MAKING CONTRACT-BREAKERS PAY

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ABSTRACT

This paper examines a deceptively simple question: when can one contracting party obtain a court order requiring the other to pay a sum that the other has agreed to pay? Somewhat surprisingly, the English lawyer's traditional answer is: 'It depends'. If the promise was to pay consequent on a breach of contract, it will be enforceable only if it is not a 'penalty clause'; on the other hand, where the promise creates a contractual debt, enforceable by an action for the agreed sum, the defendant will be ordered to pay in almost all cases where the liability to pay has accrued.

This paper suggests that there is instead one broad remedial principle which governs the enforceability of contractual promises to pay money, irrespective of whether or not the payment is conditional on a breach of contract: viz., that the court will not order a defendant to perform its promise where the claimant has no legitimate interest in that remedy. To vindicate this claim, this paper will argue that the operation of both the 'penalties rule' as well as the 'legitimate interest bar' in *White & Carter (Councils) Ltd v McGregor* [1962] A.C. 413 has been misunderstood.

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INTRODUCTION

This paper explores a deceptively simple question: if one person contracts to pay another a sum of money upon the happening of a particular event, and the event occurs, under what circumstances will a court order the promisor to pay? The English lawyer's traditional answer is: 'It depends'. Specifically, the rules which determine whether a court will order payment of the stipulated sum are said to vary depending on whether the event in question is a breach of contract. If it is not, the promisee brings an action for the agreed sum and is entitled in all, or at least almost all, circumstances to an order for payment. However, if the event *is* a breach of contract, the promisee sues for damages and their entitlement to an order for payment of the stipulated sum depends on the 'penalties rule', i.e., on whether the stipulation is characterised as 'liquidated damages' or a 'penalty clause'. My aim in this paper is to present a picture of rather greater unity.

The first part of the paper focuses the rules governing actions for the agreed sums. In particular, it seeks to defend two propositions. First, that orders for the payment of agreed sums are *not* available as of right simply when the obligation to pay the agreed sum has accrued; rather, it is necessary that the claimant have a relevant 'legitimate interest'. In other words, I claim that the so-called 'legitimate interest' restriction on actions for the agreed sum in *White & Carter (Councils) Ltd v McGregor*[1] restricts the claimant's available remedies rather than their ability to hold open the contract and cause the obligation to pay to accrue. Second, and relatedly, I claim that the relevant 'legitimate interest' concerns the claimant's interest in suing for the agreed sum rather than their interest in performing their own obligations under the contract.

The second part of the paper aims to show that 'liquidated damages clauses' are not, despite what is commonly thought, attempts to agree the *damages* payable in case of breach. Instead, the more theoretically satisfactory and historically consistent interpretation is that these clauses are agreements which purport to create *debts* which accrue upon breach. In this part of the paper, I also consider and reject two possible objections to my view: one based on freedom of contract, and the other on commercial certainty.

Finally, the third part of the paper argues that the jurisdiction to relieve from penalties is in fact just an application of the *White & Carter* 'legitimate interest' bar which applies to other debt claims. The paper argues that this analysis helps explain long-standing questions about both *White & Carter* and the penalties rule. I then suggest an explanation for why this 'legitimate interest' bar is more frequently invoked successfully in relation to debts which are conditional on a breach of contract than in other contexts.

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[1] *White & Carter (Councils) Ltd v McGregor* [1962] A.C. 413; [1962] 2 W.L.R. 17.

There are two important clarifications about the scope of this paper. First, the paper focuses only on final orders to pay agreed sums; it does not examine orders for interim payments. Although superficially similar to final orders, interim payments serve a rather different purpose: they aim to mitigate any 'hardship or prejudice to a plaintiff which may exist during the period from the commencement of the action until trial'[2] where liability to pay is clear. They can be sought whenever the claimant is seeking a money judgment, whether or not an order to pay an agreed sum (i.e., even if the claimant's claim is for unliquidated damages).[3] The conditions for their availability reflect this different objective. Second, this paper is only concerned with the enforcement of contractual promises to pay money; it does not look at the specific enforcement of other contractual promises. It is quite possible that parallels can be drawn between the rules governing the specific enforcement of contractual obligations to pay money and other contractual obligations, but that is a task for a different paper.

1. ACTIONS FOR THE AGREED SUM

By far the most frequently sought relief in civil claims in England is an order that the defendant pay the claimant a contractually-agreed debt.[4] In the vast majority of these cases, there is no dispute about the rules governing the availability of such orders. Indeed, many cases proceed on the assumption that such orders are available as of right (subject to considerations of limitation, illegality, etc.) so long as the relevant obligation to pay has accrued. So, for example, Millett L.J. stated in *Jervis v Harris* that '[t]he plaintiff who claims payment of a debt need not prove anything beyond the occurrence of the event or condition on the occurrence of which the debt became due'.[5] The reality is not quite so simple.

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[2] *Ricci Burns Ltd v Toole* [1989] 1 W.L.R. 993 at 1003; [1989] 3 All E.R. 478 at 485 (Ralph Gibson L.J.).

[3] Civil Procedure Rules 1998, r25.7(1).

[4] 79% of the total number of civil claims issued in the county and magistrates' courts between 2015 and 2022 were for specified sums of money (Ministry of Justice, *Civil Justice Statistics Quarterly* (accessible at https://www.gov.uk/government/collections/civil-justice-statistics-quarterly)).

[5] *Jervis v Harris* [1996] Ch. 195 at 202; [1996] 2 W.L.R. 220 at 226. See also *Howe v Motor Insurers' Bureau (No 2)* [2017] EWCA Civ 932; [2018] 1 W.L.R. 923 at [32] (Lewison L.J.). A clear example of a case in which this premiss is assumed, although not stated, is *H Dakin & Co v Lee* [1916] 1 K.B. 566 at 579–580 (Lord Cozens-Hardy M.R.).

1.1. Two conditions on availability

1.1.1. Accrual (and co-operation)

Unsurprisingly, accrual of the obligation to pay is one of the necessary conditions for a claimant to succeed in an action for the agreed sum.[6] Orders to pay agreed sums compel the specific performance of the obligation to pay,[7] and so there is little justification for ordering the defendant to perform unless and until the obligation in fact accrues.[8]

As Lord Reid noted in *White & Carter*,[9] this means that in some cases orders for the payment of agreed sums will not be available without the defendant's co-operation. Specifically, such orders will not be available without the defendant's co-operation in cases where the claimant cannot earn the agreed sum without co-operation: for example, where access to the defendant's land is required in order to perform a building contract.[10]

1.1.2. Legitimate interest

In the famous decision in *White & Carter*, Lord Reid arguably introduced a further condition on the availability of orders requiring payment of agreed sums, viz., that the claimant has some relevant 'legitimate interest'. Unfortunately, the precise effect of Lord Reid's speech is unhelpfully unclear. In one passage, Lord Reid states that: [11]

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6 *Cutter v Powell* (1795) 6 Term Rep. 320 at 325; 101 E.R. 573 at 576 (Ashurst J.); *Bolton v Mahadeva* [1972] 1 W.L.R. 1009 at 1011–1012 (Cairns L.J.).

7 *Attica Sea Carriers Corp v Ferrostaal Poseidon Bulk Reederei GmbH ('The Puerto Buitrago')* [1976] 1 Lloyd's Rep. 250 at 255 (Denning L.J.); *Ministry of Sound (Ireland) Ltd v World Online Ltd* [2003] EWHC 2178 (Ch); [2003] 2 All E.R. (Comm) 823 at [67] (Nicholas Strauss Q.C.).

8 In other contexts, courts are exceptionally willing to order the performance of an obligation before any breach thereof by way of *quia timet* injunction. It may be that this is also possible in respect of claims for agreed sums (see e.g. the suggestion to this effect in Stephen Smith, *Rights, Wrongs, and Injustices* (Oxford: Oxford University Press 2019) at 140); however, I am not aware of any cases in which such an order has been made. Perhaps most closely analogous is the decision in *Flight v Cook* (1755) 2 Ves. Sen. 619; 28 E.R. 394—however, what was ordered in that case was not simply that the defendant must pay when payment fell due; instead, Sir Thomas Clarke ordered that the defendant provide present security for the payment.

9 *White & Carter* [1962] A.C. 413 at 428.

10 See e.g. *Hounslow London Borough Council v Twickenham Garden Developments Ltd* [1971] Ch. 233; [1970] 3 W.L.R. 538

11 *White & Carter* [1962] A.C. 413 at 431.

> If a party has no interest to enforce a stipulation, he cannot in general enforce it: so it might be said that, if a party has no interest to. insist on a particular remedy, he ought not to be allowed to insist on it.

Here, the absence of a legitimate interest seems to preclude a claimant from succeeding in an action for the agreed sum in respect of an already-accrued obligation to pay. But, puzzlingly, in a passage earlier on the very same page, Lord Reid states that: [12]

> [I]f it can be shown that a person has no legitimate interest, financial or otherwise, in performing the contract rather than claiming damages, he ought not to be allowed to saddle the other party with an additional burden with no benefit to himself

This suggests a rather different role for the 'legitimate interest' bar, viz., that it instead constrains the claimant's ability, where the defendant has repudiated the contract, to affirm the contract and thereby earn the agreed sum by rendering performance themselves. We can refer to these two conceptions of the 'legitimate interest' bar as the 'barring the remedy' and 'barring the right' views respectively.[13]

By far the dominant view in the decided cases is that the claimant's want of legitimate interest bars the right. In most cases, judicial discussion of the *White & Carter* 'legitimate interest' bar presupposes that a claimant who has no relevant legitimate interest 'come[s] under a duty to accept the repudiation' and so is 'not entitled to elect to hold the [defendant] to the [contract]'.[14] Most commentators take a similar view.[15] But in no case so far has the effect of the legitimate interest bar concretely fallen for decision; and, indeed, the two cases which attended to the distinction between barring the remedy and barring the right both actually favoured the former.[16] In the sections which follow, I aim to show that the dominant view is incorrect—the

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12 *White & Carter* [1962] A.C. 413 at 431.

13 The distinction has often been overlooked in the decided cases; for two rare examples where it has not been, both supporting the 'barring the remedy' analysis, see *Decro-Wall International S.A. v Practitioners in Marketing Ltd.* [1971] 1 W.L.R. 361 at 375 (Sachs L.J.) and *Clea Shipping Corp v Bulk Oil International Ltd ('The Alaskan Trader (No. 2)')* [1983] 2 Lloyd's Rep. 645 at 651 (Lloyd J.)

14 *Gator Shipping Corp v Trans-Asiatic Oil Ltd S.A. ('The Odenfield')* [1978] 2 Lloyd's Rep 357 at 373 (Kerr J.). See also *Isabella Shipowner S.A. v Shagang Shipping Co Ltd ('The Aquafaith')* [2012] 2 Lloyd's Rep 61 at [43] (Cooke J.) and *MSC Mediterranean Shipping Co S.A. v Cottonex Anstalt* [2016] EWCA Civ 789; [2016] 2 C.L.C. 27 at [29] (Moore-Bick L.J.)

15 See e.g. Qiao Liu, 'The *White & Carter* principle: a restatement' (2011) 74 M.L.R. 171 at 178–180 and Jonathan Morgan, 'Smuggling mitigation into *White & Carter*: time to come clean?' [2015] L.M.C.L.Q. 576 at 577. It is interesting that Smith adopts this characterisation in Smith, *Rights, Wrongs, and Injustices* (2019) at 139 despite his recognition elsewhere in the book that there exist certain 'remedial defences' which bar remedies without affecting underlying substantive rights.

16 See fn. 13.

best interpretation is that the legitimate interest bar operates to bar the *remedy*,[17] not the *right*. As we shall see, this might have significant implications for the relationship between the *White & Carter* rule and the penalties rule.[18]

1.2. Problems with 'barring the right'

The primary problem with the dominant view is that the 'barring the right' analysis is inconsistent with (although not expressly rejected by) the Supreme Court decision in *Société Générale, London Branch v Geys*.[19] The story in *Geys* is a relatively simple one. Mr Geys was employed by the defendant bank. His contract of employment provided that he was to be paid a sum of money upon termination; the sum payable depended on the length of his employment at the time of termination. On 29 November 2007, the bank summarily dismissed Mr Geys in breach of contract; Mr Geys did not accept the repudiation until 2 January 2008. Although the precise figure was not calculated, it was common ground that there was a difference of around €5.5m in the termination payment due depending on whether Mr Geys was still employed on 1 January 2008 (i.e., after the bank's repudiatory breach, but before Mr Geys' acceptance). The bank argued, relying in part on *White & Carter*, that—at least in the case of employment contracts—a contract can be terminated automatically by one party's wrongful repudiation.[20] By a majority, the Supreme Court held that 'a party's repudiation terminates a contract… only if and when the other party elects to accept the repudiation'.[21] Mr Geys was, therefore, entitled to the larger of the two possible termination payments.

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[17] For the avoidance of doubt, when we talk about 'barring the remedy' what is meant is restricting the kinds of orders (e.g. to pay the agreed sum, to pay damages) which the court will make in respect of the defendant's breach of contract, viz., failing to pay the agreed sum. The usage of remedies in this sense—to denote certain kinds of orders—is relatively common but by no means ubiquitous (see e.g. Smith, *Rights, Wrongs, and Injustices* (2019) at 2–3 and Andrew Burrows, *Remedies for Torts, Breach of Contract, and Equitable Wrongs* (4th edn, Oxford: Oxford University Press 2019) at 4 for examples of this usage. The multiple senses of 'remedy' are well-explored in Peter Birks, 'Rights, wrongs, and remedies' (2000) 20 O.J.L.S. 1 at 9–17).

[18] Although I do not explore this question in detail, it may be that the choice between the 'barring the right' and 'barring the remedy' analyses also has implications for the time at which the court assesses the legitimacy of the claimant's interests. On the former view, that question must be assessed as at the time of the defendant's repudiation of the contract; whereas, on the latter view, the question is arguably more apt to be assessed as at the date of trial.

[19] *Société Générale, London Branch v Geys* [2012] UKSC 63; [2013] 1 A.C. 523.

[20] *Société Générale v Geys* [2012] UKSC 63 at A.C. 528–529.

[21] *Société Générale v Geys* [2012] UKSC 63 at [15] (Lord Hope). The question is disused at greater length by Lord Wilson at [62]–[97].

Although discussed in argument, *White & Carter* is barely mentioned in any of their Lordships' judgments. [22] Nonetheless, *Geys* has hugely important ramifications for the proper interpretation of the 'legitimate interest' bar. Most obviously, the majority's conclusion that no breach of contract can effect an automatic termination is flatly inconsistent with the 'barring the right' conception, viz., that a contract will automatically be terminated by repudiatory breach just when the innocent party has no legitimate interest in holding open the contract. Moreover, whilst Lord Sumption stated that *White & Carter* demonstrated that 'the right to treat the contract as subsisting has never been absolute',[23] the majority adopted a rather different interpretation. Lord Wilson stated that he 'agree[d] with the Court of Appeal's treatment of [Lord Reid's remarks in *White & Carter*] in the *Decro-Wall* case',[24] in which Sachs L.J. stated that 'it is the range of remedies that is limited, not the right to elect'.[25]

It is also worth noting that at least two other cases have endorsed the 'barring the remedy' analysis. The first is *The Alaskan Trader*, in which Lloyd J. stated that:[26]

> [A]lthough the point is sometimes put in terms of the innocent party being obliged to accept the repudiation… I think it is more accurate to say that it is the Court which, on equitable grounds, refuses to allow the innocent party to enforce his full contractual rights

The second is *MSC Mediterranean Shipping Co S.A. v Cottonex Anstalt*, in which Moore-Bick L.J. suggested that the effect of *White & Carter* is that 'in an appropriate case the court in the exercise of its general equitable jurisdiction will decline to grant the innocent party the *remedy* to which he would normally be entitled'.[27] His Lordship also mentioned specifically that the fact that *White & Carter* operates to bar the remedy rather than the right was a 'distinction of importance'[28] in the *Geys* case.

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[22] The case is discussed at [86]–[87] of Lord Wilson's judgment and [114], [133], and [139] of Lord Sumption's judgment.

[23] *Société Générale v Geys* [2012] UKSC 63 at [114] (see also [139](2)). Rather confusingly, Lord Sumption focused on Lord Reid's statements about co-operation rather than the legitimate interest bar—but it is obvious from the cases on which his Lordship relies that it is the latter rather than the former at issue.

[24] *Société Générale v Geys* [2012] UKSC 63 at [87].

[25] *Decro-Wall* [1971] 1 W.L.R. 361 at 375.

[26] *The Alaskan Trader (No. 2)* [1983] 2 Lloyd's Rep. 645 at 651

[27] *MSC Mediterranean Shipping (CA)* [2016] EWCA Civ 789 at [40] (emphasis original).

[28] *MSC Mediterranean Shipping (CA)* [2016] EWCA Civ 789 at [40].

1.3. Barring the remedy

1.3.1. Consistency with argument

Not only does the 'barring the remedy' analysis fit subsequent cases better than the alternative 'barring the right' analysis, it is also more consistent with the basis of the appeal in *White & Carter* itself.

When the dispute was before the Inner House of the Court of Session, it was abundantly clear that the primary question was whether the court should exercise a discretion to deny the pursuers the remedy they sought. This is apparent both from the report of the respondent's argument[29] as well as from each of the three judgments. Both the Lord Justice-Clerk[30] and Lord Mackintosh[31] held that the case fell squarely within the decision in *Langford & Co Ltd v Dutch*[32]— a case in which, in an action for debt, the claim was denied because there was nothing 'which would justify the pursuers in claiming the remedy which they seek'.[33] Lord Patrick similarly recognised that there was no 'rescission of the contract, because one party to a contract cannot rescind it at his own hand'[34] (denying, in other words, the automatic termination theory with which the 'barring the right' analysis is associated), before relying on the court's discretion to refuse specific relief in order to justify refusing to order payment in this case.[35]

Despite the potential ambiguity,[36] Lord Reid also seems to have understood the case in terms of barring the remedy sought. His Lordship considered that the primary issue in the case was the correctness of the decision in *Langford*. Although Lord Reid ultimately concluded that *Langford* was wrongly decided,[37] his Lordship's reasons for this conclusion are illustrative. His Lordship importantly *did not* conclude that an action in debt cannot be denied on discretionary grounds. Quite to the contrary, Lord Reid explained that *Langford* was purporting

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29 *White & Carter (Councils) Limited v McGregor* 1960 S.C. 276 at 277; 1961 S.L.T. 144 at 147.

30 *White & Carter (Court of Session)* 1960 S.C. 276 at 281–282.

31 *White & Carter (Court of Session)* 1960 S.C. 276 at 286.

32 *Langford & Co Ltd v Dutch* 1952 S.C. 15; 1952 S.L.T. 72.

33 *Langford v Dutch* 1952 S.C. 15 at 19 (Lord Cooper).

34 *White & Carter (Court of Session)* 1960 S.C. 276 at 283. Note that 'rescission' here is being used is being used in the sense of rescission *ex nunc*, i.e., what would now typically be called 'termination' in English law.

35 *White & Carter (Court of Session)* 1960 S.C. 276 at 284.

36 See text to fns. 11 and 12 above.

37 *White & Carter* [1962] A.C. 413 at 430.

to apply the principle in *Grahame v Magistrates of Kirkcaldy*,[38] viz., that 'a superior Court, having equitable jurisdiction, must also have a discretion, in certain exceptional cases, to withhold from parties applying for it that remedy to which, in ordinary circumstances, they would be entitled as a matter of course'.[39] Rather than questioning this principle, Lord Reid instead held that the Lord President in *Langford* merely misapplied it by denying the claim in debt on the basis that seeking to recover the debt was not 'reasonable'[40] rather than the more stringent test in *Kirkcaldy Magistrates*, viz., whether there is a 'very cogent reason'[41] to deny the claim.[42]

That Lord Reid had in mind a power to refuse remedies should come as little surprise. While the idea that the court has a discretion to deny claims in debt was, and remains, a novel suggestion in English law, the existence of a generalised discretion (exceptionally) to refuse remedies receives rather stronger support in Scottish jurisprudence. Lord Reid's comments in *White & Carter* have been consistently interpreted in this manner in subsequent Scottish cases.[43]

1.3.2. Consistency with other forms of specific performance

Not only is the 'barring the remedy' interpretation of *White & Carter* more coherent with Lord Reid's speech, it is also a more principled rule for the law to adopt. According to the 'barring the right' interpretation, all forms of specific relief can be refused at the discretion of the court, other than claims in debt; in contrast, the 'barring the remedy' analysis treats all claims for specific relief consistently with one another. Absent some reason for singling out claims in debt, we should prefer an interpretation of the law which avoids drawing such a distinction.

1.3.2.1. Attempts to justify differing treatment

One suggestion, proposed by Smith, is that the discretion to refuse specific relief is a product of factors which do not apply to claims in debt. Smith suggests that there are '(largely)

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[38] *Grahame v Magistrates of Kirkcaldy* (1882) 7 App. Cas. 547; (1882) 9 R. (H.L.) 91.

[39] *Grahame v Magistrates of Kirkcaldy* (1882) 7 App. Cas. 547 at 557 (Lord Watson). See similarly *Moore v Paterson* (1881) 9 R. 337 at 351 (Lord Shand).

[40] *Langford v Dutch* 1952 S.C. 15 at 18 (Lord Cooper).

[41] *Grahame v Magistrates of Kirkcaldy* (1882) 7 App. Cas. 547 at 557 (Lord Watson).

[42] *White & Carter* [1962] A.C. 413 at 429–430.

[43] See e.g *Salaried Staff London Loan Co Ltd v Swears and Wells Ltd* 1985 S.C.189 at 193–194; 1985 S.L.T. 326 at 328–329 (Lord Emslie); *Stockton Park (Leisure) Ltd v Border Oats Ltd* 1990 S.C. 209 at 214; 1991 S.L.T. 333 at 335 (Lord Cameron); and *Co-operative Insurance Society Ltd v Halfords Ltd* 1998 S.C. 212 at 230–231; 1999 S.L.T. 685 at 696 (Lord Penrose).

administrative reasons'[44] for the courts' power to refuse specific relief, such as difficulties in supervising and enforcing the order, which courts overcome by monetary awards instead.[45] But this suggestions overlooks how perilously thin the line between claims for specific performance and claims in debt can be. Where the claimant seeks an order that the defendant make periodic payments or make a payment to a third party, the relevant order is one for specific performance rather than an order to pay a sum due;[46] and in this context it is clear that the court preserves its usual discretion to refuse the remedy sought.[47]

An alternative potential justification for treating debt claims differently to other forms of specific relief, such as specific performance, is that money orders might be thought to engage fewer concerns about oppressive coercive enforcement. The argument, perhaps, is this: specific performance and other forms of specific relief are enforced by means of contempt proceedings. Civil contempt is 'quasi-criminal',[48] and is punishable by committal, sequestration of assets, or a fine.[49] In contrast, it might be said, the means by which money orders are enforced are less draconian. Therefore, one might think that there is a greater need for a discretion to refuse non-money specific relief—given the oppressive means by which such orders can be enforced—than there is for money orders.

There are at least three reasons to reject this argument. First, Practice Direction 70 clearly envisages the possibility of some form of contempt proceedings in respect of money orders.[50] Indeed, until 1970, committal for contempt following failure to pay a judgment debt remained a distinct possibility. Although the Debtors Act 1869 generally abolished imprisonment for the non-payment of a debt,[51] section 5 of that Act preserved a limited power to 'commit [a judgment debtor] to prison for a term not exceeding six weeks, or until payment of the sum due' where it is proven that the debtor 'either has or has had since the date of the order or judgment the means to pay the sum in respect of which he has made default, and has refused or neglected… to pay the same'.[52] While the scope of the orders to which section 5 applies has

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[44] Smith, *Rights, Wrongs, and Injustices* (2019) at 141.

[45] Smith, *Rights, Wrongs, and Injustices* (2019) at 141.

[46] See e.g. *Beswick v Beswick* [1968] A.C. 58; [1967] 3 W.L.R. 932.

[47] Indeed in *Beswick v Beswick* [1968] A.C. 58 itself much of the argument concerned whether the court should decline to make an order for specific performance.

[48] See e.g. *Comet Products UK Ltd v Hawkex Plastics Ltd* [1971] 2 Q.B. 67 at 77; [1971] 2 W.L.R. 361 at 369 (Cross L.J.).

[49] CPR, r81.9(1).

[50] 70A PD 1.2(1).

[51] Debtors Act 1869, s.4.

[52] Debtors Act 1869, s.5.

been greatly diminished by the Administration of Justice Act 1970, s.11—essentially only to money orders in family proceedings[53] and to claims for unpaid taxes[54]—it remains an over-simplification to say that money orders cannot be enforced by contempt proceedings.

Second, although non-money orders are indeed sometimes enforced through contempt proceedings for committal, this is not invariably the case. As Ormrod L.J. noted in *Ansah v Ansah*: 'committal orders are remedies of last resort'.[55] Where a non-money order can be enforced by some less oppressive means, that will usually be the appropriate course. For example, where an order has been made for the conveyance of rights to specific property the court may, if the defendant refuses to execute the conveyance, authorise a nominee to execute the conveyance instead.[56] Similarly, orders that the claimant recover possession of specific chattel or land may be enforced by warrants of specific delivery[57] and possession[58] respectively (i.e., orders which authorise a bailiff or enforcement officer physically to obtain possession of the property and restore it to the claimant).

Third, and perhaps most importantly, it should not be overlooked that the enforcement of money orders can be—even without contempt proceedings—a draconian process. For example, writs of control authorise a court enforcement agent to enter property, without a warrant,[59] and potentially to use reasonable force[60] to seize possession of the judgment debtor's goods in order to sell them to meet the judgment debt.

For all of these reasons, it is a mistake to think that there are significantly greater reasons to require a discretionary power to refuse to make non-money orders than there are to make money orders.

1.3.2.2. Consequences of failing to adopt a unified approach

The failure to appreciate that debt claims can be refused in the same manner as claims for specific performance has only led to confusion. In *The Puerto Buitrago*, Denning L.J. refused

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53 Administration of Justice Act 1970, ss.11(a) and (c).

54 Administration of Justice Act 1970, s.11(b).

55 *Ansah v Ansah* [1977] Fam. 138 at 144; [1977] 2 W.L.R. 760 at 765.

56 Senior Courts Act 1981, s.39.

57 CPR, r83.23.

58 CPR, r83.26.

59 Tribunals, Courts, and Enforcement Act 2007, sch. 12, para. 14(1))

60 Tribunals, Courts, and Enforcement Act 2007, sch. 12, para. 20(2)). The enforcement agent must apply to the court for a warrant authorising the use of reasonable force.

to make an order to pay a sum due because 'by suing for the money, the plaintiff is seeking to enforce specific performance of the contract—and he should not be allowed to do so when damages would be an adequate remedy'.[61] But, while the claim was a claim to enforce specifically the defendant's obligation, it was *not* a claim for the Equitable remedy of specific performance; it was a common law claim for an order to pay a sum due. It was therefore not obvious what justified his Lordship's reference to the Equitable 'adequacy of damages' bar. Although Denning L.J. considered the decision in *White & Carter*, it seems his Lordship focused only on the result in that case rather than on Lord Reid's 'legitimate interest' qualification (which is mentioned by none of the three Lords Justices in *The Puerto Buitrago*). Subsequent cases have, however, sought to explain the reasoning in *The Puerto Buitrago* as an example of the 'legitimate interest' bar.[62] A similar mistake to that found in *The Puerto Buitrago* is seen in *Ministry of Sound (Ireland) Ltd v World Online Ltd*.[63] In that case, Nicholas Strauss Q.C. considered whether the claimants' claim in debt might be barred by the adequacy of damages or want of mutuality.[64] However, instead of relying on the 'legitimate interest' bar in *White & Carter* to support applying these Equitable bars to a common law claim, Nicholas Strauss Q.C. first concluded that the claimant *had* a legitimate interest *before* turning to these considerations.[65]

1.4. Responding to objections

There are two[66] important objections to the 'barring the remedy' analysis: the first is a matter of interpreting Lord Reid's speech in *White & Carter*; the second concerns the practical efficacy of 'barring the remedy'.[67]

The first objection is that Lord Reid's hypothetical 'expert report' example in *White & Carter* presupposes the 'barring the right' analysis. The example concerns an expert who is hired to

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61 *The Puerto Buitrago* [1976] 1 Lloyd's Rep. 250 at 255.

62 See e.g. *Ocean Marine Navigation Ltd v Koch Carbon Inc ('The Dynamic')* [2003] EWHC 1936 (Comm) at [20]; [2003] 2 Lloyd's Rep. 693 at [20] (Simon J.). Scottish cases have taken a similar view; see e.g. *Scottish Metropolitan Property Plc v Christie* 1987 S.L.T. (Sh. Ct.) 18 at 24 (Sheriff Macphail).

63 *Ministry of Sound* [2003] EWHC 2178 (Ch).

64 *Ministry of Sound* [2003] EWHC 2178 (Ch) at [67]–[72].

65 *Ministry of Sound* [2003] EWHC 2178 (Ch) at [64]–[66].

66 One further objection, which I consider at §1.6 and §3.2.1 below, is that there have—so far—been no successful invocations of the 'legitimate interest' bar on facts where only the 'barring the remedy' analysis can explain the result reached (i.e., where the defendant was not seeking to repudiate the contract before the sum accrued).

67 I am grateful to Rob Stevens for suggesting both of these possible objections.

prepare a report the contract for which is repudiated before any work is done.[68] Lord Reid suggests that the expert might have 'a legitimate interest other than an immediate financial interest'.[69] While this is somewhat obscure, the report of counsel's argument suggests that what is meant is e.g. 'the advantage to [the expert's] reputation in doing the work'.[70] This appears to be an advantage in the claimant tendering their own performance, rather than an interest in the remedy sought. If we suppose that there should be congruency between the necessary interest and the effect of the absence of such an interest,[71] this might suggest that Lord Reid instead had in mind the 'barring the right' conception. But, while this analysis is not without merit, it is surely outweighed by Lord Reid's express reliance on cases about barring remedies. Moreover, there is no necessary incongruency in a claimant relying on their interest in tendering performance to support their interest in a particular remedy. If a claimant has an interest in performing certain work, it seems that they have at least some derivative interest in being paid for that work.

The second objection is that the 'legitimate interest' bar, if it operates to bar the remedy rather than the right, is in practical terms entirely circumvented by the claimant's claim to damages. Consider the facts of *White & Carter* itself. If the claimant were confined to a claim in damages, how would those damages be quantified? The ordinary measure of damages is such sum of money as would place the claimant in the same position as if the contract had been performed.[72] If we suppose that the contract is not automatically terminated, then—the objection proposes—the relevant non-performance must be the defendant's failure to pay the sum due (since the claimant is able to earn payment because the contract remains open). The sum of money necessary to put the claimant in the position as if that obligation had been performed is precisely the amount of the sum due—but ordering the payment of this sum is the very remedy which is supposedly barred.

A superficially appealing answering to this objection is to rely on the law of mitigation.[73] Perhaps the claimant cannot recover the full sum due because they ought to have mitigated their loss by finding alternative work rather than insisting on rendering unwanted performance? The difficulty with this suggestion is that, ordinarily, the so-called 'duty' to mitigate only arises

68 *White & Carter* [1962] A.C. 413 at 431.

69 *White & Carter* [1962] A.C. 413 at 431.

70 *White & Carter* [1962] A.C. 413

71 See further §1.5 below.

72 *Robinson v Harman* (1848) 1 Ex. 850; 154 E.R. 363.

73 For a similar suggestion, see Morgan, 'Smuggling mitigation into *White & Carter*: time to come clean?', albeit suggesting that this solution might be found in a re-interpretation of Lord Reid's 'legitimate interest' bar.

at the moment of breach[74]—but, on the supposed facts, that would be the moment where the obligation to pay accrues, whereas the proposed mitigation would have to occur *before* that point.

A more attractive answer is the possibility that the law will not, generally, allow a party to outflank restrictions on their legal rights or remedies.[75] So, for example, whereas the usual test for remoteness in a negligence claim is whether the loss is of a kind which was 'reasonably foresee[able]… as a result of the breach however unlikely it may be, unless it can be brushed aside as far fetched',[76] if the claimant has a concurrent claim in contract (for which the remoteness standard is whether the loss was of a type which was 'reasonably contemplated as a serious possibility')[77] it is the contractual rules which apply to the tort claim[78]—the claimant cannot outflank the more restrictive contract rules by bringing their claim in tort. Similarly, it might be that a claimant who is barred from recovering an agreed sum cannot rely on the non-payment of that same sum in the quantification of damages.

1.5. The object of the claimant's legitimate interest

Lord Reid's remarks about the 'legitimate interest' bar were not only ambiguous as to the effect of the claimant lacking the relevant legitimate interest; it was also unclear in what exactly it is that the claimant must have a legitimate interest. As before, there are two options. The first is that the claimant must have an interest 'in performing the contract';[79] the second is that they must have an interest in 'insist[ing] on a particular remedy'.[80]

Each of the two alternatives are naturally associated with one of the two conceptions of the effect of the 'legitimate interest' bar. The claimant having no interest in rendering performance

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74 *Tredegar Iron & Coal Co v Hawthorn Bros & Co* (1902) 18 T.L.R. 716; *Shindler v Northern Raincoat Co Ltd* [1960] 1 W.L.R. 1038; [1960] 2 All E.R. 239.

75 See further Paul Davies, 'Concurrent liability: a spluttering revolution' in Worthington, Robertson, and Virgo (eds), *Revolution and Evolution in Private Law* (Oxford: Hart Publishing 2018). This suggestion is admittedly at odds with the conventional view that a claimant is free to elect between their possible causes of action however is most favourable to them: see *Henderson v Merrett Syndicates Ltd (No. 1)* [1995] 2 A.C. 145; [1994] 3 W.L.R. 761.

76 *Koufos v C. Czarnikow Ltd ('The Heron II')* [1969] 1 A.C. 350 at 422; [1967] 3 W.L.R. 1491 at 1534 (Lord Upjohn).

77 *Attorney General of the Virgin Islands v Global Water Associates Ltd* [2020] UKPC 18; [2021] A.C. 23 at [32] (Lord Hodge)

78 *Wellesley Partners LLP v Withers LLP* [2015] EWCA Civ 1146; [2016] Ch. 529.

79 *White & Carter* [1962] A.C. 413 at 431.

80 *White & Carter* [1962] A.C. 413 at 431.

ostensibly provides a reason for the contract automatically to terminate, whereas the claimant having no interest in recovering the agreed sum plausibly provides a reason for the court not to order the payment of that sum. For this reason, it is unsurprising—given that subsequent decisions have often spoken in terms of barring the right—that it is the former legitimate interest which is more commonly discussed.

If, however, the analysis above is correct, and the effect of the claimant having no relevant legitimate interest is to bar the remedy they are seeking, then there are good reasons of consistency to instead focus on asking whether the claimant in fact has a legitimate interest in that remedy. Notably, in *El Makdessi v Cavendish Square Holding BV; ParkingEye Ltd v Beavis*[81] (a case to which we will return below), it is in these terms which Lord Neuberger and Lord Sumption interpreted *White & Carter*.[82] Similarly, in *Scottish Metropolitan Property plc v Christie*—an action for payment of arrears of rent which had been guaranteed by the defenders—Sheriff Macphail approached the question whether the pursuers had the necessary legitimate interest by asking whether they had a legitimate interest 'in obtaining payment of the rent' in the circumstances.[83]

That is not to say that the question whether the claimant has a legitimate interest in rendering performance is irrelevant. As mentioned above, the fact that a claimant has an interest in rendering performance seems to generate a derivative interest in receiving the agreed remuneration for performance.

1.6. An overlooked power?

One puzzle remains. To date, Lord Reid's legitimate interest bar has only successfully been invoked on two occasions. The first was the decision in *The Alaskan Trader*; the second was Leggatt J.'s judgment in *MSC Mediterranean v Cottonex* (on appeal the 'legitimate interest' point fell away, but Moore-Back L.J. indicated that his Lordship would have upheld Leggatt J.'s decision on this point had the matter arisen).[84] Given the vast number of debt claims before the courts, why is this the case?

Perhaps more importantly, it is striking that neither of these two cases was a 'clean' example of the *White & Carter* bar being used to bar the remedy. In both cases the defendant purported

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[81] *El Makdessi v Cavendish Square Holding BV; ParkingEye Ltd v Beavis* [2015] UKSC 67; [2016] A.C. 1172

[82] *Makdessi v Cavendish* [2015] UKSC 67 at [29]: '[T]he law will not generally make a remedy available to a party, the adverse impact of which on the defaulter significantly exceeds any legitimate interest of the innocent party'.

[83] *Scottish Metropolitan Property Plc v Christie* 1987 S.L.T. (Sh. Ct.) 18 at 26.

[84] *MSC Mediterranean Shipping (CA)* [2016] EWCA Civ 789 at [43].

to repudiate the contract before the obligation to pay accrued. The results in these cases are therefore at least consistent with the 'barring the right' analysis. One might therefore question why, if the legitimate interest bar truly operates to bar the remedy, we can find no decided case in which it has unambiguously done so.[85]

The short answer is that the discretion to refuse a remedy is an exceptional one which, as Lord Watson said in *Grahame v Kirkcaldy Magistrates*, should only be exercised where there is a 'very cogent reason' to do so. There are almost no circumstances in which this will be the case with a simple debt claim; some further complication will nearly inevitably be required. But, to demonstrate this adequately, we must first turn to the rules on penalty clauses.

2. THE PENALTY RULE

Like the rules governing actions for the agreed sum, the jurisdiction to relieve from penalty clauses is ostensibly simple. In this section, I begin by outlining the relevant rules. I then suggest that there are significant misunderstandings about both to what kinds of clauses the 'penalties rule' applies as well as the test which is applied in determining whether or not to grant relief.

2.1. Overview

If contracting parties agree that, upon a breach of contract, the party in default is to pay a particular sum of money, courts will order the payment of that sum unless the clause is considered a 'penalty'.[86] In determining whether the clause is a penalty, the courts undertake a two-stage inquiry. The first stage (the 'jurisdiction' question) asks whether the clause is even susceptible to review under the penalties jurisdiction, i.e., whether the clause is potentially penal. If so, the second stage (the 'review' question) then determines whether the clause is or is not in fact a penalty.

The modern formulation of both the 'jurisdiction' and 'review' questions is found in the Supreme Court's decision in *Makdessi*. Both will be explored in greater detail below. But, in short, a clause falls within the penalties jurisdiction just if it imposes a secondary obligation,

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85 Although it is important to remember that the absence of a decision on a particular issue often signals no more than 'the forensic point that it did not occur to counsel or the members of the Court': *LA Micro Group (UK) Ltd v LA Micro Group Inc* [2023] EWCA Civ 214 at [111] (Nugee L.J.).

86 It is clear that the penalties jurisdiction applies to clauses which impose detriments other than obligations to pay money which are triggered by a breach of contract. In this section I focus only on monetary penalties; however, I discuss briefly the implications of my analysis for non-monetary penalties below at §3.3.

i.e., imposes an obligation which takes effect upon a breach of contract.[87] Specifically, a clause which imposes a *primary* obligation is not even potentially penal and so is not susceptible to review under the jurisdiction. The review question then asks whether the obligation so imposed is 'out of all proportion to any legitimate interests of the innocent party in the enforcement of the primary obligation'.[88]

2.2. The jurisdiction question

2.2.1. <u>Orthodoxy</u>

The proposition that the penalties jurisdiction only applies to clauses which impose secondary obligations is not a new one. It is often expressed by the idea that clauses within the penalties jurisdiction quantify the amount of *damages* payable upon breach rather than creating debts. So, for example, in *President of India v Lips Maritime Corporation ('The Lips')*, Lord Brandon stated that a demurrage clause (a potentially-penal clause operating upon failure to load or discharge a chartered ship on time) 'does not alter the nature of the charterer's liability, which is and remains a liability for *damages'* rather than a liability to pay a debt.[89] This observation was repeated more recently by Males L.J. in *K Line Pte Ltd v Priminds Shipping (HK) Co Ltd ('The Eternal Bliss')*.[90]

Unfortunately, the concept of a secondary obligation is far from clear. It is quite possible that the term is used inconsistently in different contexts.[91] For present purposes, it is important to be clear about the structure of what we call 'secondary obligations' in this context. Many obligations have a relatively simply bilateral structure.[92] One person (the obligor) owes a duty to another person (the obligee) to do or not to do something. Secondary legal obligations involve a more complicated relationship between multiple linked sets of bilateral obligations.

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[87] See e.g. *Makdessi v Cavendish* [2015] UKSC 67 at [14] and [32] (Lord Neuberger and Lord Sumption). Their Lordships tends to describe the clause or provision as itself a 'secondary obligation', but this must be elliptical: clauses are communicative acts, not norms. The clause might express a norm, but it cannot itself be a norm.

[88] *Makdessi v Cavendish* [2015] UKSC 67 at [32] (Lord Neuberger and Lord Sumption). Lord Mance (at [152]), Lord Hodge (at [255]), and Lord Toulson (at [293]) each expressed the test in slightly different terms, but none seem to have intended any substantive difference as a result.

[89] *President of India v Lips Maritime Corp ('The Lips')* [1988] A.C. 395 at 422; [1987] 3 W.L.R. 572 at 578.

[90] *K Line Pte Ltd v Priminds Shipping (HK) Co Ltd ('The Eternal Bliss')* [2021] EWCA Civ 1712; [2022] 3 All E.R. 396 at [21].

[91] See e.g. David Foxton, 'How useful is Lord Diplock's distinction between primary and secondary obligations in contract?' (2019) 135 L.Q.R. 249.

[92] I discuss below whether this is true of primary legal obligations—see §2.2.2

On the one hand is a bilateral relationship between the claimant and the defendant, requiring the defendant to perform some remedial action. On the other hand is a bilateral relationship between the claimant and the court, requiring the court to order the defendant to perform that remedial action. This essentially trilateral relationship is a product of the fact that secondary obligations, as remedial obligations, are intimately related to courts and court orders.[93]

The precise nature of the relationship between these two sets of bilateral obligations is the subject of some debate. Some maintain that courts make remedial orders which replicate the content of antecedent claimant-defendant obligations which arise by operation of law;[94] others suggest that the claimant-defendant obligation arises only once the court has made the relevant order.[95] But, on either view, secondary obligations are trilateral rather than bilateral: it is not simply that defendants owe remedial obligations; courts owe institutional obligations to make remedial orders.[96] Secondary obligations are, in part at least, obligations owed by courts.

With that in mind, we can identify with greater precision the orthodox view of what kinds of clauses fall within the penalties jurisdiction. If these clauses impose secondary obligations rather than primary obligations (i.e., quantify damages rather than create debts), then the obligations they create are trilateral: they purport to impose obligations not only on the defaulting party (to pay a certain sum of money) but also on courts (to make a particular order).

2.2.2. Theoretical difficulties

This should immediately seem conceptually challenging. Contract law has important connections to the institution of promise, and promissory obligations are paradigmatically bilateral. One cannot, ordinarily, impose duties on other people by promising that they will or will not do a particular thing.[97] Yet this is precisely what the orthodox view of the penalties

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[93] The idea that the law of remedies is fundamentally the law governing (a subset of) court orders is fairly commonplace; see e.g. Jack Jacob, *The Fabric of English Civil Justice* (London: Stevens & Sons 1987) at 168–170; Rafal Zakrzewski, *Remedies Reclassified* (Oxford: Oxford University Press 2005) at 44–45; Burrows, *Remedies for Torts, Breach of Contract, and Equitable Wrongs* (2019) at 4; and Smith, *Rights, Wrongs, and Injustices* (2019) at 2–3.

[94] See e.g. Birks, 'Rights, wrongs, and remedies' at 15–16; Sandy Steel and Robert Stevens, 'The secondary legal duty to pay damages' (2020) 136 L.Q.R. 283.

[95] See e.g. Stephen Smith, 'Why courts make orders (and what this tells us about damages)' (2011) 64 C.L.P. 51; Smith, *Rights, Wrongs, and Injustices* (2019) at 191–202.

[96] There are yet further debates which may be had. For example, we might ask at what point courts come under their duty to make remedial orders: when the wrong occurs, or when (and if) that wrong is proved in court? Or we might ask whether the courts' obligation is a *legal* obligation. It certainly is not one which sounds in damages, although I suspect this is far from a decisive point. However, these further complications do not bear on the point which is presently important: secondary obligations are (in part) obligations on courts.

[97] Unless of course the apparent promisor's promise can be attributed to the potential obligor.

jurisdiction presupposes: that potentially-penal clauses are promises between the contracting parties about how a third party (viz., the court) will act. It is in the very nature of *secondary* obligations that the obligations imposed are at least in part obligations owed by courts (a fact which is unfortunately all-too-often obscured by a tendency to focus on the claimant-defendant aspect of secondary obligations). It is therefore unclear why, if potentially-penal clauses indeed purported to create secondary obligations, courts ever have reason to follow them.

Of course, courts are not third parties to contractual promises in quite the same way as ordinary private individuals. Courts owe institutional obligations even in respect of primary contractual obligations. Ordinarily, if A promises to pay B the sum of £50 in exchange for certain goods, courts are required to recognise A's duty to pay B as a legal duty. If courts owe institutional obligations of this kind then why, it might be asked, is there any challenge in their owing institutional obligations to make certain kinds of remedial orders?

However, this response overlooks an important difference in the relationship between the parties' agreement and the court's obligation in these two situations. When we speak of the court's obligation to recognise validly-created contractual duties, the parties' agreement partially determines the *content* of the court's obligation, but it does not provide the *grounds* of that obligation. In other words: when courts recognise primary obligations, they do not do so because the parties have agreed that they will do so. The court's duty to recognise contractual agreements as creating legal obligations is instead justified by—perhaps—instrumental reasons in favour of giving legal force to private agreements. In contrast, where the parties seek to create secondary obligations by agreement, the agreement provides not only the content but also the grounds of the court's obligation. Put another way: what is objectionable about agreed secondary obligations is *not* the court being bound to give effect to the parties' agreement; instead, it is the court being so bound *because the parties have agreed that it should be so bound*.

Is it possible that potentially-penal clauses merely agree what is owed between the claimant and defendant, and that they are enforced by courts for simply the same reasons courts give legal force to other agreements? For the orthodox view this, unfortunately, concedes too much. As Pearson J. noted in *F&K Jabbour v Custodian of Israeli Absentee Property*, it would be an 'unusual sense' of the word 'damages' which covered a sum payable 'under [the defendant's] promise'.[98] In other words: clauses which merely purport to create obligations between the claimant and defendant create debts, not damages.

Unfortunately, this distinction between the grounds and content of obligations has not always been clearly drawn in decided cases. For example, in *Photo Productions Ltd v Securicor*

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[98] *F&K Jabbour v Custodian of Israeli Absentee Property* [1954] 1 W.L.R. 139 at 143; [1954] 1 All E.R. 145 at 150.

Transport Ltd, Lord Diplock considered that the '[p]arties are free to agree to whatever exclusion or modification of all types of obligations [both primary and secondary] as they please' because '[t]he contract… is just as much the source of secondary obligations as it is of primary obligations'.[99] However, while it may be the case that the contract is the source (i.e., grounds) of the bilateral aspect of the secondary obligation (i.e., whatever remedial duty the contract-breaker may owe the innocent party),[100] it is not the source of the court's duty to recognise primary duties or to make remedial orders—even if its existence is a necessary condition for those duties to arise.

2.2.3. Inconsistency with other remedial agreements

Given these conceptual difficulties, it should come as little surprise that other attempts to make 'remedial agreements'—that is, agreements between the parties as to the kinds of orders courts should make—meet with little success.[101] Contracting parties' apparent power to agree damages[102] is an incongruous one.[103]

The most obvious example of the court's unwillingness to treat itself as bound by remedial agreements is where the parties contract for the grant of specific relief. The principal authority on this question is *Quadrant Visual Communications Ltd v Hutchison Telephone (UK)*,[104] in which the Court of Appeal had to consider the effect of a contractual provision which sought

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[99] *Photo Production Ltd v Securicor Transport Ltd* [1980] A.C. 827 at 849–850; [1980] 2 W.L.R. 283 at 294.

[100] A position especially associated with various 'continuity thesis' accounts of legal remedies.

[101] Solène Rowan, 'For the recognition of remedial terms agreed inter partes' (2010) 126 L.Q.R. 448 offers an excellent survey of the wider law on this point. However, her claim that such clauses do not usurp the role of the court—because the latter should be subordinate to freedom of contract—overlooks the core issue, viz., that the court is not party to the relevant contract. The principles which justify judicial recognition of primary obligations do not, necessarily, justify secondary obligations. See above at §2.2.2.

[102] Sometimes, it is said that parties 'agree damages' where one party disputes liability but agrees the quantum of liability if liability is established. However, this is not an agreement about damages in the same sense. In these situations, all that is involved is that the claimant has proved a certain fact—the amount of the loss they have sustained—by admission rather than by evidence.

[103] There are a number of other similar oddities. Exclusion and limitation clauses are one example (on which see further Robert Stevens, 'Rights restricting remedies' in Robertson and Tilbury (eds), *Divergences in Private Law* (Hart 2016) at 176–177). Outside the context of remedial law, jurisdiction clauses (i.e., choice of court agreements) are, arguably, another.

[104] *Quadrant Visual Communications Ltd v Hutchison Telephone (UK)* [1993] B.C.L.C. 442. See also *Awbury Technical Solutions LLC v Karson Management (Bermuda) Ltd* [2019] EWHC 233 (Comm); [2019] Bus. L.R. 559 at [57]–[59] (Butcher J.) to similar effect.

to disapply the 'clean hands' bar to orders for specific performance. Unsurprisingly, the Court of Appeal declined to give effect to this provision. Butler-Sloss L.J. stated: [105]

> [The clause] might in certain circumstances bind the parties, but in my judgment it could not bind the court. The plaintiffs chose to apply for a discretionary remedy, that is to say, the equitable remedy of specific performance, and the discretion of the court cannot be fettered by the agreement of the parties... [I]t is not the function of the court to be a rubber stamp.

Of course, it might be said that *Quadrant Visual* is distinguishable from 'penalty clause' situations, in that orders for damages are granted 'as of right', whereas—as both Stocker and Butler-Sloss L.J.J. noted—in *Quadrant Visual* 'the plaintiffs chose to apply for a *discretionary* remedy'.[106] But this apparent distinction is illusory. The fact that damages are available as of right is of no relevance to whether the parties do or should have a power to insist upon a particular quantification of damages of their choosing.

The same is true where the parties agree, after the commencement of proceedings, that the court should give judgment in particular terms (i.e., a 'consent order'). The general rule is that the parties must apply to the court to request that such an order be made.[107] No rule or practice direction states that the court *must* acquiesce to such an application (even if, in practice, it almost always will). Indeed, the contrary is implied by the wording of CPR, r40.6(2)(c), which suggests that the purpose of the application is to obtain 'the approval of the court'.[108] Equally, where declaratory relief is sought by consent, such relief will only be granted in exceptional circumstances.[109]

2.2.4. Incompatibility with the limits on the court's power to make damages orders

A final difficulty for the orthodox account of potentially-penal clauses is that it seems to presuppose that contracting parties are able to expand the court's ordinary order-making powers. Recall that the conventional view is that potentially-penal clauses are instructions to the court about what damages it should order the defendant to pay. The orders which result are,

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105 *Quadrant Visual* [1993] B.C.L.C. 442 at 452. See also at 451 (Stocker L.J.).

106 *Quadrant Visual* [1993] B.C.L.C. 442 at 452 (emphasis added).

107 CPR, r40.6(5).

108 In some situations, judicial input is not necessary: 'a court officer may enter and seal an agreed judgment or order' (CPR, r40.6(2)–(3)). But this provision merely confers a power on the court officer to assent to the order on behalf of the court; it does not require that the court officer do so in all circumstances.

109 *Wallersteiner v Moir (No.1)* [1974] 1 W.L.R. 991 at 1030; [1974] 3 All E.R. 217 at 252 (Buckley L.J.).

therefore, orders to pay damages. However, puzzlingly, it seems that at least some clauses which are potentially penal stipulate for consequences which cannot be the subject of a damages order.

The most obvious example is that potentially-penal clauses may require the defendant to transfer rights other than money.[110] In contrast, orders for the payment of damages necessarily take the form of payment in money. This latter proposition is so axiomatic as to have generated almost no direct authority. However, in *F&K Jabbour v Custodian of Israeli Absentee Property*, Pearson J. cited with approval a definition of damages as 'the *pecuniary* compensation which the law awards to a person for the injury he has sustained by reason of the act or default of another'.[111] The same definition was also cited with approval by H.H.J. Hegarty Q.C. in *Bartoline Ltd v Royal & Sun Alliance Insurance plc*.[112]

2.2.5. A re-interpretation

These challenges fall away if we abandon the orthodox insistence that 'liquidated damages' clauses are indeed about damages. The better view may instead be that the clauses to which the penalties jurisdiction apply create debts rather than quantify damages. On this view, potentially-penal clauses generate primary obligations qualified by a condition precedent: specifically, an obligation which accrues only upon a breach of contract. The power to relieve from penalties is, therefore, not a refusal to make an order the parties have requested; instead, it is a refusal to order a party specifically to perform a particular obligation.[113]

Of course, the putatively penal obligation is, on this view, still 'secondary' in the temporal sense, viz., it comes into existence only *after* breach of the 'primary' obligation. Moreover, it is 'secondary' in a causal sense, in that it comes into existence *because of* the breach. However, it is not 'secondary' in the technical legal sense, in that it is concerned with what the parties have expressly agreed they owe to one another, rather than with the remedies a court is bound to make available to an aggrieved party.

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[110] *Makdessi v Cavendish* [2015] UKSC 67 at [16] (Lord Neuberger and Lord Sumption).

[111] *F&K Jabbour v Custodian of Israeli Absentee Property* [1954] 1 W.L.R. 139 at 143–144. The definition is originally found in Lord Hailsham (ed), *Halsbury's Laws of England* (4th edn, 1998) vol 12(1), para 802.

[112] *Bartoline Ltd v Royal & Sun Alliance Insurance plc* [2006] EWHC 3598 (Q.B.); [2007] 1 All E.R. (Comm) 1043 at [108].

[113] See similarly Carmine Conte, 'The penalty rule revised' (2016) 132 L.Q.R. 382 at 386.

2.2.6. History

It is fair to acknowledge that this alternative view of penalty clauses is at odds with the preponderance of modern authority.[114] As mentioned previously, the Supreme Court recently re-affirmed that the penalties jurisdiction can only apply to a clause which takes effect on breach.[115] Their Lordships treated this conclusion as synonymous with the proposition that the clause must be one which creates a secondary obligation rather than a primary one (i.e., it must quantify damages rather than create a debt). The same conclusion was presupposed by the Court of Appeal in *Alder v Moore*[116]—although their Lordships were divided on the proper construction of the relevant contractual provision, each of the Lords Justices tacitly assumed that the penalties jurisdiction could not apply if the clause generated a debt.

However, these modern authorities sit uneasily with the historical development of the jurisdiction to relieve from penalties. In fact, the traditional basis of the penalties jurisdiction is considerably more consistent with the view that potentially-penal clause are those which create primary obligations conditioned upon a breach.

This paper does not aim to provide a comprehensive historical account of the penalties jurisdiction;[117] however, a brief summary may help. The penalties jurisdiction developed originally from the Equitable jurisdiction to relieve from penal bonds. Unlike modern 'liquidated damages' clauses, penal bonds appeared clearly to create primary obligations from which the court might grant relief. They took the form of a promise to pay a certain amount of money which was defeasible upon the 'debtor' satisfying a certain condition (e.g., delivering specified goods by a certain time). If the debtor failed to satisfy the condition, the creditor could sue on the bond to recover the 'penalty'. Although common law courts originally allowed such actions to succeed unless the condition had strictly been satisfied, there developed a practice in the Courts of Chancery of restraining the action in debt in certain situations so long as the debtor compensated the creditor for any loss which resulted from the failure to satisfy the condition. In other words, relief from penal bonds involved courts refusing to order performance of a primary obligation—just as proposed above.

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[114] Although cf. *Jervis v Harris* [1996] Ch. 195 at 206 (Millett L.J.) and *M&J Polymers Ltd v Imerys Minerals Ltd* [2008] EWHC 344 (Comm); [2008] 1 All E.R. (Comm) 893 at [40]–[44] (Burton J.).

[115] *Makdessi v Cavendish* [2015] UKSC 67 at [14] (Lord Neuberger and Lord Sumption). See similarly at [32].

[116] *Alder v Moore* [1961] 2 Q.B. 57; [1961] 2 W.L.R. 426.

[117] The seminal text is A.W.B. Simpson, 'The penal bond with conditional defeasance' (1966) 82 L.Q.R. 392. See also Roger Halson, *Liquidated Damages and Penalty Clauses* (Oxford: Oxford University Press 2018) at ch1 Nicholas Tiverios, *Contractual Penalties in Australia and the United Kingdom* (Federation Press 2019) at ch2. An illuminating discussion is also to be found in *AMEV-UDC Finance Ltd v Austin* [1986] HCA 63; (1986) 162 C.L.R. 170 and in *Andrews v Australia and New Zealand Banking Group Ltd* [2012] HCA 30; (2012) 247 C.L.R. 205.

The story is, admittedly, not quite so simple. Historically, the penal bond was saved from being considered usurious at least partly because the penalty was conceived of as compensatory.[118] 'Compensatory obligations' are sometimes identified with 'secondary obligations', which might lead one to think that courts regarded penal bonds as, in substance, creating secondary obligations. For example, Lord Neuberger and Lord Sumption stated in *Makdessi* that:[119]

> The equitable jurisdiction to relieve from penalties … [was] directed to contractual provisions which on their face created primary obligations, but which during the 17th and 18th centuries the courts of equity treated as secondary obligations on the ground that the real intention was that they should stand as a mere security for performance

This reasoning is premissed upon a false identity. Whether an obligation is 'primary' or 'secondary' concerns the grounds and structure of the obligation, whereas whether it is 'compensatory' concerns its content. There is no contradiction in a primary compensatory obligation, or a secondary non-compensatory obligation.[120] The penalty payable under a penal bond may have been 'compensatory', but it was still a *primary* obligation as opposed to a *secondary* one. In any case, it seems that a more significant reason such agreements were not considered usurious is that the obligee was not *certain* to receive more than what they gave (since they might satisfy the condition).[121]

Lord Neuberger and Lord Sumption also defended the 'secondary obligation' conception of the penalties rule by claiming that the modern rule has severed ties with its historical predecessor. Their Lordships stated that, following the Administration of Justice Acts of 1696[122] and 1705,[123] 'the further development of the penalty rule was entirely the work of the courts of common law. It developed… on wholly different lines [from the Equitable jurisdiction]'.[124]

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118 See Simpson, 'The penal bond with conditional defeasance' at 412–413; *Sloman v Walter* (1783) 1 Bro. C.C. 418 at 419; 28 E.R. 1213 at 1214 (Thurlow L.C.); *Paciocco v Australia and New Zealand Banking Group Ltd* [2016] HCA 28 at [20]–[21]; (2016) 258 C.L.R. 525 at [20]–[21] (Kiefel J.).

119 *Makdessi v Cavendish* [2015] UKSC 67 at [7].

120 Contractual indemnity clauses are an example of the former; accounts of profits are plausibly an example of the latter.

121 *Burton's Case* (1591) 5 Co. Rep. 69; 77 E.R. 159. The theory that penalties were intended by the parties to be compensatory eventually grew in prominence: see Simpson, 'The penal bond with conditional defeasance' at 419–420, Joseph Chitty, *A Practical Treatise on the Law of Contracts Not Under Seal* (4th edn, London: Sweet 1850) at 758, and *Kemble v Farren* (1829) 6 Bing. 141; 130 E.R. 1234.

122 (8 & 9 Wil. 3 c11).

123 (4 & 5 Anne c16).

124 *Makdessi v Cavendish* [2015] UKSC 67 at [6]–[7].

However, this account is—with respect—mistaken. Relief at common law was entirely replicative of the rules in Chancery. As Halson notes,[125] the practice of relieving from penal bonds at common law arose in response to the combination of the ubiquity of relief in Chancery and the primacy of the Equitable jurisdiction following *The Earl of Oxford's Case*.[126] It was, in effect, the means by which 'the common law courts… recaptured their jurisdiction by replicating the principles of relief adopted by the Chancery Court'.[127] Lord Nottingham, writing some twenty years prior to 1696, described the phenomenon as one where:[128]

> [L]ex sequitur equitatem, that is… how courts of law have changed their rules and, when they saw that equity would relieve, have chosen rather to relieve the parties themselves than send them hither… and all this to prevent a suit in Chancery, which otherwise would give the same relief.

Blackstone similarly wrote, in 1769, that 'courts of common law… adopt[ed]… the same principles of redress as have prevailed in our courts of equity'.[129] As against this, no authority is cited in *Makdessi* for the proposition that the common law rule was 'wholly different' from its Equitable origins. Indeed, the shift towards 'secondary obligations' seems to be decidedly modern.[130]

2.2.7. Illegitimate review of the fairness of bargains?

The primary objection to analysing the penalties jurisdiction in terms of a refusal to enforce conditional primary obligations is that this is said to involve the courts illegitimately reviewing the fairness of bargains. So, for example, in *Makdessi*, Lord Neuberger and Lord Sumption stated that:[131]

> There is a fundamental difference between a jurisdiction to review the fairness of a contractual obligation and a jurisdiction to regulate the remedy for its breach… [T]he courts do not review the fairness of men's bargains either at law or in equity. The penalty rule regulates only the

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125 Halson, *Liquidated Damages and Penalty Clauses* (2018) at [1.18].

126 *The Earl of Oxford's Case in Chancery* (1615) Rep. Ch. 1; 21 E.R. 485

127 Halson, *Liquidated Damages and Penalty Clauses* (2018) at [1.18].

128 D.E.C. Yale, *Lord Nottingham's Manual of Chancery Practice and Prolegomena of Chancery and Equity* (Cambridge: Cambridge University Press 1965) at 203.

129 4 Bl Comm 435.

130 See esp. Tiverios, *Contractual Penalties in Australia and the United Kingdom* (2019) at ch2 for a discussion of the 19th- and 20th-century developments.

131 *Makdessi v Cavendish* [2015] UKSC 67 at [13].

> remedies available for breach of a party's primary obligations, not the primary obligations themselves.

However, even if we accept the major premiss of this argument (viz., that courts ought never to regulate the substantive fairness of agreements), it is far from clear that the argument works.

There is an important difference between a court holding that a substantively unfair agreement creates no legal obligation and a court refusing to order the performance of substantively unfair obligations. This crucial distinction is the distinction between *invalid* (void) obligations and merely *unenforceable* obligations. The characterisation of an obligation as unenforceable rather than void is usually demonstrated by the fact that the performance of an valid (but unenforceable) obligation cannot be recovered in a claim for restitution,[132] whereas the performance of a void obligation can. Therefore, a court which declined to order the performance of a primary obligation would not be 'review[ing] the fairness' of the primary obligation itself; it would merely be 'regulat[ing]… the remedies available for breach of a party's primary obligations'.[133]

Admittedly, there appears to be no English authority establishing that potentially-penal clauses do indeed create unenforceable obligations (i.e., that money paid pursuant to a penalty clause is irrecoverable).[134] However, Dillon L.J. does describe penalty clauses as 'unenforceable' in *Jobson v Johnson*[135] (as opposed e.g. to 'invalid'), and Nicholls L.J. states specifically that such clauses are not 'simply struck out of the contract'.[136] And, moreover, consistency with the historical treatment of money paid under usurious contracts suggests that payments made pursuant to penalty clauses should be irrecoverable.[137]

2.2.8. Undermining commercial certainty

A second objection to the view defended in this paper is that confining the application of the penalties jurisdiction to secondary obligations promotes commercial certainty. For example, in the course of argument in *Makdessi*, counsel submitted that the Australian approach in *Andrews*

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132 *Moses v Macferlan* (1760) 2 Burr. 1005 at 1012; 97 E.R. 676 at 680–681 (Lord Mansfield).

133 *Makdessi v Cavendish* [2015] UKSC 67 at [13].

134 Indeed, Birks seems to have taken the contrary view: see Peter Birks, *An Introduction to the Law of Restitution* (Oxford: Clarendon Press 1985) at 215.

135 *Jobson v Johnson* [1989] 1 W.L.R. 1026 at 1035; [1989] 1 All E.R. 621 at 628.

136 *Jobson v Johnson* [1989] 1 W.L.R. 1026 at 1040.

137 *Moses v Macferlan* (1760) 2 Burr. 1005 at 1012 (Lord Mansfield).

v Australia and New Zealand Banking Group Ltd[138]—which is similar to the view defended in this paper—ought not to be adopted because it would 'only create further uncertainty over the circumstances in which the law of penalties is engaged'.[139] The suggestion, it seems, is that since exercise of the penalties jurisdiction involves departing from the parties bargain (and so undermines certainty), any expansion of the doctrine beyond secondary obligations would only exacerbate the certainty-based issue.

There are two difficulties with this objection. First, the view defended in this paper is not that the penalties jurisdiction ought to be extended beyond secondary obligations—it is that the obligations to which the penalties jurisdiction applies simply *are* primary, not secondary. The view therefore involves no expansion of the scope of the doctrine at all; merely a re-conceptualisation of the nature of its subject-matter. Second, moreover, if there is in any event a power for courts to refuse to order the performance of primary monetary obligations (as was argued above) it is doubtful that the view taken here of the penalties jurisdiction involves any greater certainty concerns.[140]

2.3. The review question

Yet further complications arise in determining when a potentially-penal clause will in fact be an unenforceable penalty. Rather than bringing clarity, the recent restatement of the law in *Makdessi* has sown the seeds for future confusion.

In *Makdessi*, Lord Neuberger and Lord Sumption stated that a clause will be penal if it 'imposes a detriment on the on the contract-breaker out of all proportion to any legitimate interest of the innocent party *in the enforcement of the primary obligation*'.[141] In other words, their Lordships state that whether a clause is penal is determined by comparing the magnitude of the sanction with the innocent party's interest in the contract being performed. If the sanction is wholly disproportionate to the primary obligation which it secures, the clause will be penal.

Unfortunately, despite the apparent clarity of this statement of principle, there are two reasons to doubt whether this is in fact the test which is to be applied. Instead, the better view seems to be that the true test is whether the detriment imposed is out of all proportion to the innocent party's interest *in enforcing the impugned clause*.

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138 *Andrews v ANZ* [2012] HCA 30.

139 *Makdessi v Cavendish* [2015] UKSC 67 at A.C. 1179

140 Indeed, as I argue below, it is plausible that these two apparently distinct sets of rules are in fact two facets of a unified whole.

141 *Makdessi v Cavendish* [2015] UKSC 67 at [32] (emphasis added).

2.3.1. Inconsistency with reasoning in *ParkingEye*

The first problem with the *Makdessi* formulation is that their Lordships do not appear to have applied their own formulation in the conjoined appeal in *ParkingEye v Beavis*. In *Beavis*, the claimant (ParkingEye) had a licence to operate a carpark to which the British Airways Pension Fund held title. ParkingEye placed notices throughout the carpark which expressed the terms on which drivers were entitled to park. As material, these terms were that the driver would not park for longer than two hours, and that a '[f]ailure to comply [with this condition] will result in a Parking Charge of £85'. No charge was expressed for the first two-hour period. Lord Neuberger and Lord Sumption held that the Parking Charge was not a penalty: [142]

> [A]lthough ParkingEye was not liable to suffer loss as a result of overstaying motorists, it had a legitimate interest in charging them which extended beyond the recovery of any loss… It is an interest of ParkingEye, because it sells its services as the managers of such schemes and meets the costs of doing so from charges for breach of the terms.

In short: ParkingEye's legitimate interest was *in obtaining payment of the £85 charge*—their Lordships' reasoned that ParkingEye's business model involved obtaining revenue through the payment of Parking Charges, and that a business model of this kind is legitimate.[143] In fact, ParkingEye's interest was *not* (or at least not primarily) in enforcing the primary obligation, viz., to exit the carpark within two hours of parking therein. If every driver observed this condition, ParkingEye's business would collapse.

It is fair to note that their Lordships recognised that ParkingEye did also have an interest in enforcing the primary obligation—if every driver overstayed, then ParkingEye would not be able to comply with its obligation to the Pension Fund to provide a 'traffic space maximisation scheme'. But this does not appear to have been the principal consideration which drove their Lordships' reasoning.[144] Nor were their Lordships primarily concerned with the interests of the Pension Fund itself, as they were prepared to accept that ParkingEye had a sufficient interest even if the interests of the Pension Fund were to be disregarded.[145]

Of course, this is not to say that the innocent party's interest 'in enforcement of the primary obligation' (i.e., in performance by the defaulting party) is irrelevant. Quite the contrary: if the

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142 *Makdessi v Cavendish* [2015] UKSC 67 at [99].

143 See also *Makdessi v Cavendish* [2015] UKSC 67 at [107]–[109] (Lord Neuberger and Lord Sumption).

144 See e.g. *Vehicle Control Services Limited v Carly MacKie* 2017 S.L.T. (Sh Ct) 111; 2017 G.W.D. 13-198 at [13] (Sheriff George Alexander Way) and *Indigo Park Services UK Ltd v Watson* 2017 G.W.D. 40-610 at [46] (Sheriff L.A. Drummond Q.C.) which specifically identify both types of interest involved in *ParkingEye*.

145 *Makdessi v Cavendish* [2015] UKSC 67 at [99] (Lord Neuberger and Lord Sumption).

claimant has a substantial interest in performance they are likely to have a derivative interest in enforcing the impugned clause because the enforceability of the clause will incentivise performance. Their Lordships' formulation of the test in *Makdessi* is better understood in this light—identifying an interest 'in enforcement of the primary obligation' is one way (perhaps even the most common way) of showing that the claimant has a legitimate interest in enforcing the impugned clause; but, as *ParkingEye* demonstrates, it is not the only way.

Interestingly, courts have applied the *Makdessi* test in this manner—i.e., by asking whether there is a legitimate interest in enforcing the impugned clause—in subsequent cases involving default interest. For example, in *Ahuja Investments Ltd v Victorygame Ltd*, Judge Hodge Q.C. accepted that 'a lender has a legitimate commercial interest in applying a higher rate of interest to a borrower who is in in default because such a borrower represents an increased credit risk'.[146] While lenders obviously do *also* have legitimate interests in deterring default, the fact that defaulting debtors represent a greater credit risk is not such an interest: the interest here is purely in charging the higher rate of interest *after the fact* of default.

2.3.2. Inconsistency with basis for the reformulated test

In addition, their Lordships' reasons for reformulating the penalties rule in terms of a 'legitimate interest' inquiry are incongruous with a focus solely on the innocent party's interest in performance of the primary obligation. Lord Neuberger and Lord Sumption purported to rely on 'the famous case [of] *White and Carter'* in order to justify the conclusion that 'the law will not generally make a remedy available to a party, the adverse impact of which on the defaulter significantly exceeds any legitimate interest of the innocent party'.[147] This passage provides two reasons to adopt a more capacious understanding of the range of appropriate legitimate interests than their Lordships' later formulation. First, since the general principle on which their Lordships rely is clearly concerned with the remedies available to an aggrieved party, coincidence between cause and effect dictates that the interest ought to be an interest in those *remedies* (i.e., enforcement of the impugned clause). And, second, by directly relying upon *White & Carter,* their Lordships impliedly suggest that the relevant legitimate interest is the same as that which is necessary in the context of the action for the agreed sum. As suggested above, the best view is that the relevant interest in *White & Carter* is an interest in recovering the sum due under the contract. The parallel in the penalties context is clearly an interest in

146 *Ahuja Investments Ltd v Victorygame Ltd* [2021] EWHC 2382 (Ch) at [143]. See also *Cargill International Trading PTE Ltd v Uttam Galva Steels Ltd* [2019] EWHC 476 (Comm) at [50] (Bryan J.); *WWTAI AirOpCo II DAC v BH Air Ltd* [2021] EWHC 2331 (Comm) at [45] (David Edwards Q.C.) and *Houssein v London Credit Ltd* [2023] EWHC 1428 (Ch) at [201] (Deputy Judge Richard Farnhill).

147 *Makdessi v Cavendish* [2015] UKSC 67 at [29].

recovering the sum due under the impugned clause rather than (only) an interest in ensuring performance of the primary obligations.

3. ONE SET OF RULES OR TWO?

At this point it should be clear that there is a striking symmetry between the rules governing the availability of actions for the agreed sum and the rules governing the enforceability of potentially-penal clauses. Both sets of rules concern the recoverability of contractual debts, and both sets of rules ask whether there is a legitimate interest in recovering that debt. In both cases, the absence of a legitimate interest renders the obligation to pay the debt unenforceable. Indeed, Tomlinson J. recognised in *Indian Airlines Ltd v GIA International Ltd* that the penalties rule and the rule in *White & Carter* might both apply to restrain enforcement of the same clause.[148] We ought, therefore, seriously to consider whether the two apparently distinct sets of rules are as distinct as they are presented.

3.1. A divergence in results?

Perhaps the strongest objection to this possibility—at least provided that one accepts the exegesis of the two rules above—is that application of the two sets of rules seems at first glance to yield different results in closely analogous situations. Consider the following two scenarios:

> **Scenario A**: David contracts to purchase Charles' title to a book in consideration of £1,000,000. Charles delivers the book but David does not pay.
>
> **Scenario B**: David contracts to purchase Charles' title to a book in consideration of cleaning the windows of Charles' house by 1 January. The contract states that David must pay Charles £1,000,000 if the windows are not cleaned on time. Charles delivers the book but David does not clean the windows by 1 January.

It is likely, and we can assume for the sake of argument, that a court would order payment of the £1,000,000 in Scenario A but not in Scenario B. Why, it might be asked, do these two situations not reach the same result if the two sets of rules are truly the same?

The answer to this challenge is that the court will not substitute its own values and preferences for those of the parties. The idea that the court will defer to the parties' subjective values and

148 *Indian Airlines Ltd v GIA International Ltd* [2002] EWHC 2361 (Comm) at [75]–[78].

preferences is well-established in a number of contexts. For example, it underpins the rule that contractual consideration need not be adequate[149] as well as the idea that a court will not re-write a contract merely because it seems 'imprudent'.[150] In Scenario A, the parties have attached a value of £1,000,000 to Charles' title to the book. Since Charles has given David something which both agreed was worth £1,000,000, it is easy to see why Charles has at least a pro tanto legitimate interest in recovering that amount of money. In contrast, in Scenario B, Charles' title to the book is agreed to be equivalent in value to *two* different things: *either* window-cleaning *or* £1,000,000. Bur window-cleaning is a service with a ready market—and its value on that market is far lower than £1,000,000. In other words, if Charles is paid the cost of window-cleaning, he can readily obtain it—albeit at a different time and probably by a different person. In those circumstances, it is difficult to see how Charles could have a legitimate interest in obtaining the more expensive of the two things which the parties agreed the book was worth (£1,000,000) rather than the cheaper (window-cleaning). If Charles was content to part with the book for window cleaning *ex ante*, there is typically little justification for him to insist on more *ex post*. Of course, matters may be different if Charles can show that there was particular significance in receiving the cleaning from David, or by 1 January. If so, then receiving the cost of obtaining substitute window-cleaning would not satisfy the parties' original agreed valuation—it is therefore in precisely such cases that it is more likely that the impugned clause will be enforceable.

3.2. Solving problems

3.2.1. The absence of successful *White & Carter* cases

Recall that we earlier posed the question why, if there is a 'legitimate interest' restriction on claiming orders to pay sums due, there are almost no cases in which such a bar has successfully been invoked—and no case in which the restriction was successfully invoked where the defendant was not seeking to repudiate an ongoing contract. Once we appreciate the significance of the court's unwillingness to interfere with the parties' subjective values and preferences we can understand why this is.

As illustrated above, in straightforward exchange contracts—where the obligation sought to be enforced corresponds to only one specific obligation on the payee's side—the would-be payee will almost always have a legitimate interest in receiving what the parties agreed was the proper recompense for the payee's performance. The legitimate interest bar is therefore typically only

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[149] *Chappell & Co Ltd v Nestle Co Ltd* [1960] A.C. 87; [1959] 3 W.L.R. 168.

[150] *Arnold v Britton* [2015] UKSC 36; [2015] A.C. 1619 at [20] (Lord Neuberger).

successfully invoked where the circumstances have changed dramatically from those envisaged by the parties such that the parties' agreed valuation no longer exerts the same normative force. So, for example, in *The Alaskan Trader*, the defendant charterers were deprived of the use of the chartered ship for almost a quarter of the full length of the charterparty due to a need to repair the ship. Once the ship had been repaired, the agreement which remained was rather different to that which was originally agreed. An interesting parallel can be drawn with the decision in *Metropolitan Water Board v Dick, Kerr & Co Ltd*,[151] in which a significant delay in the performance of a building contract due to supervening illegality 'prevent[ed] th[e] contract ever being the same as it was'.[152] The contract was therefore frustrated; in other words, the parties original agreement did not justify continued obligations in the circumstances. By a similar logic, we can see why the parties' original valuation of the charterparty in *The Alaskan Trader* no longer grounded a legitimate interest in the shipowner in recovering the agreed sum: the nature of the contract had been sufficiently changed by the delay that the charterer was no longer bound by their original valuation.

This is not to say that the *White & Carter* restriction could never successfully be invoked in a straightforward exchange contract absent some significant change in circumstances. But, if such a case is possible at all, it will certainly require exceptional facts in some other way.

3.2.2. The penalty rule applying only on breach

A further problem that is solved—or, at least, sidestepped—by treating the *White & Carter* rule and the penalty rule as two facets of the same principle is the question why the penalty rule is said only to apply on breach.

Many common justifications for the penalties rule have struggled to explain the 'formalistic' rule that a putatively penal clause must operate on breach. For instance, Chen-Wishart has suggested that the rule is concerned with the substantive fairness of agreements,[153] and Birks suggested that the penalties rule reflects the over-optimism people tend to have about future events (the effect of which, it is said, is to vitiate to some degree their consent to bargains concerning those events).[154] However all of these analyses prove too much; they apply equally to clauses which do not, on their face, appear to be potentially penal at all, such as:

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151 *Metropolitan Water Board v Dick, Kerr & Co Ltd* [1918] A.C. 119.

152 *Metropolitan Water Board v Dick, Kerr & Co Ltd* [1918] A.C. 119 at 128 (Lord Dunedin).

153 Mindy Chen-Wishart, 'Controlling the power to agree damages' in Birks (ed), *Wrongs and Remedies in the Twenty-First Century* (Oxford: Clarendon Press 1996). It is right to note that Chen-Wishart is similarly critical of confining the 'penalties rule' to 'secondary obligations'.

154 Birks, *An Introduction to the Law of Restitution* (1985) at 213–216.

> **Scenario C**: David contracts to purchase Charles' title to a book in consideration of £1,000,000. The obligation to pay is expressed to be defeasible upon David cleaning Charles' windows. Charles delivers the book pursuant to the contract but David does not clean the windows.

Scenario C is no more, nor less, fair than Scenario B. It requires no greater foresight, either. Yet Scenario B would conventionally be said to be reviewable under the penalties rule, whereas Scenario C would not.

The result is that the penalties rule has been described as 'formalistic', and capable of being subverted by 'ingenious drafting'.[155] Although their Lordships considered in *Makdessi* that the law would focus on the 'substance of the transaction and not just its form', they accepted that 'the application of the… rule can still turn on questions of drafting'.[156] But there is, in practical terms, no difference between Scenario B and Scenario C, and so an account of the law which postulates that these cases would be treated differently does not commend itself. Like cases, as lawyers often say, must be treated alike.

The puzzle falls away if we accept that the *White & Carter* rule and the penalty rule are two facets of the same principle. On that view, the penalty rule *does not* formalistically apply on breach; it simply goes by another name when it applies other than on breach. Therefore, Scenario B and Scenario C would plausibly yield the same result.

3.3. Ramifications for non-money 'penalties'

There is one final significant ramification of the preceding analysis. Currently, the penalties rule is thought to apply uniformly to different kinds of penalty—whether the clause stipulates for the payment of money or for some other sanction. However, there is usually a difference in the way in which monetary and non-monetary promises are specifically enforced: by an order to pay the sum due and by an order for specific performance respectively. The latter engages a range of considerations which do not arise in the context of actions for the agreed sum, e.g. the liberty-based concerns involved in courts' refusal to order specific performance of personal services. If the constraints on enforcing potentially-penal clauses are simply the same constraints as those which restrict specific enforcement, then it is quite plausible that this wider range of considerations ought also—in appropriate cases—to apply in the penalties context.

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155 *Makdessi v Cavendish* [2015] UKSC 67 at [40] (Lord Neuberger and Lord Sumption)

156 *Makdessi v Cavendish* [2015] UKSC 67 at [43] (Lord Neuberger and Lord Sumption).

CONCLUSION

Beneath the deceptively simple question with which we began—when can one contracting-party enforce the other's promise to pay a sum of money?—there lay lurking difficult questions about the 'legitimate interest' bar in *White & Carter* and the penalties jurisdiction. Although the former is often assumed to be a qualification to the principle that 'an unaccepted repudiation is a thing writ in water',[157] it was suggested above that the rule is instead one facet of a broader remedial principle that courts will refuse to grant remedies—especially specific relief—in which the claimant has no legitimate interest. The rule is, therefore, analogous to rules barring the grant of specific performance or injunctions. And, while the Supreme Court has relatively recently stated that the penalties rule restricts' contracting parties' freedom to agree damages, this paper argued that their Lordships' analysis presupposed a conceptually problematic view of what parties are agreeing when they create 'potentially-penal' clauses. Instead, in a pleasing symmetry, the conceptually and historically more satisfying analysis is that the penalties rule involves courts refusing to enforce debts in the enforcement of which claimants have no legitimate interest.

Just as it is often thought that there are two sets of rules governing the enforcement of contractual promises to pay money, there are two senses in which we might 'make contract-breakers pay'. We might do so literally, or we might to do metaphorically. The thesis of this paper is that, as far as English contract law is concerned, the literal option is the only one on the table. Claims to enforce money promises are actions in debt, and are allowed—or, exceptionally, refused—in accordance with a unified set of remedial principles.

[157] *Howard v Pickford Tool Machine Co Ltd* [1951] 1 K.B. 417 at 421 (Asquith L.J.)