

Specific Performance	
General Principles	<ul style="list-style-type: none"> <li>❖ <b>Specific Performance:</b> Order of specific performance is an order directing party to contract to perform contract according to it's terms - positive</li> <li>❖ <b>Equitable Personal remedy in auxiliary jurisdiction</b></li> <li>❖ <b>When to award:</b> ONLY available in common law action of breach of contract</li> <li>❖ <b>3 Discretionary Considerations:</b> <ol style="list-style-type: none"> <li>1. Fairness to both parties</li> <li>2. Supervision requirement</li> <li>3. Bars to Performance</li> </ol> </li> <li>❖ <b>3 Jurisdictional Prerequisites to award:</b> <ol style="list-style-type: none"> <li>1. Specifically enforceable contract – binding in law w/o illegal purpose or liable to be rescinded by P</li> <li>2. Valuable consideration given for performance</li> <li>3. Damages must be an inadequate remedy for non-performance</li> </ol> </li> </ul>
<b>1   Discretionary Considerations to order of Specific Performance</b>	
<b>Step 1</b>	<b>Fairness to both parties</b>
General Principles	<ul style="list-style-type: none"> <li>❖ <b>Mutuality:</b> D has equivalent right to performance of the P's obligations <ul style="list-style-type: none"> <li>➢ <b>SP NOT awarded</b> → unless court satisfied that D will be sufficiently protected if P doesn't perform her obligations</li> </ul> </li> <li>❖ <b>Functions with:</b> Injunction</li> </ul>
<b>Step 2</b>	<b>Supervision</b>
General Principles	<ul style="list-style-type: none"> <li>❖ <b>Supervision:</b> Court must be confident it can supervise an order of specific performance</li> <li>❖ <b>More likely to be granted</b> where order requires D to achieve particular result e.g., convey property vs. carrying out activities (e.g., running business) [<b>Co-operative Insurance Society v Argyll Stores</b>]</li> </ul>
Caselaw	<ul style="list-style-type: none"> <li>❖ <b>No SP where</b> compelling D to continue to operate supermarket – ongoing responsibility – <b>possibility of constant supervision:</b> <b>Co-operative Insurance Society Ltd v Argyll Stores</b></li> <li>❖ <b>No SP where</b> there is a need for <b>constant court orders:</b> <b>Patrick Stevedores</b></li> <li>❖ <b>Construction contracts? - Cooperation v Emmons</b></li> <li>❖ <b>No SP for Employment contracts</b> subject to <b>exceptions:</b> <ol style="list-style-type: none"> <li>1. <b>policy &amp; pragmatic reasons for enforcement are absent</b> → E.g., where performance does not require employer's cooperation; <b>Patrick Stevedores</b></li> <li>2. <b>Injunction to restrain employee from working for rival employer</b> – opera singer restrained from working for rival opera theatre – court to satisfy D can enter external employment; <b>Lumley v Wagner</b></li> </ol> </li> </ul>
Construction Contracts	<ul style="list-style-type: none"> <li>❖ <b>3 conditions for awarding specific performance in construction contracts:</b> <ol style="list-style-type: none"> <li>1. Contract is sufficiently precise to be enforced</li> <li>2. P has substantial interest in performance (which cannot be compensated in damages)</li> <li>3. D has possession of land on which work is to be done</li> </ol> </li> </ul> <div style="float: right; border: 1px solid black; padding: 5px; width: fit-content;"><b>Cooperation v Emmons</b></div>
<b>Step 3</b>	<b>Other Considerations → Bars to Relief</b>
Key Principles	<p style="background-color: yellow; margin: 0;"><b>Bars:</b></p> <ol style="list-style-type: none"> <li>1. <b>Laches</b> (delay), Hardship, unclean hands</li> <li>2. Want of mutuality</li> <li>3. Plaintiff's willingness &amp; readiness to perform their obligations</li> <li>4. Conduct of the Plaintiff</li> <li>5. Hardship barring equitable relief (economic impact of COVID-19)</li> </ol>
<b>2   Jurisdictional Considerations: 3 Prerequisites to award of specific performance</b>	
1 Enforceable Contract	<ul style="list-style-type: none"> <li>❖ Need to have an <b>enforceable binding contract</b></li> <li>❖ <b>(1) Contract must be validly formed</b> – all elements present, requisite capacity &amp; not for illegal purpose</li> <li>❖ <b>(2) Contract must not be voidable</b> – i.e., capable of being rescinded by D [no vitiating factors present i.e., fraud, misrepresentation]</li> </ul>

	<ul style="list-style-type: none"> <li>❖ <b>(3) Statutory Compliance</b> – agreement must be in writing 4 sale of land (<b>s 54A(1) Conveyancing Act 1919 (NSW)</b>) – subject to exception in s 54A(2) for Part performance (or where statute is used as instrument of fraud)</li> </ul>
<p><b>2 Valuable Consideration</b></p>	<ul style="list-style-type: none"> <li>❖ <b>Valuable consideration</b> must be given in return for contract to be enforced <ol style="list-style-type: none"> <li>1. Nominal consideration not valid in equity (<b>Bell Group Ltd (in liq) v Westpac Banking Corporation (No 9) (2008)</b>)</li> </ol> </li> <li>❖ <b>Plaintiff must not be a volunteer</b></li> <li>❖ <b>Deeds:</b> Agreements under seal w/o valuable consideration cannot be subject to order of specific performance</li> </ul>
<p><b>3 Inadequacy of damages as a remedy for non-performance</b></p>	<ul style="list-style-type: none"> <li>❖ <b>No Jurisdiction:</b> If common law damages are adequate, no equitable jurisdiction to award specific performance</li> <li>❖ <b>Difficulties in quantifying common law damages:</b> render common law damages inadequate</li> <li>❖ <b>Typically, specifically enforceable:</b> <ol style="list-style-type: none"> <li>1. <b>Sale of land</b> (to property developers) – <b>subject to bars of relief; Loan Investment Corp of Australasia v Bonner</b></li> <li>2. Contracts for <b>unique chattels</b> (not readily available on market) <ul style="list-style-type: none"> <li>▪ SP granted for contract to purchase taxi cab – cab not unique – cab license unique – transfer of valuable privilege annexed to chattel; <b>Dougan v Ley</b></li> </ul> </li> <li>3. <b>Contracts for ships/aircrafts</b> (timing &amp; commercial needs)</li> <li>4. Ordered where <b>commonly available commodities</b> become <b>temporarily scarce</b></li> <li>5. <b>A purchaser of land;</b> likewise, a vendor can enforce the purchaser’s obligation to pay the purchase price.</li> <li>6. May be awarded <b>when damages are difficult to quantify or ensure payment</b>, such as in contracts involving annuities</li> <li>7. <b>Contract conferring benefit on third party</b> – contract involves obligation to confer benefit on third party – loss to P is nominal (<b>Beswick v Beswick</b>)</li> </ol> </li> <li>❖ <b>Not specifically enforceable:</b> <ol style="list-style-type: none"> <li>1. <b>Contracts to borrow or lend money</b> (common law damages are adequate remedy) (<b>Loan Investment Corporation v Bonner</b>)</li> <li>2. <b>Contracts for sale of personal property</b> e.g., common chattels (<b>Dougan v Ley</b>)</li> <li>3. <b>Contracts for personal service</b> – not subject to SP if it would compel D to maintain personal relationship w. P (<b>Patrick Stevedores v Maritime Union</b>)</li> <li>4. <b>Loss suffered by 3<sup>rd</sup> party not privy to contract;</b> <b>Coulls v Bagot’s Executor &amp; Trustee (1967)</b></li> </ol> </li> </ul>