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# The Words and Acts of a Black Letter Scholar

MICHAEL WEIR\*

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## Abstract

*Professor Denis Ong was an educator in equity and commercial law for decades at Bond University until his death in 2021. This article canvasses the career of Professor Ong touching on his approach to teaching and assessment; his time as a controversial Head of School at Macquarie Law School in the late 1980s and his published books. The article provides some perspectives about critical legal theory which was pivotal to the difficulties that arose in regard the Macquarie Law School and how it impacted on Professor Ong. The article also provides an analysis of the approach taken by Professor Ong in considering significant areas of equity, property law and commercial law in his own writing style sometimes focussing on what he considered were errors by judges. The black letter approach of Professor Ong is clear in his approach to his writing and analysis of case law. The article outlines several reviews of his nine books all published by Federation Press.*

‘The committee found in Ong the highest of personal integrity; a strong determination to act only in accordance with the rule of law.’<sup>1</sup>

## I Introduction

For thirty-three years in the corner of the north-by-east wing of level four of the Bond University School of Law (now Faculty of Law), Professor Denis Ong (Danisong Ke Sim Ong) spent his time with a consistent focus on the analysis of property and commercial law with an emphasis on equity and trusts. His toil also included lectures and tutorials for thousands of students who received considered education in equity and trusts. To date, Professor Ong may have taught more Bond University faculty of law students than any other lecturer. His thirty-two years as an Associate Professor and then a Professor at Bond University followed a controversial period as Head of School at

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<sup>1</sup> Bruce Mansfield and Mark Hutchinson, *Liberality of Opportunity: A History of Macquarie University 1964-1989*, (Macquarie University in association with Hale and Iremonger, 1992) 309.

Macquarie University School of Law. His term as Head of Faculty has been analysed and commented on in case law, books and government reports. Over many years Professor Ong took time to draft his treatise, *Trust Law in Australia*, and a further eight books all with his loyal publisher Federation Press. This article will acknowledge the career of Professor Ong and consider aspects of his work and his impact on students, colleagues and readers of his books. Although Professor Ong was a very private man, this is my perspective of aspects of his career and the person.

## II Ong as an Educator

Professor Ong had his own unique approach to teaching. Unlike the standard use of pervasive PowerPoint slides involving sentence after sentence for students to swallow, Professor Ong's approach was to provide an essay full of pithy comments involving an analysis of case law and legislation. His lectures steered students to think about important principles and perspectives about judicial determinations. That analysis would, in some examples, involve pointing out the limitations of High Court judges leading to an exclamation— 'that is wrong' – or similar words on occasions when a breach in common law principle was forensically detected.

As Deputy Dean I was once asked to review a lecture by Professor Ong. My response was that the lecture was beautifully drafted reflecting clarity while requiring students to work for the essence of his analysis. It prompted me to seek to prepare lectures with the craftsmanship of Professor Ong. Professor Ong was not for finishing his lecture early and he often spoke without the normal ten-minute break between two lectures. It is said the students who appreciated Professor Ong most were the most competent students of the cohort who appreciated the quality of the lecture and the beauty and clarity of his equitable enlightenment. Professor Ong asked students to seek out the complexity of the legal concepts using black letter law analysis. This was not the approach favoured for some students, but a failure to connect with this approach was an opportunity lost.

Professor Ong was not one to present extravagant marks every semester at the Board of Examiners Meeting. He disliked marking curves to determine results to be then picked over by academic colleagues. Professor Ong considered lawyers should consider a 70% mark a good result while 80% or more was rare. As he said to me – 'we can't create a situation where the student would have a too high appreciation of their abilities.' This reflected in the limited numbers of High Distinctions that he presented at the end of the Board of Examiners Meeting. Were there any? While others considered high marks were a virtue, Professor Ong would consider it a necessity to seek

and reflect excellence in his marking. Professor Ong stood firm, and if I can use a modified term applied by another, namely Prime Minister Margaret Thatcher, ‘This man is not for turning.’

### III Macquarie Law School Context

Professor Ong was a refugee from the problems that arose out of the Macquarie Law School in the late 1980s. It is difficult to consider Professor Ong’s career without considering his tumultuous experience as Head of School of the Macquarie Law School and the role of critical legal theory ‘CLT’ in that period. Professor Ong was not a supporter of CLT and his approach to teaching and research was irreconcilable with it.

Professor Ong’s role in dealing with the deep differences that arose between faculty members in that period would result in he and his colleague Professor Dianne Everett to move to Bond University in late 1989. Professor Ong and Everett remained close colleagues until her death in 2009.

James Boyle, a significant proponent of CLT, suggested:

From the outside, critical legal theory appears to be a strange blend of legal realism, the New Left, and literary criticism. It oscillates between wildly esoteric European philosophy and painstaking descriptions of the fine texture of mundane social interaction. It is left-wing yet it is deeply critical of Marxism. It is avowedly against hierarchy, yet it is often accessible only to those at the top of the educational pyramid. It is generally criticised as being too theoretical, yet its protagonists seem to believe that it informs an immediate and concrete type of political action, both within and outside the law school. Finally, it is antiformalist, yet it probably takes doctrine more seriously than any other contemporary school of legal scholarship.<sup>2</sup>

CLT suggests that ‘things should be otherwise’<sup>3</sup> which requires it to deal with contemporary social and philosophical considerations. ‘CLT scholars recognize, while other scholars deny, minimize, or ignore, the “politics of law”’.<sup>4</sup> CLT is said to be the ‘*enfant terrible*’ of legal studies for some.<sup>5</sup> Hunt considers critical race theory to have emerged from dissatisfaction with legal scholarship and its conservatism in law schools and institutions such as courts.<sup>6</sup>

James provides an analysis of legal education from the 1890s to the late 1900s which includes a treatment of CLT and the context when Professor Ong worked at Macquarie University Law School. Legal

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<sup>2</sup> James Boyle, ‘The Politics of Reasons: Critical Legal Theory and Local Social’ (1985) 133 *University of Pennsylvania Law Review*, 685, 688.

<sup>3</sup> *Ibid* 689.

<sup>4</sup> *Ibid* 704.

<sup>5</sup> Alan Hunt, ‘The Critique of Law: What is ‘Critical’ about Critical Legal Theory?’ (1987) 14 *Journal of Law and Society* 5, 5.

<sup>6</sup> *Ibid* 6-7.

education in early times in Australia relied on practitioners for legal education seen as a vocation not an academic discipline.<sup>7</sup> After that period, the focus was upon full time teachers based upon ‘legal scientism’ where the focus was on dealing with principles involving case analysis drawing on a ‘law as science’ approach to legal education. This approach involved ‘excluding questions of social policy, politics and the use of non-legal data’.<sup>8</sup> CLT was said to have commenced in the 1970s in the USA and this influenced Australian law academics. The impact between these approaches became clear in the 1970s as CLT began to be more commonly applied, including some radical political views, community-based legal centres, and Marxist and feminist viewpoints.<sup>9</sup>

Some considered that ‘law was a constructed system of beliefs and meanings – in the same way that politics and religion are – that operates to make inequalities of wealth and privilege appear natural’.<sup>10</sup> Two university law schools, namely Macquarie Law School and the Department of Legal Studies at La Trobe University, developed non-orthodox programs of legal education in late 1980s reflecting some of the CLT approach.<sup>11</sup>

One judge, Justice Gordon Samuels, approved of alternative analysis of legal thought focussing on issues of social conscience and a critical approach.<sup>12</sup> Other more conservative judicial viewpoints, journalists and politicians had little interest in this initiative on what was seen as impractical learning reflecting hard left perspectives.<sup>13</sup> Lang queried whether the students would be useful enough to obtain employment.<sup>14</sup>

It is clear from his writing and general approach to his work that Professor Ong rejected CLT and endorsed a traditional approach to analyse legal matters using the traditional black letter approaches which focus on accepted law and technical rules as against a conceptual approach to the use of the law.<sup>15</sup> This was a significant reason for the division that arose at Macquarie University Law School. Despite the nascent enthusiasm of the 1970s for CLT, it appears that the CLT approach did not grow to be accepted as the normal and primary approach to legal education. This was seen in the comments made by

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<sup>7</sup> Nickolas J James, ‘A Brief History of Critique in Australian Legal Education’ (2000) 24 *Melbourne University Law Review* 965, 968

<sup>8</sup> Ibid.

<sup>9</sup> Ibid 969-970.

<sup>10</sup> Ibid 970.

<sup>11</sup> Ibid 971.

<sup>12</sup> Ibid 971

<sup>13</sup> Ibid 971-972.

<sup>14</sup> Ibid 972. Refer also to Andrew Lang, ‘Will Macquarie Law Graduates Remain Employable?’ (1989) May *Law Society of New South Wales Journal*, 41.

<sup>15</sup> *Wex* (online at November 2022) ‘blackletter law’ <[https://www.law.cornell.edu/wex/blackletter\\_law](https://www.law.cornell.edu/wex/blackletter_law)>.

the Pearce Report in the later 1980s<sup>16</sup> which was concerned about its impact on the ability of students educated under CLT to find careers as lawyers, and the amount of disputation between members of the faculty.<sup>17</sup> The Pearce Report was critical of the Macquarie University Law School and recommended a phasing out of the School and linking that recommendation to the role of the CLT movement.<sup>18</sup> One significant comment by the Pearce Committee about the Macquarie University Law School was that the quantity of law study in the degree was minimal, and required a more a 'more solid legal substance'.<sup>19</sup>

The Pearce Report's recommendations were refuted by CLT proponents, academics Rob McQueen and Hilary Charlesworth, on the basis that it did not understand the impact and value of CLT.<sup>20</sup> A Macquarie University Law School Review Committee responded that the progressive approach should apply, including 'the School should endeavour in infuse relevant background material (historical, sociological, etc) and critical analysis into the so-called professional subjects'.<sup>21</sup>

#### IV Head of School Period

The Macquarie University Law School commenced in the late 1970's and exhibited a tendency towards critical analysis and this developed conflicts within the School.<sup>22</sup>

that divisiveness that soon poisoned relations in the School infected colleagues' appreciation of one and another's [sic] scholarship: some were accused of black letter pedantry, others of theory uncontaminated by the realities of the law.<sup>23</sup>

After the resignation of the Head of School JL Goldring in early 1987, the role of Head of School was undertaken by Professor Ong by a narrow majority vote on 4 July 1987.<sup>24</sup> Professor Ong, in his

<sup>16</sup> James (n 7) 973-975.

<sup>17</sup> Dennis Pearce, Enid Campbell and Don Harding, *Australian Law Schools: a discipline assessment for the Commonwealth Tertiary Education Commission* (Australian Government Publishing Service, Vol 3, 1987) 946.

<sup>18</sup> Ibid 950; James (n 7) 974.

<sup>19</sup> Mansfield and Hutchinson (n 1)306.

<sup>20</sup> James (n 7) 974-975.

<sup>21</sup> Ibid 975; Gill Boehringer, 'Resisting Pearce: the Significance of the Review of the Macquarie Law School – the Role of Macquarie's Progressives' (1988) 5 *Australian Journal of Law and Society* 99 Citing Macquarie University Report of the Committee Appointed to Review the School of Law the way forward (1985) (refer also to David Barker AM, *The Pearce Report- Does it Still Influence Australian Legal Education?* 5 <<http://www5.austlii.edu.au/au/journals/JIALawTA/2014/8.pdf>>.

<sup>22</sup> Mansfield and Hutchinson (n 1) 278.

<sup>23</sup> Ibid

<sup>24</sup> *Re Macquarie University; Ex Parte Ong* (1989) 17 NSWLR 113, 119 ('Ong').

indefatigable manner, had a view that reform relied upon the Head of School's authority and that he would defend that view.<sup>25</sup>

Professor Ong's role with the then-Vice Chancellor Di Yerbury ('VC') under the CAVC (Committee to Advise the Vice Chancellor) was to respond to the Pearce Committee comments and to deal with conflicts within the school.<sup>26</sup> Professor Ong, with his typical lawyerly approach, suggested to CAVC 'that the Vice-Chancellor may wish to take a more direct role in the administration of the School of Law' and added that the Head of School 'had delegated authority from the Council and he was not subject to contrary directions from the Vice Chancellor, unless he were acting unlawfully'.<sup>27</sup> This was seen as a challenge by the VC.

Professor Ong was placed in a position that involved all the ups and downs and enmity of disputes involving the VC; proponents of CLT; Professor Ong's strict legal approach to governance; his belief in the Head of School's authority; his attempts to deal with factionalism; and the impact of the Pearce Committee; all creating an ongoing difficult saga.

The means to deal with these matters were several Committees of Investigation at Macquarie University with the most significant Committee including a QC, a Knight and a Professor which attracted 600 pages of submissions in December 1988.<sup>28</sup> Professor Ong's solicitors advised the University solicitors he would not attend the meeting of the committee 'predicated on the basis that the Committee of Investigation is invalidly constituted'.<sup>29</sup>

The final determination of the matter was left to the University Council. The VC actively involved herself in the decision-making process. A letter drafted by the VC was circulated with the Committee's report and was provided to the Council in a manner that gave strong support to the Council for making the Head of School position vacant.<sup>30</sup> On 6 January 1989, the Council determined that the office of Head of School was vacant pursuant to Schools Regulation 5(2)(c), after providing Dr Ong with an opportunity to address the Council.<sup>31</sup> The Council appointed Professor A R Blackshield as Acting Head for a period of six months.

The meeting of the Council was not attended by the Vice Chancellor, though the letter from her was circularised but not provided to Dr Ong.<sup>32</sup> The Council also refused to provide Dr Ong with copies of material

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<sup>25</sup> Mansfield and Hutchinson (n 1) 306.

<sup>26</sup> Ibid 307.

<sup>27</sup> Ibid.

<sup>28</sup> Ibid 309. Refer also to *Ong* (n 24) 121.

<sup>29</sup> *Ong* (n 24) 122.

<sup>30</sup> Ibid 125,135.

<sup>31</sup> Ibid 114, 124

<sup>32</sup> Ibid 135



placed before the Committee of Investigation either in relation to the original or extended particulars for investigation on the basis he had waived his entitlement.<sup>33</sup> This act was pivotal to the matter before Hope JA in the action subsequently brought by Professor Ong against Macquarie University.<sup>34</sup>

On 9 February 1989 Professor Ong, petitioned the Governor as Visitor, for reinstatement as Head of the Law School on the basis that the decision was invalid by reason of alleged denials of natural justice.<sup>35</sup> The matter was heard before Visitor to Macquarie University, His Excellency, the Governor, with the assessor Hope JA.

The Assessor determined that Professor Ong was denied natural justice, so any decision was void and he should be re-instated. Justice Hope held:

My determination is accordingly that I advise his Excellency the Governor, as Visitor of Macquarie University, that: (1) The report of the Committee of Investigation and the decision of the Council to declare the office of Head of the School of Law vacant were and are void.<sup>36</sup>

The matter was resolved when University legal advice from the eminent jurist, Sir Maurice Byers QC, suggested the decision regarding natural justice was not well placed and there was a possibility of an expensive and lengthy appeal occurring. The decision to form another committee of investigation prompted Professor Ong to indicate his intention to resign as Head of School. Professor Ong advised the Registrar he would resign as Head of School on 1 August 1989 bringing an end to this period. No doubt this created difficulty and stress for all involved, but it could be said Professor Ong followed his intention to protect the rule of law and consistency in its application. It is fair to say, however, that management flexibility was not his primary attribute.<sup>37</sup>

## V Overview of Denis's View About Legal Writing

Professor Ong had a style of his own which was consistent, clear, and focussed with a parched blend of clarity which reflected a conservative common law approach relying on principle drawn from case law peppered by statutory provisions. His writing and his love of the law reflect a focus on the words of judges.

Professor Ong's concern for legal principle did not stop him from showing his concerns about judicial judgements that sat outside his view of acknowledged principles drawn from sometimes ancient cases. For some, the legal technique is florid prose – for Professor Ong, his

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<sup>33</sup> Ibid 125,126, 135.

<sup>34</sup> Ibid 135.

<sup>35</sup> Mansfield and Hutchinson (n 1) 310.

<sup>36</sup> *Ong* (n 24) 141.

<sup>37</sup> Mansfield and Hutchinson (n 1) 310.

approach was to consider the legal landscape; to analyse the paragraphs of value that interested him and which he admired (Justice Dixon was one justice he was quick to seek for his wisdom).<sup>38</sup> Other times he is disappointed or surprised by the path others had taken. The common law relies on the concept of stare decisis (decisions based upon previous decisions) but sometimes the fickle thoughts of a judge can drift off a path to another realm – not to the praise of some judges and Professor Ong. He was a man who knew what he knew and his ability to deal with complex legal issues confirms his ability.

Professor Ong completed nine books over a period of 22 years. Professor Ong started in his long sought after first book stating, ‘This book is a study of the law of trusts in Australia. It is an attempt to formulate fewer but more basis concepts to underpin the arguably excessive numbers of rules in this area of the law’.<sup>39</sup> His following books were, in a sense, a script to stand as one but produced over years. The approach and the intention of the Professor Ong was to provide a broad, focussed, over time assembled treatise involving all up about 3,000 pages or about one million words (at first hand-written by Professor Ong) with the help of his loyal typist Mrs Jane Hobler. If Professor Ong needed another PhD, he would be able to seek about ten PhDs by publication.

## VI Some Considerations of his Legal Work

Though unlike Professor Ong, I will complete an overview approach to demonstrate what he liked and what he could achieve in his unique approach.

### A. *Trusts Law in Australia*

After perusing the nine books of Professor Ong, I consider that *Trusts Law in Australia* (837 pages) (5<sup>th</sup> edition) first published in 2018 was his best book, perhaps based upon my property law background. One is surprised by the width of issues relevant to property law in a trust law text which includes bailment, Romalpa clauses, mortgages, part performance and perpetuities.

Professor Ong’s treatment in this book of Romalpa clauses, which have significance for property rights and commercial dealings, demonstrates his mastery of both case law and statute. *Aluminium Industrie Vaassen BV v Romalpa Aluminium Ltd*<sup>40</sup> was a pivotal and iconic case on Romalpa clauses involving the owner of aluminium foil that supplied to the defendant with a contract providing it would remain

<sup>38</sup> Refer to Ong’s comment on Dixon J’s judgement below.

<sup>39</sup> Denis Ong, *Trusts Law in Australia*, (The Federation Press, 1999), Preface v.

<sup>40</sup> *Aluminium Industrie Vaassen BV v Romalpa Aluminium Ltd* [1976] 1 WLR 676.

owned by the owner until payment occurred. This is the basis for a Romalpa clause.

Problems arose when the defendant entered receivership on the basis of financial difficulties.<sup>41</sup> The matter came to the UK Court of Appeal, and Professor Ong focussed on Roskill LJ and spent four pages setting four reasons why his view was misplaced.<sup>42</sup> Professor Ong also spent six pages<sup>43</sup> on the impact of the somewhat difficult *Personal Property Securities Act 2009* (Cth) in regard to a 'security interest' under ss 12, 14, 31, 32 and 62. This was an example of his ability to apply legal doctrine to practical matters involving contract, trust and commercial considerations. His writing is not an overview but an examination of the views of judges when making their decision, involving a deep scholarly understanding of the case law, statute and principle.

Also found in this text is an analysis of the doctrine of part performance<sup>44</sup> dealing with the classic case, *Maddison v Alderson*.<sup>45</sup> In *Maddison v Alderson*, the Earl of Selborne LC said that 'the acts relied upon as part performance must be unequivocally, and in their own nature, referable to some such agreement as that alleged'.<sup>46</sup>

Normally an oral disposition of land (such as a contract for sale of land) or any interest in law to be enforceable requires writing and signing but with part performance in equity that limitation can be overcome. This doctrine is generally enforced in statute.<sup>47</sup>

Professor Ong considered 'under the doctrine of part performance, what is specifically enforced is not the oral contract itself, but the equities accruing to the plaintiff from the acts done by him in part performance of that oral contract'.<sup>48</sup> Professor Ong considered 'as far as the doctrine of part performance is concerned the test of sufficiency formulated by the Earl of Selborne LC for alleged acts of part performance of an oral contract appears to be good law in Australia'.<sup>49</sup>

The issue of part performance was at the basis of the recent High Court decision in *Pipkos v Trayans*<sup>50</sup> which was released after the 2018 5th edition of *Trusts Law in Australia* book. A pivotal point in this case about whether the *Maddison v Alderson*'s more strict application of the concept should apply or the *Steadman v Steadman* approach.<sup>51</sup> That case suggested the acts of part performance did not need to be

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<sup>41</sup> Denis Ong, *Trusts Law in Australia*, (The Federation Press, 5<sup>th</sup> edition, 2018), 36.

<sup>42</sup> Ibid 36-40.

<sup>43</sup> Ibid 49-55.

<sup>44</sup> Ibid 176-178.

<sup>45</sup> *Maddison v Alderson* (1883) 8 App Cas 467,479.

<sup>46</sup> Ibid 479.

<sup>47</sup> For example section 54A (2) *Conveyancing Act 1919* (NSW) and section 6 (d) *Property Law 1975* (Qld).

<sup>48</sup> Ong (n 41) 176.

<sup>49</sup> Ibid 178.

<sup>50</sup> *Pipkos v Trayans* (2018) 359 ALR 210 ('*Pipkos*').

<sup>51</sup> *Steadman v Steadman* [1976] AC 536.

unequivocal, but required acts to be proved on the balance of probabilities; the part performance did not have to refer to such a contract alleged but had to refer to a contract and payment of money is not necessarily precluded from constituting an act of part performance.<sup>52</sup>

As per Professor Ong's view the High Court in *Pipkos's* view confirmed an approach relying on *Maddison v Alderson's* view similarly where it was stated:

Although the requirement of unequivocal referability has sometimes been expressed by different verbal formulations, the constraint that the acts of part performance must be unequivocally, and in their own nature, referable to some such agreement as that alleged has been "consistently accepted as a correct statement of the law". I agree with Kiefel CJ, Bell, Gageler and Keane JJ that the decision of the House of Lords in *Steadman v Steadman* is not a sound basis to alter it.<sup>53</sup>

This suggested that before *Pipkos*, Professor Ong was already correct.

### B. *Ong on Equity*

Ong on Equity is a classic book. Equity is somewhat difficult and tortuous in some ways, connecting with legal concepts and drawn from centuries of development and now impacted by statute. This book spends little time dealing with arcane issues but focussed on practical issues that arise for equity lawyers and commercial considerations. With expected efficiency his approach started on page 1 which begins with four kinds of equitable interests namely equitable proprietary Interests in specific property, mere equities in specific property; equitable proprietary interests not in specific property and personal equities.<sup>54</sup>

*Latec Investments Limited v Hotel Terrigal Pty Ltd*<sup>55</sup> was a first target of this book, seeing Professor Ong spend eleven pages discussing the difficult and confusing decision involving the mortgagor's entitlements after a mortgagee had exercised its power to sell a hotel to a wholly owned subsidiary of the mortgagee which involved a common board of directors. A particular focus in this book is the judgement of Kitto J.<sup>56</sup>

The High Court determined unanimously this transaction was 'a collusive and colourable sale' because of fraud between the mortgagee and purchaser which led to the High Court granting the cancellation of the registration of the transfer to the purchaser for fraud.<sup>57</sup> The

<sup>52</sup> Ong (n 41) 178.

<sup>53</sup> *Pipkos* (n 50) [157].

<sup>54</sup> Ong (n 39) 1.

<sup>55</sup> *Latec Investments Limited v Hotel Terrigal Pty Ltd* (1965) 113 CLR 265, 2-16 ('*Latec*').

<sup>56</sup> Ong (n 39) 3.

<sup>57</sup> *Latec* (n 55) 273-274; Ong (n 39) 3.

purchaser was registered under the Torrens title system followed by an equitable floating charge over the property. The primary issue was whether the innocent mortgagor could restore its ownership free of the equitable floating charge also innocent of fraud.

The views of the High Court were considered by Professor Ong to be a ‘convoluted exposition’.<sup>58</sup> The High Court considered the mortgagor as an earlier equitable interest was subject to the subsequent equitable floating charge on the basis the mortgagor was unprovable against the innocent equitable floating charge because the mortgagor relied upon a setting aside or rectification of an instrument.<sup>59</sup> In regard to the relationship between the mortgagor and the chargee the mortgagor had only a ‘preliminary equity’.<sup>60</sup>

Professor Ong suggested this decision was not sustainable, without foundation, and suggested the innocent equitable floating charge should be postponed to the mortgagor.<sup>61</sup> He considered that the High Court’s judgement would be an appropriate result if the mortgagor’s interest was not an equitable interest as an equity of redemption but a ‘mere equity’ allowing the equitable chargee to have priority.

Professor Ong dealt with this by considering the internal inconsistency of Kitto’s views and noted for both the mortgagor and the floating charge, if merits are equal, priority in time of creation has the better equity, which here was the innocent mortgagor.<sup>62</sup> The mastery of this discussion of this case confirms his excellent understanding of property law; equity in its clarity and understanding beyond the understanding of the High Court. When one reads this case, one considers that the Justices didn’t really understand how to deal with this matter. Drawing upon the conclusion of Professor Ong, I agree with Professor Ong and not the High Court.

## **1 *Equitable Priorities***

As a man for legal history and the application of principles, Professor Ong provides a very good analysis of case law in equitable priorities.<sup>63</sup> This analysis involves a reference to a number of High Court of Australia cases. Equitable priorities involve dealing with circumstances that include for example where a vendor signs a contract for the sale of land for consideration thereby creating an equitable unregistered interest in land for the purchaser and subsequently the vendor sells the same land to another purchaser. If neither of the two purchasers are

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<sup>58</sup> Ong (n 39) 4.

<sup>59</sup> *Ibid* 5.

<sup>60</sup> *Ibid* 6.

<sup>61</sup> *Ibid* 5-6.

<sup>62</sup> *Ibid* 6, 9.

<sup>63</sup> *Ibid* 9-45.

registered the purchasers both have an equitable interest in this land and the concept of equitable priorities determines which interest has priority.

How is that matter of matter resolved? Professor Ong discusses the classic cases such as the English case of *Rice v Rice* where the view was that ‘As between persons having only equitable interests, if their equities are in all other respects equal, priority of the time gives the better equity’.<sup>64</sup> Examples of where the prior equity may not be equal are when the first in time, the first purchaser, fails to lodge a timely caveat of their interest before the subsequent purchaser executed a contract.<sup>65</sup> The opposite may arise, and the prior interest may retain priority, if it is shown the prior interest held a certificate of title or the subsequent interest had notice of the prior equity.<sup>66</sup>

These breaches were analysed by Professor Ong who considered priorities were based on an estoppel against the prior interest.<sup>67</sup> This is demonstrated in Professor Ong’s discussions under *Abigail v Lapin*<sup>68</sup> where there was a postponement on the basis that the prior equitable interest did not lodge a caveat and handed over documentation to allow a fraudulent person to become registered; *J and H Just (Holdings) Pty Ltd v Bank of New South Wales*<sup>69</sup> where there was no postponement of the prior equitable interest owing to the holding by the bank of the certificate of title to avoid estoppel and in *Breskvar v Wall*<sup>70</sup> where Professor Ong noted the acts of the Breskvars as prior equitable interest holder had allowed a third party to be registered thus postponing their prior equitable interest.

*Heid v Reliance Finance Corporation P L*<sup>71</sup> confirmed the above cases other than for Mason and Deane JJ who saw the matter of estoppel as not applicable in all cases<sup>72</sup> and supported ‘a more general and flexible principle that preference should be given to what is the better equity in an examination of the relevant circumstances’ and suggests that estoppel was an exercise in fiction.<sup>73</sup> Mason and Deane JJ also suggested the importance of the holder of the earlier interest and require conduct which is fairness and justice.<sup>74</sup> Professor Ong did not endorse this view, continuing his view that High Court judges sometimes move away from the path provided by stare decisis and proper understanding of principle and he had no problem of pointing it out.<sup>75</sup>

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<sup>64</sup> *Rice v Rice* (1854) 2 Drew 73; 61 ER 646; Ong (n 39) 23.

<sup>65</sup> *Abigail v Lapin* (1930) 44 CLR 166, 201; Ong (n 39) 28.

<sup>66</sup> *J and H Just (Holdings) Pty Ltd v Bank of New South Wales* (1971) 125 CLR 546.

<sup>67</sup> Ong (n 39) 23.

<sup>68</sup> *Abigail v Lapin* (1930) 44 CLR 166, 201.

<sup>69</sup> *J and H Just (Holdings) Pty Ltd v Bank of New South Wales* (1971) 125 CLR 546.

<sup>70</sup> *Breskvar v Wall* (1971) 126 CLR 376.

<sup>71</sup> *Heid v Reliance Finance Corporation P L* ((1983) 154 CLR 326.

<sup>72</sup> Ong (n 39) 39.

<sup>73</sup> *Ibid* 39,41; *Heid v Reliance Finance Corporation P L* (1983) 154 CLR 326, 34.

<sup>74</sup> *Ibid*.

<sup>75</sup> Ong (n 39) 39.

## 2 *Equitable Remedies Non-Proprietary Interests*

One interesting area is the principles that come from *Cowell v Rosehill Racecourse*<sup>76</sup> and the question of whether equitable remedies can be taken regarding non-proprietary interests or not. Proprietary interests (an interest in property) are protected by an injunction unless damages are sufficient.<sup>77</sup> Professor Ong's view is that 'an injunction may also be granted to protect non-proprietary rights for the infringement of which damages would be an inadequate remedy'.<sup>78</sup> *Cowell* involved a plaintiff who paid four shillings to watch races on the defendant's racecourse. Before the completion of the races, the plaintiff refused the request from the defendant for him to leave Rosehill Racecourse and he was forcibly removed from the racecourse. The plaintiff brought an action for assault and sued for damages for the assault.

The High Court determined that the contractual licence to be on the racecourse did not defeat the defendant's common law right to remove the plaintiff if using reasonable force is applied after he was deemed a trespasser. This would not allow the plaintiff to receive an injunction from that action, relying on Dixon in *Cowell*.<sup>79</sup> When considering this point Professor Ong suggested what Dixon J suggested was not that an injunction is available only for proprietary interests. He refers to a situation like *Cowell* if the defendant does not have only a contractual licence but the defendant has an overriding common law proprietary interest (ie the defendant had granted an easement on the plaintiff's land, then it would allow access to an injunction).<sup>80</sup>

This was discussed in the English case in *Hurst v Picture Theatres Ltd*<sup>81</sup> where there was an attempt to suggest that an ability to 'to enjoy looking at a spectacle' was a proprietary interest and in that sense was seen as an easement in gross, but the High Court in *Cowell* considered that an easement in gross not part of the common law. Though some English cases (*Hounslow London Borough v Twickenham Garden Developments Ltd* and *Winter Garden Theatre (London) Ltd v Millennium Productions Limited*) have applied the broad *Hurst* principles, but to date, *Cowell* is still the best Australian law on this point. This is an excellent example of the ability to incorporate English cases, but with the capacity to analyse the Australian case law, to parse what is the relevant law in Australia and clear differences in English law to understand and apply difficult but fascinating considerations.<sup>82</sup>

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<sup>76</sup> *Cowell v Rosehill Racecourse Company Ltd* (1937) 56 CLR 605; Ong (n 39) 263-6.

<sup>77</sup> Ong (n 39) 262.

<sup>78</sup> *Ibid.*

<sup>79</sup> *Cowell v Rosehill Racecourse Company Ltd* (1937) 1937 56 CLR 633; Ong (n 39) 264-5.

<sup>80</sup> *Ibid* 264.

<sup>81</sup> *Hurst v Picture Theatres Ltd* [1915] 1 KB 1.

<sup>82</sup> Ong (n 39) 266.

## VII Reviews

Over the years of his works there were many reviews that considered Professor Ong's work.

1. *Trusts Law in Australia* provides a comprehensive and scholarly analysis of modern trusts law. Earlier editions have been praised for their utility both as a text for students and as for the sophisticated analysis of decisions they provide for practitioners.

The text is logically structured, setting out the conceptual foundations of trusts before dealing with all of the key topics including express trusts, charitable trusts, voluntary trusts, resulting trusts, constructive trusts, writing and related requirements, the rules against perpetuities and accumulations, life tenants, remaindermen, tracing, and the duties, liabilities, powers, rights, appointments, retirement and removal of trustees.

Professor Denis Ong's meticulous analysis of both the facts and reasoning of key judgments identifies conceptual anomalies in the law, and interprets and at times critiques the relevant Australian and UK authorities. Each chapter finishes with a summary of relevant legal principles, making the book unusually accessible.<sup>83</sup>

2. *Ong on Equity*: The work is well-written and loaded with cases, statutes, and other helpful citations to authorities. Surely equity is not the most exciting area of law, but the author has succeeded in writing this text in a manner that brings it to life.<sup>84</sup>
3. *Ong on Equity* is a substantial and sophisticated work from Professor Denis Ong, author of the acclaimed commentary: *Trusts Law in Australia*, now in its third edition. *Ong on Equity* analyses in detail relevant cases from all the Australian and from international jurisdictions and thoroughly reviews all aspects of judicial decision making.<sup>85</sup>
4. *Ong on Estoppel*, by the prolific Professor Denis SK Ong, is one of the very few scholarly book-length treatments of the doctrine of estoppel published in Australia.<sup>86</sup>
5. *Ong on Tracing*: Professor Denis Ong is on superb form with this new work on tracing from the Federation Press. It is the first scholarly monograph published in Australia to

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<sup>83</sup> Denis Ong, *Trusts Law in Australia* (The Federation Press, 5<sup>th</sup> ed, 2018).

<sup>84</sup> Phillip Pawson, The Law Society Tasmania, Autumn 2012 *Ong on Equity*

<sup>85</sup> Denis Ong, *Ong on Equity* (The Federation Press, 3<sup>rd</sup> ed, 2011).

<sup>86</sup> Denis Ong, *Ong on Estoppel* (The Federation Press, 2020).



analyse and explain the complex principles relating to the tracing of ownership of property both at common law and in equity. We feel it will be of great assistance to both new and seasoned equity practitioners nationally and internationally in our common law jurisdiction.<sup>87</sup>

### VIII Conclusion

A legal author may provide an overview of difficult case law and legislation, but that can go too far and can miss the beauty of the law and the subtle words and shadows that are barely seen by a reader and perhaps by judges. Professor Ong demonstrated (using his large vocabulary) pellucidity<sup>88</sup> though with a gentle measure of animadversion<sup>89</sup> but always avoiding solecism.<sup>90</sup> The difficult and deep work of Ong is an example of a real black letter scholar, a person who knew what he believed, who was able to establish a niche that provided thought and enlightenment for readers. Professor Ong demonstrated integrity in his writings and his career based upon his ability and need to reflect truth - a worthy endeavour.

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<sup>87</sup> Elizabeth Robson Taylor MA of Richmond Green Chambers and Phillip Taylor MBE, Head of Chambers, Reviews Editor, "The Barrister", and Mediator, <[https://www.booktopia.com.au/ong-on-tracing-denis-sk-ong/book/9781760022150.html?source=pla&gclid=CjwKCAjw3cSSBhBGEiwAVII0Z7q-OyQFi6YOpwqiQQwkheXeXDTCgEHU1zHLlhpftkoWdJfClyTCSxoCflgQAvD\\_BwE](https://www.booktopia.com.au/ong-on-tracing-denis-sk-ong/book/9781760022150.html?source=pla&gclid=CjwKCAjw3cSSBhBGEiwAVII0Z7q-OyQFi6YOpwqiQQwkheXeXDTCgEHU1zHLlhpftkoWdJfClyTCSxoCflgQAvD_BwE)>.

<sup>88</sup> Ong (n 39) 34 - *excellent vocabulary*.

<sup>89</sup> *Ibid* 206 - *criticism or censure*.

<sup>90</sup> Denis Ong, *Ong on Specific Performance*, (The Federation Press, 2013), 33 - *one who defies convention*.