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SPECIFIC PERFORMANCE OF CONTRACTS
TO PROVIDE PERMANENT FINANCING

Roger D. Groott†

The viability of virtually every major construction project depends upon the availability of long-term financing. In an economy plagued by the twin evils of inflation and recession and the burdens which they impose upon businesses, long-term lending transactions frequently break down. Times such as these give rise to particular concern for the efficacy of lenders' remedies against defaulting borrowers and borrowers' remedies against breaching lenders. One question which arises within this context is whether specific performance of a lending transaction should be available—either to a mortgage lender against his defaulting borrower or to a borrower against his breaching lender.

This Review recently published an article by Daniel Draper urging that permanent lenders be allowed the specific performance remedy against defaulting borrowers.1 Despite the possible merits of this conclusion, it was carelessly reached because the author failed to define the specific problem under consideration and used his authority far too broadly. This Article will undertake to examine the same issues more carefully. In addition, the question of a borrower's specific performance against a lender will be considered.

Because a developer will be required to assure his lender that money to pay the construction loan will be available at the completion of the project,2 the developer, while his project is still in the planning stage, must enter into an agreement with some lender to provide permanent building funds. This lender, whose loan will carry the project during its operational stage, is called a permanent lender; the agreement between the developer and the permanent lender is the commitment. Within the generic class of commitments there are several definable sub-groups. Mr. Draper appears to

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2 The construction lender, if a national bank, may increase its permitted real estate lending by requiring certain commitments; the same is true of some state banks. See Haggerty, Procedures, Forms and Safeguards in Construction Lending with a Permanent Takeout, 85 BANKING L.J. 1035, 1036-39 (1968). Even without this incentive, it is obviously in the construction lender's interest to have a ready source of repayment.
FINANCING CONTRACTS

direct his concern toward a single sub-class—a mutually obligatory\(^3\) commitment to provide permanent financing by lending directly to the developer upon completion of a single-unit project. It is important to define the subject matter because other forms of permanent loans may require additional or different considerations. For example, a subdivision developer will have a commitment from a permanent lender to provide the permanent loan on each home as it is purchased by its occupants, but such an agreement presents different problems in terms of enforceability\(^4\) and standing to seek enforcement\(^5\) than does the commitment in question. Likewise, the commitment in the commercial context may require the permanent lender to purchase the construction loan at a discount rather than make a new lending to the developer;\(^6\) again there are different considerations in enforcing a contract to buy commercial paper and a contract to lend.\(^7\)

The commitment to provide permanent financing is a contract; the nonbreaching party may seek redress by either damages

\(^3\) The commitment may simply be a right purchased by the borrower to call for a specified loan at a certain time. See, e.g., Chambers & Co. v. Equitable Life Assur. Soc'y, 224 F.2d 338, 343-44 (5th Cir. 1955); Draper, Permanent Mortgage Financing—The Shopping Center, in REAL ESTATE FINANCING 2d 117, 119 (P.L.I. 1972). Other commitments are in form obligatory on both sides. They may or may not have mutually binding effect. See notes 45-55 and accompanying text infra.

\(^4\) In the subdivision context, the same lender often provides both the construction and the permanent financing. See, e.g., Conner v. Great Western Sav. & Loan Ass'n, 69 Cal. 2d 850, 447 P.2d 609, 73 Cal. Rptr. 369 (1968). This arrangement might be attacked under the antitrust laws as a tying arrangement (cf. Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495 (1969)) or even as a restraint on the developer's ability to convey the homes. But see New Jersey Advisory Opinion on Professional Ethics, Opinion No. 51, 87 N.J.L.J. 705 (1964) (construction lender providing both construction and permanent financing not "legally objectionable per se.")

\(^5\) The borrower, a prospective homeowner, is not a party to the commitment between the developer and the lender. Quaere: can he enforce against the lender? This question was answered affirmatively in Leben v. Nassau Sav. & Loan Ass'n, 40 App. Div. 2d 830, 337 N.Y.S.2d 310 (2d Dep't 1972) (see notes 40-43 and accompanying text infra); however, in that case the permanent lender had also committed itself to the individual home purchaser.


\(^7\) In Continental Assur. Co. v. Van Cleve Bldg. & Constr. Co., 260 S.W.2d 319 (Mo. App. 1953), it was not clear whether the commitment was to purchase existing paper or to make a new loan. The court said the distinction was "insubstantial." Id. at 323. However, a comparison of the cases cited in note 6 supra illustrates that a new permanent loan with a face value larger than the actual lending may be usurious while purchase of a construction loan with a face value larger than the actual lending for a sum equal to actual construction lending is not usurious. Another important question is the construction lender's ability to enforce against the permanent lender. If a buy-out commitment is desired, the construction lender should be a party to the commitment. Additionally, if the commitment is of the buy-out type, the policies favoring easy assignability of commercial paper must be considered in any discussion of remedies.
or specific performance. Seeking the latter remedy, however, will confront the plaintiff with the general rule that a contract to lend money will not be specifically enforced.\textsuperscript{8}

\section{The Historic Remedy}

When deciding whether to treat permanent commitments differently from contracts to lend in general, attention must first be directed to the nature of the specific performance remedy and how cases are brought within its scope. Historically, equity refused to act if a plaintiff had an adequate remedy at law. Although the old political bases for equity's reluctance to act have disappeared, the reticence, expressed in the same terms, remains. One current reason for retaining the adequacy rule is that the expansion of equitable remedies tends to contract the right to a jury trial. Under the merged systems and with the possibility of using a fact finding jury in equity, this reason has diminished in importance.\textsuperscript{9}

A more important reason for continued application of the adequacy rule, at least in contract cases, is that the equitable remedy may be inefficient. For example, assume \( A \) has agreed to sell a widget to \( B \) for \$50. While the contract is still executory, a new product appears which will better suit \( B \)'s purposes. The new product adversely affects the widget market so that the market price of widgets drops to \$40. \( B \) breaches his contract with \( A \). If \( A \) were granted specific performance he would have his \$50 but \( B \) would have an obsolete product. If \( A \) is limited to his damage remedy, he has \$10 and a widget worth \$40 while \( B \) can purchase the better product. If it is assumed that parties breach when it is economically wise for them to do so, then to require specific performance is to introduce inefficiency. Since inefficiency should not be introduced except for some overriding reason, the general rule should be that specific performance is not available.\textsuperscript{10}

The overriding reason causing the rule to give way will have to be the plaintiff's inability to be made whole through compensation.

In the example above \( A \) can be compensated by a monetary remedy. Most breach of contract cases can be treated in the same way because the subject matter of most contracts is traded in a

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\textsuperscript{8} J. Pomeroy, \textit{Equity Jurisprudence} § 221b (5th ed. 1941).
\textsuperscript{9} D. Dobbs, \textit{Remedies} § 2.5, at 61 (1973) [hereinafter cited as Dobbs].
\end{flushleft}
recognized market. The market price at the time of breach\textsuperscript{11} is ascertainable and can be compared with the contract price to determine whether the plaintiff has suffered a loss because of the defendant's breach. In addition to proving his loss of bargain, the plaintiff may also attempt to prove consequential damages.\textsuperscript{12} His failure to do so, however, would not generally be seen as affecting the adequacy of his remedy because compensation for loss of bargain is considered complete relief.\textsuperscript{13}

The likelihood that the plaintiff will be able to prove and thus recover loss of bargain damages is so strong that it is a presumptive fact. On the other hand, where a plaintiff has pleaded contract and breach, and demands specific performance, except in land contract cases,\textsuperscript{14} the defendant need only demur or move to dismiss. Such a pleading raises the adequate-remedy-at-law issue, and the court will presume that the plaintiff can prove damages and be compensated thereby. The plaintiff must then either amend his complaint to include a "special equity"\textsuperscript{15} or be satisfied with damages.\textsuperscript{16} Because plaintiffs are aware that equitable relief is not available as a matter of course, the initial complaint seeking specific performance will almost invariably contain the special equity.

Pleading a special equity in a specific performance case usually involves pleading a fact which, if proven, will establish that the plaintiff had no alternative market in which to buy or sell the subject matter of the contract. The absence of an alternative

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\textsuperscript{11} See Uniform Commercial Code §§ 2-708, 2-713 (hereinafter cited as UCC).
\textsuperscript{12} Under the UCC a seller may recover incidental damages but not consequential damages. UCC § 2-710. A buyer may recover incidental and consequential damages. UCC §§ 2-715(1), (2)(a).
\textsuperscript{13} There are many cases in which specific performance has been denied solely because there was a recognized market for the commodity in question, thus giving the disappointed party the means with which to prove loss of bargain. See Annot., 152 A.L.R. 4 (1944). If it appears that the consequential damages will be large, but speculative, specific performance will still be granted. See cases discussed at notes 19-22 and accompanying text infra.
\textsuperscript{14} Every parcel of land is considered in law to be unique; thus a contract to buy or sell land is a proper subject for specific performance. See note 76 infra.
\textsuperscript{15} The term "special equity" is used to denote the additional facts which make the case appropriate for specific performance. An example would be the difference between a contract for the sale of a horse and a contract for the sale of a specially trained horse. See Morris v. Sparrow, 225 Ark. 1019, 287 S.W.2d 583 (1956).
\textsuperscript{16} If a complaint in the merged systems pleads contract and breach, but prays only for specific performance, damages may be awarded without a specific prayer if the complaint is insufficient to support specific performance. See Fed. R. Civ. P. 54(c). See also Johnson v. Jackson, 82 F. Supp. 915 (E.D. Pa.), aff'd, 173 F.2d 223 (3d Cir. 1949) (prayer for constructive trust; damages awarded). Where separate systems exist, the complaint will be dismissed unless amended. Columbian Mut. Life Assur. Soc'y v. Whitehead, 193 Ark. 598, 101 S.W.2d 455 (1937).
market means that the plaintiff will be unable to prove loss of bargain damages and hence will have no legal remedy, thus making specific performance appropriate. Obvious examples in which specific performance may be granted are contracts involving controlling stock in close corporations\(^\text{17}\) and "unique" goods.\(^\text{18}\)

There is another class of special equity cases in which the plaintiff is allowed specific performance. The classic cases involve contracts by which a farmer promises to deliver his entire output of a certain crop to a cannery.\(^\text{19}\) The farmer then breaches by selling an early part of the crop to a third party.\(^\text{20}\) Even though the canner's loss of bargain could have been computed with precision,\(^\text{21}\) specific performance has been granted. Although the basis is not exceptionally clear, the courts seem to be concerned that the canner will suffer substantial losses because of raw materials shortages which would result in decreased production and sales without reducing overhead. Since the truth of these losses is obvious, but their amounts are too uncertain for purposes of calculating damages, the legal remedy is seen as inadequate.\(^\text{22}\)

II
THE PRECEDENTS FOR SPECIFIC PERFORMANCE OF CONTRACTS TO LEND

It is necessary to place the contract-to-lend precedents against this backdrop. The earliest reported case in which a plaintiff sought specific performance of a contract to lend money was

\(^\text{17}\) See, e.g., Aldrich v. Geahry, 367 Pa. 252; 80 A.2d 59 (1951). See also UCC § 8-107(2)(b), which allows a seller of securities to recover the price if "there is no readily available market for their resale."

\(^\text{18}\) UCC § 2-716(1) allows the buyer specific performance when "goods are unique or in other proper circumstances." These terms are not defined but the comments to the section indicate that goods are "unique" if obtainable only in a "peculiarly available source or market." UCC § 2-716, Comment 2. The comments also say that "inability to cover is strong evidence of 'other proper circumstances.'" Id. Thus even under the UCC, the test for specific performance appears to be whether there is an alternative market. The same is true of the seller's action for the price. UCC § 2-709(1)(b) states that a seller may have the remedy "if the seller is unable after reasonable effort to resell [the goods]." Again the emphasis is on the presence of an alternative market.


\(^\text{20}\) A similar breach is where the contract covers several crop years and the farmer breaches as to an earlier crop year.

\(^\text{21}\) In both of the cases cited in note 19, supra, there was a well-known market price. The plaintiff's loss of bargain as to deliveries past due could have been computed with relative ease and precision.

\(^\text{22}\) The best statement of this reasoning is found in Eastern Rolling Mill Co. v. Michlovitz, 157 Md. 51, 65, 145 A. 378, 384 (1929).
Rogers v. Challis, a suit by a lender against a borrower. Although the Rogers case involved a commercial loan, the first reason given by the court for refusing specific performance to the lender was that the courts would be faced with cases involving trifling, informal contracts to lend. The second reason for refusing the requested relief was that the legal remedy, damages, was adequate.

The first reason is not only insubstantial standing alone, but it is also inconsistent with the second. Surely no court is justified in refusing to entertain a case because other hypothetical cases of the same genre might involve trifles. Should such a case appear, it could be handled when it arises. Nor is possible informality a valid reason for refusing a remedy. Whether a contract meets the judicial and legislative standards of formality determines its enforceability, but the mode of enforcement is an entirely different question. Moreover, the court's later statement that the lender had an adequate remedy at law presupposes the enforceability of the contract and by projection presupposes a legal remedy for breach of other contracts to lend. Unless the court meant to say that contracts fatally informal in equity will be enforced at law, the adequacy-of-legal-remedy rationale overwhelms the triviality-informality rationale.

At a time when mutuality of remedy was perceived as important, it followed from Rogers that a borrower would not be permitted to specifically enforce a contract to lend against the lender. This result, however, is likely to be expressed in the same terms as Rogers—that the borrower's legal remedy is adequate.

Mr. Draper tells us that borrowers have been generally successful in enforcing contracts to lend, and further that a "notable erosion" of the Rogers rule has occurred in borrower-against-lender cases. These statements require some analysis. Successful enforcement by a borrower against a lender

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23 54 Eng. Rep. 68 (Ch. 1859).
24 Id. at 69.
25 Id. at 70.
26 Presumably this would be accomplished in a particular case by striking a balance between "de minimus non curat lex" and "ubi jus, ibi remedium."
28 Draper 425.
29 Id. at 431.
30 Some of Mr. Draper's statements defy analysis. For example, he states that "[t]he Rogers rule has yielded . . . when it has impeded modern commercial practices . . . ." Id. at 431. The three cases cited in support of this proposition all deny specific performance. Two of the cases deny the remedy to corporate borrowers against lenders obligated to purchase debentures. Busch v. Stromberg-Carlson Tel. Mfg. Co., 217 F. 328 (8th Cir. 1914), rev'd on
should not be surprising—if the term "enforcement" includes damages cases—because Rogers itself is based upon the availability of such enforcement. To the extent that "enforcement" includes specific performance by a borrower against a lender, the borrowers' general successes are coextensive with "notable erosion" of the Rogers rule. Seven cases are mustered to illustrate this erosion. Four\(^3\) of these seven cases have the following facts in common: (1) the lending was to occur in installments; (2) the lending had commenced; and (3) the borrower had executed a note and mortgage in favor of the lender. It is important that in all of these cases the plea was for delivery of the rest of the money. If no part of the loan had been made in these cases, the plaintiff-borrowers probably would have been able to return to the money market and obtain alternate financing, perhaps on less favorable terms. In that case, the borrowers probably would have been limited to the legal remedy. But by lending part of the money and taking security, the lender precluded reentry into the market and thus prevented use of the legal remedy.\(^3\)

3. Other grounds, 226 F. 200 (8th Cir.), cert. denied, 239 U.S. 644 (1915); South African Territories, Ltd. v. Wallington, [1898] A.C. 309. The third involved a contract to buy and sell a business. Included in the contract were clauses entitling the buyer to inspect the books and rescind the contract if the books were unsatisfactory. Specific performance of the inspection term was refused because the buyer refused to submit to a decree requiring specific performance of the whole contract if the books complied with the contract terms. Electric & Eng' r Management Corp. v. United Power & Light Co., 19 F.2d 311 (8th Cir. 1927). The cases are exactly contra to the stated position.

Then in the face of Draper's earlier assertion that borrowers have had the easier time in obtaining specific performance, we learn that "the cases which have undermined Rogers have usually involved suits by lenders." Draper 431 (emphasis added). Apparently this has reference to the next sentences which point out that after specific performance was refused in the Wallington case, Parliament enacted a statute permitting certain contracts to lend to be specifically enforced. But Wallington and the statute involved specific performance at the instance of the borrower. They thus furnish no authority for Mr. Draper's assertion.


33 Another possible remedy, cancellation of the mortgage and restitution of the lender's money, is very unrealistic here. In all of the cited cases, the money had already been spent on construction or down payment before the lender breached a subsequent installment.
The fifth case, *City of Camden v. South Jersey Port Commission*, is more complicated, but is essentially the same as the first four. There the city of Camden had contracted to lend money to the Port Commission for pier construction. After certain installments were paid, the pier was constructed, and $2,400,000 of Port Commission bonds were issued, the city reneged. The only factual dissimilarity between this case and those discussed above is the lack of a mortgage from the Port Commission to the city. But the Supreme Court of New Jersey did not consider the absence of a mortgage to be a significant obstacle to specific performance. It rested its decision to grant specific performance of the contract between the city and the Port Commission in part on the difficulty of calculating damages, and suggested that because of the special circumstances—the importance of the pier facilities and the large number of third parties whose rights were involved—"specific performance [was] the only method by which relief [could] be granted."

The sixth case, *Caplin v. Penn Mutual Life Insurance Co.*, is easy. The primary question was whether an assignee of an insurance policy was entitled to the assignor's right to borrow against the policy. The court decided in the affirmative and granted specific performance to the assignee-borrower. However, the defendant-insurer had failed to plead adequacy-of-legal-remedy and thus had removed the issue from the case.

*Leben v. Nassau Savings & Loan Association*, the seventh case, is troublesome. A subdivision developer had agreed with the defendant lender that the lender would provide funds for permanent financing on each home. When a purchaser's permanent loan application was approved, the purchaser would be promised a

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34 4 N.J. 357, 73 A.2d 55 (1950).
35 While planning construction of the port facility, the Port Commission had determined that the city of Camden would be the sole benefited local government, which, under the New Jersey law, meant that only that city could be assessed for the cost of improvements. Thereafter, the contract to lend was agreed to, some money lent, and construction completed. At this point the case is very similar to the mortgage cases discussed above because the Port Commission had relied on the contract in constructing the port facility, but since there were no other benefited local governments within the Port Commission area, there was no other source of funds.
36 Id. at 374, 73 A.2d at 63.
37 Id. at 373, 73 A.2d at 63.
38 182 App. Div. 269, 169 N.Y.S. 756 (2d Dep't 1918).
39 The dissent argued that specific performance should not be granted because the defendant could not, by failing to raise an issue, create equitable jurisdiction by consent. Id. at 276, 169 N.Y.S. at 761. Since the Court had power to grant such relief, that position is erroneous. See *Dobbs* § 2.7, at 83.
loan at a stated interest rate. At the closing, the loan would be made to the developer and then would be immediately assumed by the purchaser at the agreed rate. In the instant case, the purchaser had been promised a loan at six percent, but at the closing, the rate was stated to be 7.25 percent. Since the purchaser had cancelled a lease, moved into the new house, and spent over $8,000, he consummated the transaction under protest. The purchaser then commenced an action praying for a declaration that the promise to lend at six percent was binding and for reformation of the documents to reflect the six percent rate. The court held that the lending commitment "clearly obligated" the defendant to lend at six percent and granted the reformation.

The importance of Leben is dependent upon the meaning of the words "clearly obligated." If those words mean simply that the lender's commitment, before lending occurred, was an enforceable contract, the case has no particular force because it is not inconsistent with the Rogers line of cases. The case would merely stand for the proposition that after lending and execution of documents had occurred there was no longer an adequate legal remedy. If, however, the words "clearly obligated" mean that the purchaser could have had specific performance of the commitment before closing, Leben is significant. The commitment in Leben was to lend $22,400 for thirty years on a new subdivision home—clearly not a unique transaction. And if the purchaser had refused to close, the property would have been unencumbered. Thus, the case could be read to portend a vast expansion in the availability of the specific performance remedy. But because of the ambiguity inherent in the opinion, its usefulness as precedent for such an expansion is strictly limited.

In attempting to evaluate the effect of these cases on the Rogers rule, City of Camden and Caplin should be disregarded because of their unique facts. This leaves four installment loan cases and Leben. The installment loan cases are "special equity" cases of the first variety. That is, in each case the plaintiff had pleaded directly against the anticipated adequate-remedy-at-law response by demonstrating that the existence of the mortgage on his land prevented him from having his legal remedy. If the installment loan cases represent an exception to Rogers, the most frequent

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41 Id. at 830, 337 N.Y.S.2d at 312.
42 See notes 23-27 and accompanying text supra.
43 Technically, it would have been encumbered by the construction loan, but since the commitment in question was for permanent financing to pay off the construction loan, the property would be unencumbered for purposes of entry into the permanent loan market.
application of that exception would be in enforcing construction loans after the borrower has executed a mortgage for the full face amount of the anticipated loan.

The commitment to make a permanent loan, on the other hand, generally anticipates a single advance of the full amount of the loan and a simultaneous execution of a mortgage. The attempt to extend the installment loan exception to the permanent loan commitment fails because until closing the permanent loan commitment is wholly executory, the borrower's land is unencumbered, and there is no apparent market preclusion. Of course, to say that the installment loan exception will not support specific performance of permanent loan commitments does not mean that such commitments should not be specifically enforced, but only that the basis upon which such relief is granted must be different from that used in the installment situation.

III

THE RIGHTS OF A LENDER

The rights of a lender against a breaching borrower cannot be considered adequately without a preliminary examination of the commitment fee. The commitment fee for the type of transaction being scrutinized here is normally paid by the borrower at the time the lender issues the commitment. That document, with some variation in language, provides that if the borrower accepts the loan the fee will be refunded, but if the borrower refuses to accept the fee will be retained.

If the fee is paid at the time the commitment is issued, subject to retention, it is a forfeiture. If the fee is to be paid upon nonperformance it is liquidated damages. The courts have not made the distinction in commitment fee cases, but it could have some importance because forfeiture clauses are more readily enforced than liquidated damages clauses. See Macneil, *Power of Contract and Agreed Remedies*, 47 Cornell L.Q. 495, 515 (1962).

Some commitments require nonrefundable fees. See, e.g., Draper, *Permanent Mortgage Financing—The Shopping Center*, supra note 3, at 128-29, for a form requiring both a refundable and a nonrefundable fee. In both his form and his *Cornell Law Review* article, Mr. Draper characterizes the nonrefundable fee as "consideration for [the] issuance of the commitment." Id. at 129. See also Draper 427. Yet he also argues that this fee should not be applied against damages because it represents "additional interest." Draper, *supra* note 3, at 129.

The claim that the commitment fee is additional interest poses some dangers. If the commitment is of the refinancing type, and if a permanent loan carrying the legal rate of interest is made to the developer who paid the fee, and if the fee is viewed as additional interest, the permanent loan is usurious. Cf. Meadow Brook Nat'l Bank v. Recile, 302 F. Supp. 62 (E.D. La. 1969).

It can certainly be argued that a commitment fee which purports to bind both borrower
It can be argued that a commitment which appears to be mutually obligatory, but which contains this refundable fee as one of its terms, is not in fact mutually obligatory. Clearly, parties are allowed to enter into contracts requiring one party to deposit a sum with the other party so that the depositor has the option to perform and pay the price or to forfeit the deposit. Some commitments require this result. For example, a clause providing that upon the borrower's breach

the amount . . . paid as consideration for our [the lender's] agreements herein shall be retained by us in full satisfaction for our entering this agreement and holding ourselves ready and

and lender to a refinancing causes a permanent loan at the legal rate of interest to be usurious. This argument would be based on the idea that there can never be consideration for entering into a contract, but only consideration for the contract. Cf. Caplan v. Schroeder, 56 Cal. 2d 515, 518-19, 364 P.2d 321, 323, 15 Cal. Rptr. 145, 147 (1961). If this is true, the "consideration for entering into the contract" becomes part of the price paid by the borrower for the lender's performance—the lending of money. The "consideration" thus becomes interest, and if this new increment of interest plus the stated interest is higher than the legal rate, the permanent loan is usurious. If the borrower is entitled to rescission because the permanent loan is or would be usurious, he should be entitled to a return of the commitment fee.

Of course, viewing the commitment fee as interest has no effect on the lender's damage remedy. The measure would be:

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\text{stated interest + commitment} - \text{market interest} = \text{damages}
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But the fee already in the hands of the lender would have to be deducted from the award. Thus the effective measure of his damages is:

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\text{stated interest} - \text{market interest} = \text{damages}
\]

The problem is substantially different if the commitment is mutually obligatory, but the lender's obligation is to buy the construction loan. In such a case, the developer pays the commitment fee, but he never borrows from the permanent lender. This absence of a borrowing relationship tends to preclude a finding that the permanent financing is usurious. Cf. Paley v. Barton Sav. & Loan Ass'n, 82 N.J. Super. 75, 196 A.2d 682, cert. denied, 41 N.J. 602, 198 A.2d 446 (1964); Lafayette Royale Apartments, Inc. v. Meadow Brook Nat'l Bank, 397 F.2d 378 (5th Cir. 1968).

Of course, it may be difficult to determine from the commitment, assuming it is mutually obligatory, what method of financing is anticipated. Mr. Draper's form, for example, states that the permanent lender has "approved a purchase of a first mortgage loan" but in the next paragraph speaks of a "loan, which by your acceptance of this commitment you agree to accept from us." Draper, Permanent Mortgage Financing—The Shopping Center, supra note 3, at 119.

If the commitment is not obligatory on the borrower, the lender appears to have made two promises: a promise to be prepared to lend and a promise to lend if called upon by the borrower. In that case, the commitment fee can easily be seen as consideration for the first promise but not for the second. The consideration for the second promise is the borrower's promise to pay a stated interest if he calls down the loan. Thus the commitment fee should not be added to stated interest in computing the effective rate of interest on the permanent loan. D & M Development Co. v. Sherwood & Roberts, Inc., 93 Idaho 200, 457 P.2d 439 (1969). And one need not discuss the lender's damages upon the borrower's failure to borrow because the latter has no duty to borrow.

45 Dobbs § 12.5, at 824.
admits of no other interpretation. The lender has contractually precluded himself from either an action for damages or a suit for specific performance by agreeing that the contract shall become null upon the borrower's breach and forfeiture of deposit. The right to retain the deposit and the duty to treat the contract as null are in no way optional with the lender under such a clause—the commitment defines his only remedy. In such a case, the commitment is nothing more than two alternative contracts. The borrower may either borrow the money or forfeit the deposit in return for having had the right to borrow for the commitment period.

Commitments in a second identifiable group provide for refund or retention without further definition. A third category is the same except that the deposit, if retained, is characterized in the commitment as "liquidated damages."

Existing decisions all agree that the lender may retain the deposit upon the borrower’s breach, but there is no case deciding whether the lender may choose to retain the deposit and have an

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46 This clause appears in contracts in both Regional Enterprises, Inc. v. TIAA, 352 F.2d 768, 770 (9th Cir. 1965), and Boston Road Shopping Center, Inc. v. TIAA, 13 App. Div. 2d 106, 108, 213 N.Y.S.2d 522, 524 (1st Dep't 1961), aff'd, 11 N.Y.2d 831, 182 N.E.2d 116, 227 N.Y.S.2d 444 (1962).


Standby interest shall be due on this commitment in the amount of $1450 . . . . Said standby interest to be payable upon termination of commitment, but is to be waived completely if the note and mortgage papers are delivered to us in accordance with the terms and conditions hereof.

Id. at 322.

48 See, e.g., White Lakes Shopping Center, Inc. v. Jefferson Standard Life Ins. Co., 208 Kan. 121, 490 P.2d 609 (1971). This commitment required that the borrower pay $77,000 to Jefferson Standard (the lender), and added that

. . . . [u]pon the loan being closed this $77,000 deposit is to be refunded promptly; but if the loan is not closed in accordance with the terms of this alternate commitment, the $77,000 deposit is to be retained permanently by the Jefferson Standard Life Insurance Company as liquidated damages . . . .

Id. at 122, 490 P.2d at 611, quoting a provision of the commitment agreement.

additional remedy or refund the deposit and have a different remedy. The basic question is whether the parties intended to create alternative contracts or a single contract with cumulative remedies. If the contract clearly provides that the borrower may perform and pay the price, or alternatively refuse to perform and forfeit an initial payment (or make a payment) in satisfaction, the parties have created alternative contracts. If, however, the contract simply provides that, upon the borrower’s breach, a fund will be forfeited (or an amount paid), it is difficult to determine whether the parties intended to create alternative contracts. When the deposit is not characterized at all, there is no expressed intent; if intent is to be found, it must be inferred.

The clause providing for forfeiture of the deposit was placed in the contract for two obvious purposes: (1) to make the borrower’s breach expensive and thus insure his performance, and (2) to insure that the lender would have a fund from which to cover the expenses of investigating and approving the commitment. Since these expenses would normally be recovered through interest paid on the loan, they would, in the absence of a forfeiture clause, be recovered in case of breach by the award of damages to the lender measured by loss of interest. Thus retention of the deposit is designed, at least in part, to cover losses normally recoverable through the award of damages, and the forfeiture-of-deposit clause has the same operative effect as a liquidated damages clause. When the parties liquidate damages through a forfeiture clause and do not further provide that the agreed damages shall be applied to the satisfaction of an additional award of damages, the contractual remedy usually precludes the legal remedy. Since no one but the most naive and inexperienced lender would expect to have specific performance and since retention of the deposit generally precludes the award of additional damages, the lender must have expected no remedy other than retention of the deposit. Thus the inferred intent is that the forfeiture-of-deposit clause was to operate as an

50 Cf. Walter E. Heller & Co. v. American Flyers Airline Corp., 459 F.2d 896 (2d Cir. 1972) (commitment to loan money for purchase of aircraft). The borrower was obligated to pay a nonrefundable fee and was further bound to pay a stipulated amount of liquidated damages if it breached. The court upheld the lender’s right both to retain the fee and to recover the liquidated damages.

51 Draper 427. By admitting this purpose, however, one risks having the forfeiture struck down as a “penalty.”

52 The cases upholding the lender’s right to retain the fee articulate this. See note 49 supra. In particular, see White Lakes Shopping Center, Inc. v. Jefferson Standard Life Ins. Co., 208 Kan. 121, 490 P.2d 609 (1971).

“alternative contract,” which precludes employment of either of the other two remedies. The commitment which specifies that the retained deposit will be liquidated damages is an a fortiori case.

There is yet another form of commitment which must be examined, that in which the contract expressly provides for refund or retention of deposit, but adds that “[t]he payment of this fee in no way lessens the Borrower's obligation to close the loan in accordance with the terms of this commitment.” The additional language makes clear that the lender did not intend the possibility of retaining the deposit to be an alternative contract. What was intended, however, is not entirely clear. Since it would be unlikely that the lender expected to have specific performance of the contract, he must have expected to receive damages in addition to the retained deposit. Perhaps the only explanation is that the additional language must be read as the equivalent of a clause providing for a liquidated sum and further providing that the liquidated sum would be applied against a judicial award of damages.

In dealing with any commitment other than one which specifically creates alternative contracts, the disappointed lender is not necessarily contractually precluded from seeking specific performance. In pursuing the equitable remedy, however, the lender must overcome the assumption that his legal remedy is adequate. The legal remedy would be the difference (reduced to present value) between the total interest on the committed amount at the contract rate and the total interest on the committed amount at the market rate. In addition, the lender would be entitled to such consequential damages as he could prove with specificity and as were foreseeable.


55 Such a clause shows that the parties did not intend to force an election between liquidated damages or forfeiture and a judicial award of damages. An additional possibility, not yet presented to the courts in the present context, is a clause providing that specific performance should be available to the nonbreaching party. Such clauses are generally held ineffective, but if joined with a liquidated damages or forfeiture clause, they make clear that the parties did not intend the liquidated damages to be the sole remedy. See Macneil, supra note 44, at 522-23 & n.92.

56 There is no case which sets out the lender's measure of damages as a holding. However, in Rogers v. Challis, 54 Eng. Rep. 68 (Ch. 1859), the court, in refusing specific performance, stated:

It is a simple money demand; the Plaintiff says, I have sustained a pecuniary loss by my money remaining idle, and by my not getting so good an investment for it as you contracted to give me. This is a mere matter of calculation, and a jury would easily assess the amount of the damage which Plaintiff has sustained.

Id. at 70. The court clearly anticipated a normal loss of bargain measure. Further, in Central Mortgage Co. v. Partello, 132 N.Y.S. 432 (Sup. Ct. 1911), the court in dictum recognized the
As the first step in argument against damages as the lenders' remedy, Mr. Draper states that such damages have never been awarded to a lender suing a defaulting borrower.\textsuperscript{57} Apparently this is accurate, but it is also true that there is no reported case in which such damages have been refused. This latter fact alone may be of great significance, for it tends to indicate that disappointed lenders do not sue for damages. It is possible that lenders have abstained from suit because the losses caused by borrowers' breaches have not been substantial enough to litigate, at least after the retained deposit has been applied against whatever total loss there might have been. If that is the case, the argument for a blanket assumption that lenders' losses cannot be compensated by damages is weak indeed.

The second stage of the Draper argument revolves around the difficulty of determining the figure at which to peg loan yield for purposes of fixing loss of bargain. Mr. Draper first says that discounting the difference between yield at the contract rate and yield at the market rate would be a speculative process.\textsuperscript{58} But the proper rate of discounting would not be difficult to determine in this context. For example, where the plaintiff is a large financial institution, experienced, and probably expert, in investing, it can be presumed to receive the highest available rate of return on its investments. Thus, discounting should be at the market rate prevailing at the time of judgment. Such discounting should yield the expert investor what he would have had if the interest were paid according to the contract.\textsuperscript{59}

Next it is said that the borrower might attempt to prove that he would have prepaid the loan at the earliest time permitted by the contract and thus should not be held for the full period yield. Even Mr. Draper admits that this is an "unlikely event,"\textsuperscript{60} but assuming the extreme, a borrower who can prove that he would have prepaid the loan has proved that the lender would not have received the whole amount of interest. If his proof is sufficient, there is no
reason why the lender's damages should not be reduced. This reduction does not make the lender's remedy less adequate, it simply makes it less in amount, corresponding to the lender's decreased losses.

Mr. Draper then asks an "interesting and difficult" question—whether the defaulting borrower may attempt to limit the lender's damages by proving that the project would have been unsuccessful and that the lender would not have been paid interest in any event. The question may be interesting, but it is certainly not difficult. The answer is obviously negative.

The next "interesting and difficult" question is whether the lender will be required to mitigate his damages either by loaning the committed money to another or by being treated as if he had. Both law and policy so require. But Mr. Draper says the duty to mitigate damages is a duty only to act as a reasonable lender would act. Agreed.

The Draper article then turns from discussion of how damages are inadequate to why specific performance is necessary. Draper argues, not unexpectedly, that specific performance is necessary because damages are inadequate, but now inadequacy is based upon lack of market. The argument appears to be this: because each proposed commitment contains so many factors requiring the lender to make sophisticated risk evaluations and because only the least risky possibilities are approved, each commitment becomes unique and cannot be replaced by any other available investment. In the Draper scheme of things, however, borrowers default only because they can find the same amount of money for the same project at a lower rate. If this is true, then there is a market in which borrowers compete for money and lenders compete for investments. If this market is broad enough to create "market rates," it must be broad enough to contain similar investment

\[\text{\textsuperscript{61}} \text{Id.}\]

\[\text{\textsuperscript{62}} \text{Suppose that } A \text{ has contracted to purchase a widget from } B \text{ for } $10. A \text{ breaches when the market price of widgets is } $8. \text{ In an action by } B \text{ against } A \text{ for the } $2 \text{ loss of bargain, } A \text{ pleads that even if the widget had been delivered and accepted he had no intention of paying for it and therefore } B \text{ has no damages. One cannot imagine either authority for, or the possibility of succeeding with, such an argument.}\]

\[\text{\textsuperscript{63}} \text{Draper 429-30.}\]

\[\text{\textsuperscript{64}} \text{Id.}\]

\[\text{\textsuperscript{65}} \text{There seems to be an implicit hypothesis here that a court would be likely to hold the lender to an unreasonable standard. This hypothesis, like the series of arguments discussed in the text accompanying notes 57-64 supra, is merely a make-weight.}\]

\[\text{\textsuperscript{66}} \text{Draper 432-44.}\]

\[\text{\textsuperscript{67}} \text{Mr. Draper uses the term "market rate" while denying the existence of a market. Id. at 433.}\]
opportunities. If the only alternative investment for the disappointed lender is substantially more risky than the investment for which he is already committed, it would surely be in a different “market.” If those more risky investments do constitute a different market, the lender has no alternative market by which to measure his loss; he has no adequate remedy at law, and thus he should be allowed the specific performance remedy.

There must necessarily be limitations on this conclusion. Remaining for a moment in the Draper world where all projects reach fruition and borrowers breach only because they can get better rates, what is to be done with the borrower who breaches the commitment and executes a loan transaction with a new lender before the committed lender can react? Mr. Draper seems to recognize that specific performance would be improper here. If the new lender induced the borrower to breach a contract known to the lender, the committed lender will have two actions: one against the breaching borrower and the other against the inducing lender. Although the basic measure of damages in either case will be loss of bargain, it is probable that the action against the new lender, because it is a tort case, will result in a higher total damage award. This added increment of damages should be sufficient to compensate the committed lender for any additional risks caused by the breach and reinvestment. If the new lender is innocent of intentional interference, the committed lender is relegated to an action against the borrower. It seems clear that the innocent lender

68 In arguing that the borrower has market power, Mr. Draper tells us that there are 490 savings banks competing for his business. Id. at 426 n.28. In addition, there are many insurance companies which act as permanent lenders. The existence of so many lenders is some evidence that there are a substantial number of borrowers seeking money. The range of projects offered by these borrowers is no doubt large, but not infinite. Some of the projects must be similar in all relevant respects. The first problem is to determine what indicia are relevant—that is, are shopping centers to be compared with shopping centers or is a soundly designed and backed shopping center to be compared with an equally sound apartment complex? Once the relevant range of opportunities is defined (only shopping centers or shopping centers and apartment complexes), it must be determined whether there are enough opportunities within that range to constitute a “market.”

69 The lender, of course, has the burden of pleading and proving the lack of an alternative market.

70 A similar question could arise where the borrower breaches long before the commitment is due and begins negotiation with another lender. The original lender might attempt to enjoin the new lender from interfering with the commitment. Such a remedy exists, but it exists only when equitable relief was proper on the original contract. See generally Stone, Equitable Rights and Liabilities of Strangers to a Contract, 18 Colum. L. Rev. 291 (1918).

71 At least he does not urge specific performance if the new loan has already closed.

Draper 437.

72 Dobbs § 6.4, at 459.

73 Id. at 460-62.
should not be forced to suffer loss of his investment in order to specifically enforce the original commitment. Likewise it would be wasteful in the extreme to require the borrower to take the original loan in addition to the new loan. The only solution is to allow the committed lender to use his damage remedy against the borrower, hopefully with some easing of the foreseeability and specificity of proof requirements when it appears that the committed lender is not adequately compensated by the loss of bargain measure.

Thus far the assumption has been that the borrower was completing the project and taking someone's permanent loan. But the project could be in trouble and the borrower might want to cut his losses by letting the whole thing fail. Alternatively, the borrower might be caught by inflation and realize that his permanent loan, intended to cover construction costs, must be larger than the committed amount, only to have the committed lender refuse to raise the commitment. Surely specific performance should be denied the committed lender in the latter case. No purpose would be served by requiring the borrower to take a loan which will not pay off the construction loan. And in an inflationary period, it is likely that the committed lender will be able to lend the funds to another borrower at a rate at least equal to the committed rate.

The earlier case—that in which the borrower intends to abandon the project—is more difficult. The only apparent reason that the committed lender would want to continue the transaction would be to lend, foreclose, buy in, and resell. If a court were convinced that the lender could not be compensated by a legal remedy, if all other parties were to be repaid from the proceeds of the permanent loan, and if the borrower were not liable for a deficiency, a conditional specific performance decree might be proper.

Mr. Draper raises an additional argument in support of general availability of specific performance to lenders. His position is that lenders look primarily to the security in making loans, that security is real property, and that the transaction should therefore be viewed as a real property transaction for which specific performance should be granted routinely. Agreeing that lenders look primarily to the security in making loans does not require agreement with the conclusion. The lender looks at security in terms of value; the purchaser is thought to look at real estate in terms of its

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75 Draper 434-36.
physiography or its adaptability for a specific physical purpose.\textsuperscript{76} It may be that courts, since they rarely deny specific performance in land cases, have lost sight of the original justifications for the remedy, but the solution lies in contraction rather than expansion of the rule.\textsuperscript{77} If specific performance were to be granted because real property security is involved, it must be recognized that the decision actually being made is one defining valuable security as so unique that its loss cannot be compensated. The real property character of the security has little if anything to do with such a decision.

It thus appears that proper cases for the lender's specific performance are very limited. The remedy would be proper where not precluded by the commitment, no other lender has intervened, no similar investment is available, and the project is viable. The remedy might appropriately be granted in the case of a questionably viable project if there was absolutely no other possibility of compensating the lender and all other parties were protected.

IV

THE RIGHTS OF A BORROWER

Attention should now be turned to the other side of the transaction—the borrower's rights against the lender. The lender may refuse to close because the borrower has not complied with the conditions of the commitment, because the lender can get a better rate elsewhere, or because the lender has decided that the project, although in compliance with the commitment, is not economically viable. In the first situation, the lender's refusal to close is not a breach and the borrower should have no remedy. In the latter situations, the lender is in breach and the borrower should have some remedy.

First, assume that the borrower can negotiate a replacement loan with a different permanent lender. The interest rate on the new money will presumably be higher than on the committed money. If the original lender breached because a better rate was available, this better lender's rate should also be reflected in the

\textsuperscript{76} “One who has contracted to purchase a particular tract of land cannot get its exact counterpart anywhere, with all its surroundings and conveniences. It is a unique thing, not capable of being duplicated.” J. Eaton, \textit{Handbook of Equity Jurisprudence} § 259, at 527 (1901). Whether the land in question is a suburban 10 acres worth $250,000 with a $2,000,000 shopping center or an urban acre worth $250,000 with a $2,000,000 office building should be relatively unimportant for security purposes, yet each site would be worthless to the developer of the other project.

\textsuperscript{77} As Mr. Draper properly notes, mass-produced subdivision lots may well be so fungible that specific performance should not be granted. Draper 435 n.61.
replacement loan. If the original lender breached because it decided the project was not viable, the new lender will probably require a rate above the market to hedge against the perceived risk. In either event, the alternative loan is available and the borrower who takes that loan and sues for damages will have no great difficulty in proving his loss of bargain. However, the delay incident to negotiating the new loan might cause the borrower to sustain substantial losses which cannot be compensated in a damage action. Recovery for such items as loss of prospective tenants, loss of prospective sales, and expenses connected with negotiating the new loan will probably be barred either because the amounts cannot be proven with specificity or because of the foreseeability doctrine.\textsuperscript{78}

Recognizing that he will have substantial uncompensated losses if he accepts an alternative loan, the borrower may decide to seek specific performance against the breaching permanent lender. The borrower's position is similar to that of the output contract buyer in that the claimed right to specific performance is based upon inability of the legal remedy to cover obvious but noncompensable consequential losses. The difficulty with this argument is that the output contract cases involve a series of deliveries to be made over time.\textsuperscript{79} If, for example, a farmer refuses to deliver his crop in the first year of the contract, a specific performance decree might come too late to be useful as to that crop, but it would be efficacious as to future crops. If the buyer is awarded specific performance, his future deliveries are protected and the losses sought to be prevented are avoided. Moreover, economic wastage caused by overhead, lost sales, and breached contracts further along the distribution chain is avoided.\textsuperscript{80} The commitment under discussion here is a single occurrence transaction. Once the project is completed, the developer and all those relying upon him for payment need the money at once and only once. Since the development situation does not have the built-in time frame that the output contracts have, specific performance is less likely to be an efficacious remedy in the development case and should be more difficult to obtain there than in the output case.

\textsuperscript{78} Cases dealing with these problems are collected in Annot., 36 A.L.R. 1408, 1413-35 (1925).

\textsuperscript{79} See cases cited in note 19 supra.

\textsuperscript{80} In the farm output cases, the defendant farmer was one of many who had entered into the same type of contract with the processor. Thus the processor had a broader interest than simple enforcement against the particular defendant—it was seeking to establish its right as against all growers. This factor is not present to the same degree in the commitment cases. See notes 19-22 and accompanying text supra.
If specific performance were immediately available to the borrower it could be an effective remedy, but that would seldom be the case. If specific performance were to be granted as a matter of course to those borrowers who could prove obvious but noncompensable consequential losses, the lender who had already decided not to lend, faced with a suit for specific performance, would be entitled to put the borrower to his proof of inadequate damages at trial. Alternatively, if the remedy were granted as it is in land contract cases, upon proof of the defendant’s breach, the commitment would almost always be a complex document filled with conditions, some of which would require the lender’s “satisfaction” or something similar.\textsuperscript{81} Granting that the lender must be reasonable in finding itself satisfied,\textsuperscript{82} such a contract could invariably be litigated on the question of breach. Whether the specific performance was to be granted as a matter of discretion or as a matter of right, the lender who found it advantageous not to perform in the first place would most likely find it advantageous to litigate. The litigation process would take time. Meanwhile, the project might sit idle, contractors might go unpaid, and the construction lender would not be paid. Thus the availability of specific performance against the lender who breaches immediately before closing would serve no useful purpose.

On the other hand, by withholding specific performance from the borrower, he will be forced to seek and accept the available alternative loan, pay off his creditors, and begin operating the project. This result would be desirable since it would have the effect of mitigating the borrower’s losses and consequently would lessen the lender’s potential liability. It would also tend to prevent wastage caused by delays in occupancy and operation of the project.

Withholding specific performance from the borrower still leaves for solution the problem of apparent, noncompensable losses. This problem may be more illusory than real, for as the loss becomes more obvious, the requirement for specificity in proof seems to relax.\textsuperscript{83} The same can be said of the foreseeability standard.\textsuperscript{84} Assuming, however, that such losses exist, they will have to be borne

\textsuperscript{81} See, e.g., Draper, Permanent Mortgage Financing—The Shopping Center, supra note 3, at 122-29.


\textsuperscript{83} See Dobbs § 12.3, at 802-03.

by the borrower. Also, just as the lender can protect himself against the borrower's breach by requiring a commitment fee, the borrower can protect himself by a liquidated damages clause and a delineation of foreseeable losses in the commitment contract.

To base rejection of the specific performance remedy upon the time required for litigation necessitates recognition of situations in which the time gap loses its importance. If the lender were to repudiate the commitment long before the closing date, if the borrower were able to obtain a short-term loan to pay off the construction loan and make the project operable, or if the construction lender were to agree to carry the project for an additional period, the situation would change substantially. Particularly in the latter two cases, because the project would have been completed, it would be possible to determine whether the borrower had complied with all the terms of the original commitment and to assess his potential losses. If compliance were found and if the potential losses appeared to be so significant that the damage remedy would be inadequate, specific performance could properly be granted. The anticipatory repudiation case is more difficult. The time frame in which to conduct the necessary litigation is present, but because the project is still in the construction stage, it would be impossible to determine whether the borrower had complied with the commitment. To order specific performance in that case would place the chancellor in the position of monitoring the completion of the project, a position that has been traditionally avoided. The complexity of the commitment, the nearness to completion, the developer's reputation for competence, and the adequacy of the damage remedy should all be weighed in determining whether to grant specific performance in such a case.

Thus far it has been assumed that the borrower could negotiate an alternative loan. This means that the borrower would have no difficulty in proving loss of bargain and that the only real question concerning the adequacy of the legal remedy would be whether the borrower could be compensated adequately for his consequential losses. The opposite assumption, that the borrower could not obtain an alternative loan, raises a substantially different set of problems. If there were no alternative market, the borrower would not be able to prove his loss of bargain, but might,

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85 See generally H. McClintock, Equity § 61, at 160-61 (1948).
86 Some jurisdictions refuse to accept this possibility. See, e.g., Lowe v. Turpie, 147 Ind. 652, 44 N.E. 25 (1896). This rule is criticized in 5 A. Corbin, Contracts § 1078 (1964).
within foreseeability and specificity limits, be able to prove his consequential losses.87 This case thus bears surface similarity to the unique goods cases rather than the output contract cases. When the availability of an alternative loan was assumed, the position of the other parties—construction lender, contractors, etc.—was not a consideration since they would still be paid from the new loan proceeds. However, if the new loan is unavailable, the interests of those parties must be considered.

There are two basic fact patterns in which the committed lender would breach and no other loan would be available to the borrower. One is when the money market has become so tight that the lender can obtain a better rate elsewhere and there is no other money available at a price the borrower can afford. The other is when the lender has decided that the borrower’s project is not economically viable and all other lenders concur in this judgment.

In the first situation, there is little choice but to grant the borrower specific performance. The very risk he contracted against, a rise in interest rates, has been realized, and he has no legal remedy because the unavailability of another loan prevents proof of loss of bargain;88 and his ability to prove consequential damages will be limited by the specificity and foreseeability rules. Moreover, to refuse specific performance here would place a significant burden on the third parties who had relied upon the availability of the permanent financing to protect them from loss. The remedy will still be less than perfect because the time lag problem will not have been solved, and the project may be teetering by the time that litigation is completed and the loan is actually made.89 But the worst position in which the permanent lender could find himself would be loaning on a jeopardized project. The hardship inherent in this position would be created by the lender’s own refusal to lend according to the commitment. If the project

87 See, e.g., Stanish v. Polish Roman Catholic Union, 484 F.2d 713, 723-26 (7th Cir. 1973) (decided under Indiana law).
88 The borrower would still have to prove this inability. In order to obtain such proof, the borrower will have to seek the alternative loan. Placing this burden on the borrower thus encourages a diligent search.
89 If the project has failed and the construction lender has begun foreclosure by the time the case comes to trial, specific performance will be of little use. The developer and his third party dependents nevertheless should not have to bear out-of-pocket losses because of the lender’s default. In St. Paul at Chase Corp. v. Manufacturers Life Ins. Co., 262 Md. 192, 278 A.2d 12, cert. denied, 404 U.S. 857 (1971), a case of this kind, the damage remedy granted the developer against the breaching lender in effect indemnified him against all out-of-pocket losses, including a deficiency judgment in favor of the construction lender. This remedy still leaves the developer uncompensated as to loss of profits, but is a good alternative to specific performance when the latter remedy would be ineffectual.
were to go under, the lender would still have the opportunity for salvage through purchase at foreclosure and resale.

The second situation is more complex. If the committed lender has refused to lend because of serious doubts as to the viability of the project, and if other lenders have concurred in that judgment by refusing to lend, the project is probably nonviable. The lender's decision may be an economically wise one since sinking additional funds into a failing project, if the infusion of money will not save it, would be wasteful. The lender's position in opposing specific performance in such a case thus would be a classically strong one.\textsuperscript{90}

On the other hand, the third parties who have relied upon the availability of the permanent financing to provide repayment for their own extensions of credit, materials, and services have a strong interest in having the loan made. If these third parties had lent or provided wisely, they would be able to recoup from the project itself by foreclosing mortgages or liens. If that method would leave them unsatisfied, it could be argued that they have simply made a poor investment and should suffer the loss. But this argument ignores the very basis upon which the lending or furnishing occurred—that the increasing value of the project was not to be the sole source of repayment. Moreover, as between one who undertakes to finance a project in its operational stage and those who undertake to finance its construction, the risk of nonviability, an operational risk, should be placed upon the former.

The borrower, who, since he is suing for specific performance, apparently remains optimistic, is probably willing to take the risk of whatever liabilities will accrue on the permanent loan to pay his current liabilities. The permanent lender should be required to specifically perform here. In spite of the possible inefficiency of requiring a loan which may not result in a viable economic unit, the interests of the other parties involved are strong and the risk which has occurred is one that can properly be placed on the committed lender. That lender, if his judgment is correct and the project fails, still has the opportunity to salvage through foreclosure, purchase, and resale as well as through a deficiency judgment against the borrower.\textsuperscript{91}

\textsuperscript{90} See text accompanying note 10 supra.

\textsuperscript{91} If the project is nonviable, the risk being allocated as between the construction lender (and associated third parties) and the permanent lender is the risk of failing to achieve satisfaction through foreclosure and a deficiency judgment. Since the earlier lenders were relying upon the property, the developer, and the permanent financing, while the permanent lender had only the property and the developer upon which to rely, it seems fair that this risk should fall on the permanent lender.
The decision to grant specific performance to the borrower who is unable to obtain an alternative loan appears harsh. This is particularly true since it tends to make specific performance more readily available to the borrower than to the lender. But it must be noted that the borrower's inability to obtain the new loan is inherently more provable than the lender's inability to find an alternative investment. In order to prove such inability, the borrower should be required to present evidence of attempts to secure other financing. If this proof is offered, the inadequacy of the legal remedy becomes certain. Even if the lender can present evidence of other investments rejected as too risky, this evidence is less convincing than the borrower's evidence because the rejection of the alternative investments is a reflection of the lender's judgment rather than an event brought about by the activities of disinterested third parties.

Conclusion

Careful definition of the type of commitment under scrutiny demonstrates that the installment loan cases in which specific performance has been granted are poor authority for general grants of specific performance in contract-to-lend cases. Those cases do not reduce the importance of favoring the legal remedy; they merely present facts upon which the legal remedy is truly inadequate. Thus, the principles espoused in these cases are not necessarily applicable to the commercial commitment. Although it is difficult to project results for a broad class of cases with substantially varying facts, this Article has attempted to outline the considerations which are present in commercial commitment cases. Because the damage remedy will usually compensate the disappointed party adequately, specific performance should usually be denied. Only in those rare cases in which a lender is actually able to prove inability to make an alternative investment or a borrower can demonstrate the unavailability of alternative financing should specific performance be granted.