acknowledging that party agreements of this nature cannot oust or bind the exercise of judicial discretion, it concludes that both theoretical and practical considerations indicate that they should be a significant factor in the decision whether or not to order specific performance or to grant an injunction for breach of contract.