

Bond University

# Bond Law Review

---

Volume 34

Issue 3

---

2022

The Purest Positivist of Them All? Denis Ong's Equity Jurisprudence

Brendan Edgeworth  
University of New South Wales

---

Follow this and additional works at: <https://blr.scholasticahq.com/>



This work is licensed under a [Creative Commons Attribution-Noncommercial-No Derivative Works 4.0 Licence](https://creativecommons.org/licenses/by-nc-nd/4.0/).

# The Purest Positivist of Them All? Denis Ong's Equity Jurisprudence

BRENDAN EDGEWORTH\*

---

## I Introduction

It is undeniable that the late Denis Ong's remarkable scholarly output has placed him among the foremost academic authorities in the field of equity and trusts in Australia. With a plethora of books and academic journal articles to his name, few scholars have produced as vast a store of analysis of a large swathe of private law jurisprudence, stretching over more than four decades. This article seeks to outline the remarkable quality of this body of work. It does so in part by reference his first major piece of academic research, his doctoral thesis. It may come as a surprise to many that his first significant scholarly achievement was a PhD focussing on legal philosophy. The subject was constitutional breakdown, specifically in Nigeria and Southern Rhodesia, and the thesis examined the possible relevance of the theory of the legal positivist Hans Kelsen to understand how their emergent legal systems retained legitimacy in the face of their (sometimes violent) rupture with their colonial past.<sup>1</sup> It is difficult to imagine how theoretical understandings of postcolonial constitutional law and public law in Africa could be any further from the private law domain of equity and trusts, grounded as it is in an often reverential Australian adoption of the fundamental principles developed in the English Chancery courts over the course of the last four centuries.

In any event, no evidence subsists of Dr Ong's attempts at publishing his thesis. This of itself is unsurprising given that PhDs in law at that time were seldom to be found in bookshops. What does seem perplexing is that there appears to be no publications of any material whatsoever directly drawn from the thesis, either at that time or later. Nor is there any extant evidence that his immersion into the dense, neo-Kantian features of Kelsen's positivism formed the basis for later engagement with theoretical studies of law. Rather, in the manner of Ludwig Wittgenstein, who in the penultimate proposition of the *Tractatus Logico-Philosophicus* proclaimed that the work could be seen as a ladder that allowed him to move to a higher level of philosophical

---

\* Emeritus Professor, Faculty of Law and Justice, UNSW Sydney.

<sup>1</sup> DSK Ong, *Legal Aspects of Constitutional Breakdown in the Commonwealth – with Particular Reference to Nigeria and Southern Rhodesia* (Unpublished, PhD Thesis, Canberra 1974) 27 ('Thesis').

inquiry and could therefore be safely kicked away thereafter,<sup>2</sup> Denis Ong seems to have abandoned Kelsen altogether once the award of doctorate was conferred, preferring instead to dwell in the sunny, rather less rarefied, uplands of trusts, estoppel and equitable remedies. This is unfortunate, because his analysis and adoption of Kelsen's theory of law – a somewhat rare event in Anglophonic legal theoretical discourse – and its defence against its most prominent critics, is an outstanding example of incisive philosophical analysis.

Notwithstanding the apparently unbridgeable gulf separating these two domains of intellectual endeavour, namely continental legal positivism and Anglophonic equity jurisprudence, my paper seeks to explore possible implicit, unstated links between the somewhat arid abstractions of Kelsen's self-described 'Pure Theory of Law' and Denis Ong's exclusively doctrinal scholarship, seeing the former as a stepladder, as it were, towards his later work. The reason for doing so is in part biographical. Denis Ong and I were colleagues at Macquarie University Law School in the 1980s. We taught Land Law together in 1986-7, and Denis was Head of School at the time I left in 1989 to take up a Lectureship at the University of New South Wales.

Macquarie University Law School was in those days notorious for being a very fractious and acrimonious place, with news of disputes frequently appearing in the newspapers. Upon being appointed, new academics were, by dint of the local self-appointed conscription officers who spent their time policing allegiances, enlisted to one side or the other, or more precisely, I to one side and he the other. Why? Because his research was exclusively doctrinal, while some of mine was contextual. Despite the prevailing cold war mentality between the main protagonists of these two divergent approaches to legal research, Denis Ong and I got on very well indeed, both while teaching the particularly doctrinal Land Law course (designed and convened at the time by another Macquarie Law School refugee to Bond Law School, the late Dianne Everett) as well as through our general interactions as colleagues engaged in a shared pedagogical enterprise. As Denis Ong's Bond Law School colleagues would attest, he was unwaveringly polite in dealings with colleagues, no matter how contentious an issue might be, or how heated a discussion might get. It was in the course of such interactions that I discovered his PhD topic. Many discussions ensued concerning Kelsen and HLA Hart, whose work was the focus of some of my research at the time, but also various doctrinal issues, many of

---

<sup>2</sup> Ludwig Wittgenstein, *Tractatus Logico-Philosophicus*, trans CK Ogden (Routledge and Kegan Paul, 1922). The phrase used by Wittgenstein (at 6.54) was, '[m]y propositions serve as elucidations in the following way: anyone who understands me eventually recognizes them as nonsensical, when he has used them—as steps—to climb beyond them. (He must, so to speak, throw away the ladder after he has climbed up it.) He must transcend these propositions, and then he will see the world aright'.

which covered equity and trusts. These amiable and stimulating deliberations, both on legal positivism generally on the one hand, and equity and trusts on the other, form the backdrop of the argument below.

## II Kelsen and Constitutional Crisis

Denis Ong's doctoral thesis examined the role of legal theory in the understanding of judicial decision-making in the context of constitutional crisis, specifically the point at which the overthrow of a regime by unconstitutional means gives rise to a putatively new legal order.<sup>3</sup> The dilemma for the judge, appointed under the former regime, is acute: to what extent, if at all, do the 'laws' enacted by the new rulers become valid, and thereby, enforceable? In two cases, Nigeria and Southern Rhodesia, judges faced precisely this dilemma. Surprisingly, some of them resorted to legal theory to resolve the dilemma of whether to rule all new laws and acts at odds with the former legal system unconstitutional and invalid, or to determine that a new legal order had come into existence out of the ashes of its predecessor. In particular, the theory they referred to was Hans Kelsen's 'Pure Theory of Law'.<sup>4</sup>

For Kelsen, the essence of law is that it is an enclosed system of norms, organised in hierarchical fashion. At the bottom is the instance of application of a rule, for instance by a police officer. This act is legal if it is authorised by a higher norm, such as a criminal statute. This law is in turn lawful if properly enacted by the legislature, which in turn acts lawfully, if it is constitutionally authorised to pass such a law. To avoid the problem of infinite regress, the constitution is itself lawful if it can be traced to the jurisdiction's historically first constitution, which is ultimately underpinned by a Grundnorm, or basic norm, namely, that that constitution is to be accepted as binding. But the basic norm is unlike other norms: it lacks positive, that is to say, formal *posited* expression. Rather, it is *presupposed* in the sense of being a logical postulate of the legal system, without which the hierarchy would not be possible. It is not an empirically verifiable phenomenon, like HLA Hart's rule of recognition, whereby in practice, the legal system is in general accepted as legitimate by citizens.<sup>5</sup> Kelsen emphasises that a condition for the existence of a basic norm is that the legal system is by and large effective, but that factor does not exhaust its nature. It is the normative dimension of the grundnorm that is critical: citizens, judges, officials believe that the first constitution is valid, as are norms that trace their existence to it, and *ought to be obeyed*. It is in this way that the law is a distinct system. As the systems theorist Niklas Luhmann characterises it, the law as a system is marked by a) cognitive openness

<sup>3</sup> Ong, Thesis (n 1) 27.

<sup>4</sup> Hans Kelsen, *Pure Theory of Law*, tr M Knight (University of California Press, 1967).

<sup>5</sup> HLA Hart, *The Concept of Law* (Oxford University Press, 1961) esp ch 6.

and b) normative closure: it must deal with, process and respond to facts generated by other systems – politics, economics, health, education, welfare – but by means of its own internal *closed set of norms* – not those of those other systems.<sup>6</sup>

Kelsen's work is of particular importance for understanding situations of coups d'état or revolutions, where a regime is toppled unconstitutionally. As a way of showing how his theory captures the reality of legal systems, he suggests in such instances that the basic norm changes as support for the former ebbs away. The new regime, when enacting a new constitution and various new rules in defiance of the former constitution, does so by virtue of a new basic norm, whereby the new legal system, as a hierarchy of norms, gradually comes into existence when a sufficient proportion of the populace come to accept its rules as valid. It followed for Denis Ong that the various judges' references to Kelsen's work (not simply in the Nigerian and Southern Rhodesia cases, but also the earlier upheavals in Uganda and Pakistan) to determine whether to uphold the decrees of the usurping regime were completely misconceived. As judges appointed under an earlier regime, they could do no other than presuppose the validity of that earlier constitution, which was implicitly and intrinsically binding upon them. Not unlike Horace Rumpole's view of the marital contract in respect of which his wife's wishes evoked a basic norm requiring him to unthinkingly, yet normatively, say, 'she who must be obeyed', the grundnorm similarly expresses normative allegiance from the judiciary.<sup>7</sup> Asking whether the 'basic norm' that conferred validity on the previous regime had been changed or superseded was completely beyond their competence.

As Denis Ong forcefully argued, an interpretive, or sociological, exercise such as assessing whether a new or former basic norm operated was totally at odds with the presuppositions embedded in their judicial role. As appointees of the former regime, their authority ultimately derived from the previous basic norm, and no other. However, in a situation of revolution, where the old regime was deposed and a new basic norm was established conferring authority to pass laws on the new regime, if the judges appointed under the former regime were to uphold regulations promulgated by the new regime, and these were broadly accepted by officials and citizens, it could be said that a new basic norm had been acquired in the jurisdiction. In doing so, they would be abandoning their status as conferred by the previous legal system.

Importantly, in an incisive dissection of the judges' opinions and the reviews of various academic commentators, Denis Ong mounts a

---

<sup>6</sup> Niklas Luhmann, *The Differentiation of Society* (Columbia University Press, 1982); Niklas Luhmann, *A Sociological Theory of Law* (Routledge, 1985).

<sup>7</sup> See, eg, John Mortimer, *Rumpole of the Bailey* (Penguin Books, 2019); *Rumpole's Return* (Television production, [Thames Television](#), 1980).

formidable defence of Kelsen's work and also re-affirms his adoption of the 'purity' of his legal analysis: only internal, normative legal analysis is appropriate to understanding how an effective legal system operates. This pure version of theory, in turn, comes to inform the analysis of legal rules and principles. But before passing to consider the doctrinal dimension, the extraordinary acuity of Denis Ong's theoretical analysis should be noted. In the course of the thesis, he presents formidable arguments against some of the most influential contemporary legal theorists, such as Joseph Raz and Tony Honore, who attempt to find flaws in Kelsen's theory. One senses that had he chosen to continue to pursue legal theory as his preferred domain of legal research, he would have established a reputation at least as impressive as he has achieved in the domain of equity and trusts. Possibly more so, as the theoretical position he proposed put him at odds with many leading theorists, which in turn would have brought him into contact with a wider international community of scholars, and comparable exposure. Despite these possibilities, Denis Ong elected to focus on the more concrete domains of legal doctrine, but not without his immersion in Kelsen's work having had a profound, underlying effect on his general framework for legal research.

### III Kelsen's Legal Positivism: Doctrinal Implications

Every approach to the interpretation of legal doctrine has a theoretical framework to underpin it. In this respect law is no different from any other domain of human endeavour. The framework might be explicit, as where a judge relies on the theory to explain his or her reasoning. Or, more commonly, they are implicit as where the case law, or statutory provision, fails to yield a clear answer and the judge resorts to policy beyond the law to find the best answer (as advocated by HLA Hart)<sup>8</sup>, or attempts to discern a broader background principle to inform the interpretation (following Ronald Dworkin's theory of law).<sup>9</sup>

Similarly, Denis Ong's scholarship, although theoretical references are conspicuously absent, nonetheless displays with great consistency and clarity a steadfast adherence to Kelsen's positivism. It does so in three separate respects. First, it adopts Kelsen's central 'pure' concept of a legal system, being a hierarchy of norms underpinned by a basic norm that underpins the entire system, which thereby excludes consideration of justice, morality or politics. Second, Kelsen's notion that a legal system is a gapless system whereby the exercise of interpreting the rules requires that the rules, and nothing but the rules, exhausts the hermeneutic resources available for the interpreter,

---

<sup>8</sup> Hart (n 5) esp ch 5.

<sup>9</sup> Ronald Dworkin, *Law's Empire* (Belknap Press, 1986).

paradigmatically the judge. As he concludes in his *Introduction to the Problems of Legal Theory*,

[g]enuine gaps ... do not exist. A genuine gap would mean that a legal dispute could not be settled in accordance with prevailing norms because the statute – as one says – lacks a provision addressing the case, and therefore cannot be applied. Every legal dispute consists in one party making a claim against another party, and the decision granting or rejecting the claim depends on whether or not the statute – that is, a valid norm to be applied in the concrete case – establishes the claimed legal obligation. Since there is no third possibility, a decision can always be made, and, indeed, can always be made on the basis of the statute, that is, by applying the statute.<sup>10</sup>

Thirdly, it insists that all extraneous ‘contextual’ considerations are absolutely irrelevant to the interpretive process in any pure theory of law. As Denis Ong so crisply and approvingly stated in the Introduction to his thesis, Kelsen’s theory is directed:

specifically at dispensing with all elements of justice, morality and divinity because, he claims, such elements have been unwarrantedly permitted to encrust, and hence to confuse, the issue of whether certain rules qualify as law. In fine, the desideratum of clarity through simplicity is what Kelsen promises to satisfy.<sup>11</sup>

There is no better way of characterising Denis Ong’s approach to understanding the law in his prolific later writings than this statement does. Wherever legal rules display confusion, as evident either in divergent judicial interpretations of a particular doctrine, or disagreements about the meaning of a statutory provision, he approaches the confusion not with a suggestion of a better result from the perspective of policy, justice, morality, or efficiency, but simply one that accords better with the overall weight of judicial authority, or one that has the stronger imprint of statutory material to support it, or one that is more logically aligned with the authoritative principles. In the same way that Kelsen’s understanding of legal systems emphasises the hierarchical, or vertical, architecture of the pattern of legal norms, similarly Denis Ong’s interpretive standpoint is to scrutinise only the legal norms, and their historical antecedents, to find the ‘correct’ answer. His entire oeuvre is characterised by this approach, and he pursues it with such a level of consistency and conceptual rigour as to make his scholarship a striking example of incisive black-letter doctrinal exegesis. Because of constraints of space, I will explore critically his

---

<sup>10</sup> Hans Kelsen, *Introduction to the Problems of Legal Theory*, tr Bonnie Litschewski Paulson and Stanley L Paulson (Clarendon Press, 1992). On Kelsen’s theory of interpretation generally, see Stanley L. Paulson, ‘Hans Kelsen on Legal Interpretation, Legal Cognition, and Legal Science’ (2019) 10 *Jurisprudence: An International Journal of Legal and Political Thought* 188-221.

<sup>11</sup> Ong, Thesis (n 1) 2.

approach in only a small number of conceptually challenging areas of equity and trusts, though I believe that they represent a fairly representative sample of his general approach.

#### IV Kelson in Action

I have chosen just three examples but they are typical of his work in general, and they suffice to demonstrate the strengths and consistency of Denis Ong's approach. But for all the strengths, the approach is not without its flaws, and its critics. Suffice to say at the outset, they typify the conceptual and analytical rigour that he displayed across his entire scholarship.

##### *A Example One: Proprietary Estoppel and the 'Reversal' of Detriment*

The doctrine of proprietary estoppel has generated a very large body of case law in recent years. Typically arising in domestic or familial situations where formal contractual dealings with land are absent, or cannot be proven, the question arises as to what obligations flow from promises to transfer land that are made to persons who to greater or lesser degrees change their plans, sometimes at great cost, in the expectation of future benefit. The courts have, with some significant divergences of opinion, focused on the detriment suffered by the promisee if the promisor were not held to the promise they made. The leading authority on the relevant principles is the High Court's 1999 decision in *Giumelli v Giumelli* (*Giumelli*).<sup>12</sup> The weight of authority now suggests that the former measure of relief as 'the minimum equity to do justice' to the claimant,<sup>13</sup> has, at least in Australia, been displaced in favour a prima facie entitlement to have the promisor's promise fulfilled. Only where the fulfilment of the promise would be 'unjust' to the claimant will a lesser award be made. As Denis Ong correctly notes, '[d]ecisions subsequent to *Giumelli* have made it very clear that such a prima facie entitlement is not likely to be easily displaced'.<sup>14</sup>

In analysing the ratio in *Giumelli* and the subsequent decisions, Denis Ong meticulously unpacks the reasoning adopted by judges in relation to the question of when this relief will be granted and when a lesser award will be made, the issue on which much of the case law turns. The court will not order the respondent to fulfil the promise if to do so would be 'unjust'. Turning his critical focus to *Giumelli*, he identifies its significance as a leading authority, while nonetheless raising serious problems in the Court's reasoning. His analysis

<sup>12</sup> (1999) 196 CLR 101 ('*Giumelli*').

<sup>13</sup> *Crabb v Arun District Council* [1976] Ch 179, 198 (Scarman LJ) ('*Crabb*').

<sup>14</sup> Denis Ong, *Trusts Law in Australia* (Federation Press, 5th ed, 2018) 641 ('Trusts Law') citing as one example *Secretary, Department of Social Security v Agnew* (2000) 96 FCR 357, 362.



represents to my mind the most insightful of the many commentaries that that important decision has generated. The Court noted that the owners of land had represented to their son that they would transfer certain lands to him. In reliance on this promise, he planted an orchard on the land. The Court held that as a result of this ‘detrimental reliance’ the son had a ‘prima facie entitlement’<sup>15</sup> to the promised land. But the Court held that in order ‘to avoid injustice to others’, specifically the frustration of later dealings in relation to the land by the parents with other members of the family, ‘[t]he result [pointed] inexorably to relief expressed not in terms of acquisition of title to land but in a money sum’.<sup>16</sup>

This result is certainly surprising, particularly in light of the trajectory of earlier case law which displayed a move by Australian courts away from Lord Scarman’s ‘minimum equity’ formulation in *Crabb*,<sup>17</sup> noted above. The central problem with the High Court’s formulation of the remedy is that it broadens the question of ‘injustice’ beyond the courts’ traditional binary assessment (of whether the award of promise fulfilment is excessive as between the promisor and promisee) to various third parties who had nothing to do with the detrimental reliance that forms the essential feature of the doctrine. Moreover, equity has a range of doctrines, for example the equitable priority rules as established by authorities such as *Rice v Rice* and *Latec v Terrigal*,<sup>18</sup> that address precisely these kinds of competing claims between earlier and later equitable interest holders. Why those doctrines should not have been decisive in ranking the later claimants – who were not parties to the action – rather than the Court’s reconfiguration of the remedy as between those who were, is never satisfactorily explained. Denis Ong perceptively beams in on the flaws in the reasoning, but in the gentlest, and ironic, of tones. ‘It is not immediately apparent’, he writes, ‘why the existence of these circumstances should have ‘inexorably’ ruled out the claimant’s entitlement.’ He then advances the compelling argument that whatever may have subsequently happened between the parents and other relatives should have had no bearing whatsoever on the question as to whether finding an equitable interest in the son was ‘unjust’.

With remorseless logic, he goes on to argue that the further reasoning of the Court was deeply flawed:

If the claimant *never had* the equitable ownership of the promised lot, and if he never lost such ownership, then it was illogical for the High Court to

---

<sup>15</sup> *Giumelli* (n 12)125 [50] (Gleeson CJ, McHugh, Gummow and Callinan JJ).

<sup>16</sup> *Ibid.*

<sup>17</sup> See footnote 13 above.

<sup>18</sup> *Rice v Rice* (1853) 2 Drew 73; 61 ER 646; *Latec Investments Ltd v Hotel Terrigal Pty Ltd (in liq)* (1965) 113 CLR 265.

purport to *compensate* him for his non-existent loss by ordering his parents to pay to him ‘a sum representing the present value of the promised lot’.<sup>19</sup>

He adds a further, entirely convincing criticism of the reasoning by identifying the Court’s ‘internally inconsistent’ conclusion: namely, that while it would be ‘unjust’ to find that the son had a proprietary interest that flowed from the constructive trust in his favour, it was not ‘unjust’ to find that he was entitled to a ‘charge’ equivalent in value to that interest.<sup>20</sup>

Significantly, he does not advance a criticism of the decision from the broader perspective of ‘justice’, ‘fairness’ or wider public policy, although there are equally strong arguments from these perspectives to lead to a finding in favour of the son. To the extent that the son’s reliance was clear and the ensuing detriment significant, and preceded in a temporal sense the activities of the other, later-claiming family members, who it could be reasonably assumed to have had at least constructive notice of his interest, the just and fair result would have been to have given him the land. Any further equitable claims of the other family members could have been dealt with in the form of separate claims against the parents. In true Kelsenite fashion, such considerations are at odds with the purity of legal science for Denis Ong, and so were quite irrelevant to the determination of the correct result.

### ***B Example Two: The Equitable Interest Arising from a Contract for the Sale of Land***

The question of the status of the purchaser’s equitable interest under a contract for the sale of land is one that has generated a wide degree of debate since the enactment of the *Judicature Act 1870* (UK). In the celebrated case of *Lysaght v Edwards*<sup>21</sup> decided only a few years after the statute came into force, the Court of Appeal held that the vendors’ personal representatives held property on trust for the purchasers, the vendor having contracted to sell land prior to death. But what kind of trust could this be? It could not be an express trust, because the contract expressly indicated a vendor/purchaser, not trustee/beneficiary, relationship. The Courts have split on the issue. So too have commentators. The general consensus is that the vendor (and their representatives) are constructive trustees, at least where the purchaser is in a position to secure the remedy of specific performance of the contract of sale. At this point, the decree has the effect of compelling the trustee to effect a transfer in accordance with the terms of the contract.

<sup>19</sup> Ong, *Trusts Law* (n 14) 641 citing *Giumelli* (n 12) 126 [58].

<sup>20</sup> *Ibid* 642.

<sup>21</sup> (1876) 2 Ch D 499.

From one perspective, the remedy of specific performance is only available from the moment of settlement of the sale because only at this point can the purchaser insist on transfer of title to the land. This suggests that only at that time does the purchaser have an equitable interest in the land. Denis Ong's commentary on this question is typically probing and lucid. He insists that to the extent that the remedy is available only at settlement, an equitable proprietary interest in the land can only be claimed by the purchaser from that moment at the earliest. But this is not the end of the story, because other equitable remedies are available to the purchaser, indicating that to the extent they fasten directly onto the interest that is to be conveyed, they have proprietary effect.

The unfolding analysis is attentive to this particular complication. In an extensive and learned examination of the subject, he cites a string of authorities that offer conflicting accounts of the status of the purchaser's interest. They range from Sir George Jessel MR's early claim that the constructive trust arose on execution of the contract of sale<sup>22</sup> to the later statements in *Central Trust and Safe Deposit Company v Snider*<sup>23</sup> and *Brown v Heffer*<sup>24</sup> that the logic of there being no right to specific performance until the right to transfer of the legal title suggests that only at that later date can the equitable interest come into existence. Denis Ong's conclusion is to reconcile the authorities by suggesting that the purchaser has the benefit of a *conditional* constructive trust,<sup>25</sup> citing *Oughtred v Inland Revenue Commissioners*<sup>26</sup> and *Southern Pacific Mortgages Ltd v Scott (Mortgage Business plc intervening)*.<sup>27</sup> To the extent that there is a trust, a proprietary interest of some kind can be discerned, but he concludes that it can only arise in conditional contracts of sale, where the purchaser can obtain an injunction to protect the interest. The overall account is a particularly sophisticated analysis of the case law.

Yet, this seems an unsatisfactory result from a policy perspective given that the purchaser has complied with the terms of the contract to the extent of paying a deposit (typically 10% of the purchase price), and often has taken other substantial steps toward purchase. Yet this kind of policy-driven or justice-sensitive comment is irrelevant in the context of Denis Ong's discussion. His Kelsenian positivist disposition leads him to examine only the dicta on the subject of courts. To the extent that they do not factor in the question of justice to their analysis, consideration of these concepts in the abstract would be to introduce

---

<sup>22</sup> Ibid 506.

<sup>23</sup> [1916] AC 266.

<sup>24</sup> (1967) 116 CLR 344, 350 (Barwick CJ, McTiernan, Kitto and Owen JJ).

<sup>25</sup> Ong, *Trusts Law* (n 14) 656.

<sup>26</sup> [1960] AC 206, 227-228 (Lord Ratcliffe).

<sup>27</sup> [2015] AC 385.

strictly non-legal normative material, thereby compromising the purity of the analysis.

However, there are conceptual, precedent-driven objections to Denis Ong's somewhat black and white analysis. It may be helpful at this point to contrast his approach with that of the authors of Australia's leading and most authoritative text on Equity, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies*.<sup>28</sup> For those authors, the nature of both purchaser's and vendor's interest from the moment the contract is made, rather than completed, needs to be considered in order to determine if equitable interests are generated, and if so, what kind. This exercise involves looking at the many different stages of the transfer of land. In doing so, the authors refer to a range of analyses, not simply judicial, that have addressed the issue. As for the judicial authorities, it is clear, as he notes, that the reference to the prerequisite of the remedy of specific performance does not mean specific performance 'in the strict or technical sense'.<sup>29</sup> Rather, it encompasses the range of available equitable remedies, including injunctions.

This point is emphasised by the authors, who, in a more nuanced and extended discussion, identify no less than four 'equities' that capture the plenitude of the purchaser's rights. For example, the purchaser immediately after the contract can restrain the completion of a contract with another purchaser.<sup>30</sup> This implies, surely, that a proprietary right of some kind in the interest that is the subject-matter of the contract. The authors conclude, most convincingly, that the better way to understand the proprietary position between contract and completion is that '[t]aken together, the equities can be viewed as equitable property. From the points of view of the vendor and the purchaser respectively, the equitable property can be seen as distributed between vendor and purchaser'.<sup>31</sup> This seems to me to capture better the true position in equity by reference to a wider array of case law.

Moreover, the authors' discussion refers to a wide array of secondary literature which Denis Ong simply ignores. Yet, this literature does not merely amount to 'opinion' or 'subjective interpretation' and therefore is somehow non-legal, and, according to perhaps a strict reading of Kelsen, an impure element in the legal landscape. This raises a broader critical question about Denis Ong's own scholarship: namely, the total absence of reference to the analyses of other legal writers and authorities throughout his work. To my mind, this represents a serious weakness in his general approach to legal scholarship. It stands in stark contrast to the approach he adopted in his thesis, where his robust

---

<sup>28</sup> JD Heydon et al, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (Butterworths, 5<sup>th</sup> ed, 2015).

<sup>29</sup> *Stern v McArthur* (1988) 165 CLR 489.

<sup>30</sup> As in *Hadley v The London Bank of Scotland* (1865) 3 De G J & S 63, 46 ER 562.

<sup>31</sup> JD Heydon et al (n 28) 239.

engagement with philosophers critical of Kelsen is one of its strongest features.

Compare the *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* section on equitable property rights under a contract for the sale of land, for example. This discussion is much richer, and ultimately more insightful and legally 'correct', for its embrace not just of a wider body of case law, but also engagement with a range of academic commentary, for instance that of DMW Waters' *The Constructive Trust* and Jensen's 'Reigning in the Constructive Trust'.<sup>32</sup> And this engagement works both ways. The authors' analysis concerning the various 'equities' that come into existence post-contract has been picked up in later case law, for instance, in *Fuentes v Bondi Beachside Pty Ltd*,<sup>33</sup> while the blunt statement in *Southern Pacific Mortgages Ltd v Scott (Mortgage Business plc intervening)*, relied on by Denis Ong to reach his own conclusion that there is no equitable interest until completion, has been roundly criticised as completely at odds with authority.<sup>34</sup> Whether he read these various commentaries, or he did but found them wanting I do not know, but I cannot help but think his analysis would have benefited, indeed would have been more 'correct' from a technical legal, black-letter point of view, if he had.

The above raises a more general, critical aspect of his scholarship, regarding both his textbooks and his various journal articles. For all its undeniable incisiveness and erudition, for all the undoubted learning that it displays, it is rarely cited, either in the courts or in other academic works in the same field. It is as if the ignorance of that domain of legal discourse that his own work displays has been visited on his own work by others. His work is certainly not widely cited because it is in some way inferior, or the analysis or conclusions misconceived. Instead, it is shown something of the same cold shoulder that he has shown others. Of course, there is nothing wrong in doing this. His scholarship is commendable to the extent that it proceeds by examination only of primary materials to the exclusion of the commentary and analysis of others. When I was his colleague, Denis Ong as a teacher was renowned for telling students not to read secondary material but to focus only on cases and statutes. Advice that was routinely and universally ignored, of course. While there is however something to this, getting students to grapple with primary material – the very essential elements in Kelsen's hierarchy of norms – it is far too strict an approach to understanding the richness of the law in all its forms.

---

<sup>32</sup> Ibid 238-239. See DMW Waters *The Constructive Trust* (The Athlone Press, 1984); D Jensen 'Reigning in the Constructive Trust' (2010) 32 *Sydney Law Review* 87.

<sup>33</sup> *Fuentes v Bondi Beachside Pty Ltd* [2016] NSWSC 531.

<sup>34</sup> See, eg, N Hopkins, 'Priorities and Sale and Leaseback: A Wrong Question, Much Ado About Nothing and a Story of Tails and Dogs' (2015) 79 *Conveyancer and Property Lawyer* 245; Peter Sparkes, 'Reserving a Slice of Cake' (2015) 79 *Conveyancer and Property Lawyer* 301; B Edgeworth, *Butt's Land Law* (Lawbook Co, 2017) 152-156.

It is preferable to see the legal landscape as made up of a wide array of perspectives, with the courts and legislatures clearly at the top, but supplemented by commentaries, viewpoints and criticisms, whether academic, professional or popular and at various levels, with a resulting interpenetration of ideas. In the case of black-letter doctrinal analysis, legislators, judges, law reform commissioners, academics, legal journalists and the practising profession are part of an ‘interpretive community’ who collectively generate legal meaning, grappling to reach the optimal solution in light of the doctrines, aims and purposes of the relevant rules.<sup>35</sup> Jointly, they generate a ‘nomos’ that is an ongoing venture across the entire landscape of the law.<sup>36</sup> In the case of the domains of law to which Denis Ong chose to devote his life, a similarly wide array of sources led to the rules taking on their present shape. His work would have been richer, and more widely acknowledged, had he in turn recognised them.

Finally, he was engaged in something like what philosophers refer to as a ‘performative contradiction’.<sup>37</sup> Why should someone read his books, for example, when seeking to find out what the courts said about, say, fiduciary duties or rescission of contracts, when there is large body of case law out there that represents actual, real norms situated within the hierarchy identified by Kelsen, and which spell out in great detail exactly what those duties entail? Given the, at least implicit, message in his work that suggests that there is nothing of particular hermeneutic value in the secondary literature on equity and trusts, why should his particular insights be treated as special? It is difficult to know what answer he would have to this question. Some problems inherent in this general aversion to referring to secondary literature is further exemplified in the next example.

### ***C Example Three: Equitable Severance of Joint Tenancies***

A fundamental principle of equity is that ‘equity will not assist a volunteer’. In practice this means, for example, that if a purported transaction is ineffective because of a failure to comply with legal formalities, then the prospective donee has no recourse to equitable doctrine to otherwise validate the transfer. One particular area that has generated problems for donors and donees has been severance of joint tenancies of land. Because of the formalities required, particularly in the case of Torrens title land, donors who are close to death need the certificate of title to secure registration of the donee. But it may well be

---

<sup>35</sup> See generally, Stanley Fish, *Is There a Text in This Class* (Harvard University Press, 1980), esp 147–174.

<sup>36</sup> Robert M Cover, ‘Nomos and Narrative’ (1983–84) 97 *Harvard Law Review* 4.

<sup>37</sup> See, eg, Martin Jay, ‘The Debate Over the Performative Contradiction: Habermas Versus the Poststructuralists’ in Axel Honneth et al, *Philosophical Interventions in the Unfinished Project of Enlightenment* (MIT Press, 1992) 261–279.

that a third party such as a mortgagee has possession of it. Or the other joint tenant or tenants may, and may not be willing to produce it. This leaves the intending donor in limbo.

The donee of course is unable to acquire the legal title in such circumstances. But he or she is also unable to get an equitable interest in the land because of the equitable principle regarding volunteers. However, a body of case law has emerged whereby the purported donee can acquire an equitable interests in some circumstances. Courts have diverged sharply on what the donor must have done to put the donee in a position whereby they can assert an equitable title. The key test comes from the statement of Griffith CJ in *Anning v Anning* which states that as long as the donor has done everything that it is necessary for the donor to do, the donee is then in a position to proceed to acquire the legal title without further assistance, and so is recognised in equity as having an interest in the land.<sup>38</sup> This test was affirmed by the High Court in *Corin v Patton* where the joint tenant of Torrens title land purported to sever the joint tenancy.<sup>39</sup> As she was terminally ill, there was some urgency in the matter. The problem she faced was that the certificate of title to the land was held by a mortgagee. Accordingly, she attempted to effect an equitable assignment by transferring to, and making her brother trustee of, her notional share.

The Court held that in accordance with the *Anning v Anning* test, although not its application, the donor needed not simply to have duly executed a memorandum of transfer in the donee's favour, but also to give him the certificate of title or authorise its production for him. As the latter had not been effected, no equitable interest arose. Denis Ong meticulously analyses the judges' reasoning in the case, deftly pointing out critical points of disagreement, while extracting the ratio of the decision and its implications for future cases. It is particularly insightful in relation to the purported trust and sub-trust envisaged by the donor. In a perceptive analysis of the later case of *Costin v Costin*,<sup>40</sup> he points out how obiter comments there are at odds with the ratio of *Corin v Patton*, insofar as they suggest that authority to get possession of the certificate of title from a bank is not enough: release of the certificate must be secured.<sup>41</sup> As such, we will have to await further judicial pronouncement to get clarity. Again, the entire discussion of the case law displays Denis Ong's acutely perceptive analysis of the principles and the extent of their application, or misapplication, in later decisions. It is an example of black-letter exegesis of the highest order.

Yet, at the same time, the narrowness of focus on the facts and decision in Denis Ong's discussion in *Corin v Patton* has presumably

---

<sup>38</sup> (1907) 4 CLR 1057.

<sup>39</sup> (1990) 169 CLR 540.

<sup>40</sup> (1997) 7 BPR 15, 167.

<sup>41</sup> Ong (n 14) 433

contributed to the omission in the discussion of any reference to the reform of the law in New South Wales to allow future donors in a similar position to Mrs Corin the capacity to unilaterally sever the joint tenancy. Pursuant to recommendations of the New South Wales Law Reform Commission,<sup>42</sup> which were a direct response to the clearly lamentable result in *Corin v Patton* (not because of any judicial fault but because of the practical legal hurdles faced by donors), an amended s 97 of the *Real Property Act 1900* (NSW) now provides for the registered joint tenant to execute a transfer in favour of self to effectively sever, without the need for an accompanying certificate of title. These reforms took place over a decade before the latest edition of *Trusts Law in Australia*. Of course, it could be argued that such a discussion is not directly pertinent to a text on trusts law; but insofar as the legal problem identified by *Corin v Patton* has now been resolved by statute, it is surely relevant to any discussion of the applicable law.

Again, Denis Ong's approach, consistent with a strict positivism, rules out the publications of law reform commissions for the purposes of pure legal science. But a broader view reveals a richer, more fluid and dynamic legal order, as well as directing attention beyond narrow doctrinal categories to the wider legal rules that bear directly on the facts in question. Supplementing his highly vertical, Kelsen-driven focus on hierarchies of norms with a somewhat horizontal perspective, by referring to legal writings other than the outputs of courts and legislatures, would have given his work a greater depth and richness.

## V Conclusion

As I am sure his more recent colleagues (at Bond Law School) and those more temporally distant (at Macquarie Law School) would wholeheartedly agree, it was a privilege and a pleasure to have met and worked with Denis Ong. No-one could deny the sharpness of his intellect, his unflinching work ethic, and his warm collegiality. Of course he could be, and frequently was, stubborn in his approach to things. But his was a principled stubbornness, derived from a commitment to excellence, to the pursuit of higher standards of academic practice. His sometimes sharply critical approach to the opinions of others – be they teaching colleagues, doctrinal specialists or legal philosophers – was never impolite or malicious, but driven solely by the pursuit of a better understanding, of the right answer. And who of us who had spent any time with him could forget his dry, sardonic wit? This is evident, if only ever obliquely, throughout his writings. It started early, in the first chapter of his doctoral thesis, when he questioned the reasoning of a judge in an important constitutional case. He concluded:

---

<sup>42</sup> New South Wales Law Reform Commission, *Report 73: Unilateral Severance of Joint Tenancy* (1994).



His Lordship withholds from us the explanation as to why a rule of international law (assuming that there is such a rule) is to be, without more, incorporated into the rules of a municipal legal order; or, alternatively how his court could have obtained the competence to apply a rule of international law when dealing with litigation concerning the domestic municipal law.<sup>43</sup>

And so it continued. Thankfully for us all.

---

<sup>43</sup> Ong, Thesis (n 1) 23.