INTRODUCTION

The question of the nature of negotiation damages has been a source of extensive controversy in both the case law and the scholarship.

Case law– Concerning the question of the correct conception of these damages, the case law is in a mess. The authorities have provided conflicting interpretations as to their underlying concept, and thus it is not possible to attribute a single position to them. However, three major attitudes may be identified. In some cases, the courts have clearly taken a compensatory approach, viewing these damages (or some groups of them) as concerning a notion of loss suffered by the claimant.[1] In a second group of cases, they have viewed them as being based on the defendant's wrongful enrichment.[2] In other cases, the courts have awarded damages without explicitly or consistently stating whether they view them as compensatory or restitutionary.[3]

Scholarship– The battle of broader theories of damages: the academic viewpoints are also dramatically divergent. Three major rival theories can be identified, each of which explains negotiation damages in multiple different ways. They include the following major viewpoints on the purpose for which these damages are awarded: (a) to compensate for what has been

[1] Eg *Jaggard v Sawyer* [1995] 2 All ER 189*; Severn Trent Water Ltd v Barnes* [2004] EWCA Civ 570, [2004] 26 EG 194*; Lane v O'Brien Homes Ltd* [2004] EWHC 303 (QB); *WWF World Wide Fund for Nature v World Wrestling Federation Entertainment Inc* [2007] EWCA Civ 286, [2008] 1 WLR 445 (Chadwick LJ went so far to suggest that not only negotiation damages, but also an account of profits are compensatory: ibid [59]); *Devenish Nutrition Ltd v Sanofi-Aventis SA (France)* [2008] EWCA Civ 1086, [2009] Ch 390 (Arden LJ) [41]; *One Step (Support) Ltd v Morris-Garner* [2016] EWCA Civ 180, [2017] QB 1.

[2] Eg *Strand Electric and Engineering Co Ltd v Brisford Entertainments Ltd* [1952] 2 QB 246 (Denning LJ); *Penarth Dock Engineering Co Ltd v Pounds* [1963] 1 Lloyds Rep 359; *Kuwait Airways Corp v Iraqi Airways Co* [2002] UKHL 19, [2002] 2 AC 883, [87] (Lord Nicholls).

[3] Some of the most significant of those cases include *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 1 WLR 798 (Ch)*; Attorney General v Blake* [2001] 1 AC 268 (Lord Nicholls)*;* and *Experience Hendrix LLC v PPX Enterprises Inc* [2003] EWCA Civ 323, [2003] 1 All ER (Comm) 830.

taken from the claimant; (b) to deprive the defendant of his wrongful enrichment; and (c) to vindicate the claimant's right that has been infringed. In order to comprehend the nature of each of these accounts, however, it is necessary to note that they cannot be seen in isolation from a broader conflict between theories of the law of damages. This is a conflict over what the law of damages, as a whole, is about. Looking at this bigger picture shows that each account's major concern has been, to some extent, to justify the corresponding broader theory as to the nature of damages in private law. On one hand, the traditional compensatory approach, identifying itself with the orthodox view of damages, finds the explanation of the award of these damages by the courts as a challenge, as there is an absence of loss in its traditional sense in most cases in which these damages have been awarded. On the other hand, the restitutionary approach, encompassing a group of theses suggesting that negotiation damages are based on the wrongful benefit received by the defendant, uses these damages to expand the realm of gain-based damages in a continuous effort to push back the boundaries of the compensatory view of the law of damage. The beginning of such effort, in its general form, is marked with the publication, in 1966, of Goff and Jones' *The Law of Restitution*,[4] in which they offered a new taxonomy of remedies in private law by describing as 'restitutionary' remedies which had been believed to be compensatory before then. Following the same pattern, other restitution lawyers have distinguished restitution for wrongdoing from unjust enrichment, trying to expand the gain-based analysis by applying it to the law of damages, including user and negotiation damages. Robert Stevens' rights-based theory, mainly presented in *Torts and Rights*,[5] has a radically different project though. Believing that both gain-based and loss-based analyses of negotiation damages are doomed to fail, he finds in these damages the clearest

[4] R Goff and G Jones, *The Law of Restitution* (Sweet & Maxwell 1966).

[5] R Stevens, *Torts and Rights* (OUP 2007).

instance of what he sees as the rights-based nature of damages in private law and therefore employs them at the heart of his broad project to show that his theory fits the existing case law.

It can, accordingly, be understood, from the context in which the controversy continues, that whatever the nature of negotiation damages, it is one that can affect our conception of the law of damages in general. In this thesis, I intend to investigate the nature of negotiation damages with a sustained awareness of that broader context. My methodology is both descriptive and normative. On the one hand, I will attempt to show that my proposed analysis of negotiation damages *fits* the case law. On the other hand, it will be demonstrated that such analysis is justified because of its reliance on a factual notion of a loss and the normative force of the claimant's right.

Chapter One introduces a definition of negotiation damages to which I will adhere throughout this thesis. It proposes that the term 'negotiation damages', when defined as damages measured based on the so-called hypothetical release negotiations, has a broad and a narrow connotation. While the narrow definition refers to what is commonly called '*Wrotham Park* damages',[6] the broad definition includes 'user damages' as well. In addition, when assessed by using the 'hypothetical negotiations' method, damages awarded by the courts under various other labels are negotiation damages.

Chapter Two discusses the major, existing analyses of negotiation damages. When discussing compensatory and restitutionary analyses, though, the chapter will solely focus on the accounts of these damages that attempt to explain them in terms of a *factual* loss suffered by the claimant or a factual gain received by the defendant. Analyses that are based on the so-

[6] Named after *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 1 WLR 798 (Ch).

called ‘objective’ or ‘notional’ sense of a loss, for example, are not addressed, unless necessary for the purposes of the argument.

Having contended that all the existing accounts fail to provide a satisfactory explanation for the bulk of major instances of negotiation damages, I set out in Chapter Three the framework for the analysis that is proposed by this thesis to clarify the nature of these damages. It provides a brief picture of the main theories of rights, arguing that the main tenet of the so-called interest/benefit theory has the potential to help explain how the claimant suffers a factual loss in cases of negotiation damages. On that basis, a definition of compensation and a *factual loss* will be offered that is broader than the orthodox conception of a loss. The proposed compensatory principle is termed the ‘loss of benefit’ theory in this chapter. The proposed notion of a loss will be consistently employed and frequently examined in the rest of the thesis.

Chapters Four, Five, Six, and Seven will find it necessary to examine the ‘loss of benefit’ theory of compensation in one major area of the law of damages. This is intended to reinforce my argument about the purpose of compensatory damages before examining it in the context of negotiation damages. For that purpose, the said chapters will discuss the law of contract damages. This is a vast area of law, with more significant topics that can be addressed in the space available. I will only choose for discussion some of the most important of the doctrines forming the law of contract damages. Furthermore, in discussing these doctrines, I will put emphasis on those aspects of them that are found difficult or controversial in the academic and judicial realms.

Chapter Four will set out the argument by a careful comparison between the ‘loss of benefit’ theory and the so-called ‘performance interest’ thesis (mainly represented by Daniel Friedmann’s work). I will explain that the former is a revised version of the latter. The remainder of Chapter Four will be intended to demonstrate the preferability to Friedmann’s

thesis of a view of specific remedies in contract that is based on the purpose of a right according to the interest/benefit theory of rights. Of the major specific remedies, specific performance and an order to pay a debt will be discussed.

I will, then, zoom in on contractual compensation in Chapters Five, Six, and Seven. Among various damages potentially available as a response to breach of contract, I will choose the most typical of them, i.e. expectation damages. I will attempt to clarify how the 'loss of benefit' theory provides a compensatory analysis of the most controversial cases in this area that is superior to explanations based on the dominant conception of the 'performance interest' thesis, most notably Robert Stevens' analysis. For that purpose, Chapter Five will focus on the basic measure of recovery, contending that it is, simply, damages for the claimant's 'direct loss'. Such cases as *Ruxley Electronics and Construction Ltd v Forsyth*[7] and *White Arrow Express Ltd v Lamey's Distribution Ltd*[8] are discussed first; then, sub-sale and third-party cases will be addressed.

The examination of the theory in the contractual context will be continued in Chapters Six and Seven, in which expectation damages for 'consequential losses' are dealt with. Contract damages for mental distress are argued to be simply a manifestation of the 'loss of benefit' thesis in the area of damages for a consequential loss by focusing on the 'purpose' of the claimant's contractual right. The bulk of the discussion in these two chapters will, then, focus on the doctrine of remoteness, suggesting that the 'loss of benefit' theory has a potential to explain this doctrine based on principle rather than policy, without suffering the difficulties with the so-called 'assumption of responsibility' approach.

[7] [1996] AC 344.

[8] [1995] CLC 1251.

Finally, the thesis will be equipped to discuss the nature of negotiation damages based on the ‘loss of benefit’ theory of compensation in Chapter Eight. It argues that negotiation damages provide compensation for the claimant's direct loss when a loss is conceptualised on a basis that is not narrowly and unnecessarily confined to the financial deterioration of the claimant’s well-being. This conception of negotiation damages will be suggested also to underpin the law’s answer to the questions of availability and measure of these damages and to provide a sound basis for further developments in the law.

CHAPTER ONE: DEFINITION

INTRODUCTION

This opening chapter is concerned with proposing a definition of what is described in this thesis as 'negotiation damages', a definition that will be used (and justified) throughout this thesis. For many areas of law, questions of definition and taxonomy require no more than a brief consideration. However, for the purpose of considering the specific area of the law of damages whose nature is to be investigated in this thesis, these questions are not easy ones. This is because this area of the law is very controversial and vague in many respects, not least with regards to the questions of definition and taxonomy.

In this chapter, I will propose a definition of negotiation damages that includes damages awarded under various labels, all of which have one commonality: they are all substantial damages whose measure is based on hypothetical negotiations between the claimant and the defendant, where the subject matter of the negotiation is the release of the claimant's right. The term was used in *Lunn Poly Ltd v Liverpool and Lancashire Properties Ltd*, where Neuberger LJ described 'a sum based on what reasonable people in the position of the parties would negotiate for a release of the right [of the claimant]' as 'negotiation damages'.[1] In the first section, I explain that damages awarded under a variety of other labels, including '*Wrotham Park* damages', 'reasonable royalties', and a group of 'damages in lieu of an injunction', are all species of negotiation damages in the narrow sense of the term. The second section considers 'user damages', suggesting that these also can be a species of negotiation damages in the broad

[1] [2006] EWCA Civ 430, [2006] 2 EGLR 29 [22]. Similar terminology ('negotiating damages') has been used in multiple cases; see eg *Pell Frischmann Engineering Ltd v Bow Valley Iran Ltd* [2009] UKPC 45, [2010] BLR 73 [48] (Lord Walker); *One Step (Support) Ltd v Morris-Garner* [2016] EWCA Civ 180, [2017] QB 1 [129] (Christopher Clarke LJ).

sense of it. This will pave the way for the next chapters, in which I will investigate the correct conception of the nature of these damages.

I. NARROW DEFINITION

A. Definition

'*Wrotham Park* damages' and 'damages on a *Wrotham Park* basis' are the best-known labels used to refer to negotiation damages in the narrow sense of the term. However, although both terms are used by a number of authorities,[2] I prefer to use the term 'negotiation damages on a *Wrotham Park* basis' when referring to the narrow sense of negotiation damages. This is because the terms '*Wrotham Park* damages' and 'damages on a *Wrotham Park* basis' may give the impression that negotiation damages are only available in situations where the facts of the case in issue are similar to some immanent features of *Wrotham Park Estate Co Ltd v Parkside Homes Ltd*,[3] in which damages in lieu of an injunction were awarded for breach of a covenant restricting use of land by the defendants. There is evidence in the case law that such a limitation is wrong.[4]

There are also several other terms referring to negotiation damages on a *Wrotham Park* basis. They include, though are not limited to, 'reasonable royalties', 'licence fee damages', and 'damages in lieu of an injunction'. However, none of them offers an appropriate description of negotiation damages, because, as I explain below, each of them describes only a sub-group

[2] See eg *WWF World Wide Fund for Nature v World Wrestling Federation Entertainment Inc* [2007] EWCA Civ 286, [2008] 1 WLR 445 [32], [38], [47], [64], [69], [73], [74], [76]; *Devenish Nutrition Ltd v Sanofi-Aventis SA (France)* [2008] EWCA Civ 1086, [2009] Ch 390 [36], [37]; *Pell Frischmann Engineering Ltd v Bow Valley Iran Ltd* [2009] UKPC 45, [2010] BLR 73 [47]; *Lane v O'Brien Homes Ltd* [2004] EWHC 303 (QB) [30].

[3] [1974] 1 WLR 798 (Ch).

[4] See text to n 5–7.

of negotiation damages in specific factual contexts. In other words, none of those labels are inclusive of all of the instances of negotiation damages on a *Wrotham Park* basis.

B. Awards That Are Negotiation damages on a '*Wrotham Park*' Basis

There are various terms used by the courts that fall within the narrow definition of negotiation damages. They either refer to exactly the same concept or describe instances of negotiation damages in specific contexts. The term referring exactly to the narrow concept of negotiation damages is '*Wrotham Park* damages'. The main terms used to refer to the instances of negotiation damages on a *Wrotham Park* basis in specific contexts are 'reasonable royalties' (alternatively 'reasonable licence fees') and 'damages in lieu of an injunction/ damages under Lord Cairns' Act'. The latter terms are not synonyms; they arise in different factual situations and sometimes reflect the distinction between different types of breach (torts, contract and equitable wrongdoing). Nevertheless, they are both damages awarded based on hypothetical negotiations between the parties for release of the claimant's right. I will show below how the 'hypothetical negotiations' method underlies all these damages.

1. Wrotham Park Damages

The term '*Wrotham Park* damages' refers exactly to the narrow concept of negotiation damages. A close examination of the courts' practice reveals that any reference by the courts to that term simply means that the measure of the damages in issue is based on hypothetical release negotiations between the parties.

Wrotham Park damages are named after a landmark case decided in 1974: *Wrotham Park Estate Co Ltd v Parkside Homes Ltd*.[5] In that case, the first defendant, Parkside Homes Ltd, had wronged the claimants by constructing houses on land in breach of a restrictive

[5] [1974] 1 WLR 798 (Ch).

covenant and sold them to the other defendants. The claimants sought an injunction for demolition of the houses which had been built in breach of the covenant. Brightman J refused the award of injunction, but the main obstacle to the award of damages was that while the damages were traditionally understood to be a monetary remedy based on the claimant's loss, the land had not suffered any diminution in value and the claimant could not establish any financial loss. Despite that, Brightman J, relying upon a number of previous cases (including cases involving user damages), decided that the claimant should be awarded more than merely nominal damages. Substantial damages of £2500 were awarded based on the following principle:

> In my judgment a just substitute for a mandatory injunction would be such a sum of money as might reasonably have been demanded by the plaintiffs from Parkside as a quid pro quo for relaxing the covenant.[6]

The judge then considered a number of arguments relevant to determining what the result of hypothetical release negotiations between the claimants and Parkside would have been, in which the claimant would have demanded a sum for allowing Parkside to build the houses contrary to the covenant.[7]

The technique has been employed in many cases decided after the *Wrotham Park* case, several of which will be discussed in this thesis. Some of them have simply applied the *Wrotham Park* case, awarding damages on a hypothetical negotiations basis, without using the label '*Wrotham Park* damages'; others have applied the *Wrotham Park* case and also named the damages after the case.

Although *Wrotham Park* damages are named after the *Wrotham Park* case, this is not to say that the term includes only cases in which the various features of the *Wrotham Park* case

[6] ibid 815.

[7] ibid 815–16.

are present. The only feature of the case to which the label '*Wrotham Park* damages' necessarily refers is that the damages in that case were clearly assessed on a hypothetical negotiations basis. This can be seen through the fact that the features of many of the cases in which the damages have been described as *Wrotham Park* damages are different from those of the *Wrotham Park* case. Some examples of those cases are explained below.

In *Experience Hendrix LLC v PPX Enterprises Inc* damages were awarded for breach of a negative contractual obligation.[8] The claimant was the successor in title to the estate of a deceased musician. A settlement agreement had been made between the claimant and PPX, the first defendant, following a long history of disputes. PPX licensed various master recordings made by the late musician in breach of the terms of the settlement agreement. A proportion of the defendant's royalties on the retail sale price of records was awarded for the wrongful use of masters, applying the *Wrotham Park* case, even though there was neither a breach of a restrictive covenant nor any use of land in issue. Peter Gibson LJ acknowledged that despite the fact that damages in the *Wrotham Park* case were awarded for breach of restrictive covenant, this does not limit the court's ability to award *Wrotham Park* damages only to such cases.[9]

In *Pell Frischmann Engineering Ltd v Bow Valley Iran Ltd*,[10] the negotiation damages awarded were described as *Wrotham Park* damages, even though, in contrast to the *Wrotham Park* case, not only had the defendants in *Pell Frischmann* not used land, they had simply breached the claimants' right without using anything. The defendants were found by the Privy Council to be in breach of contractual terms not to release confidential information and not to enter into a contract with a third party. Negotiation damages of £2,500,000 were awarded by

[8] [2003] EWCA Civ 323, [2003] 1 All ER (comm) 830.

[9] ibid [56].

[10] [2009] UKPC 45, [2010] BLR 73.

the Privy Council as damages for breach of the two obligations. Naming the damages after the *Wrotham Park* case simply meant that the damages were awarded on a hypothetical negotiations basis.

Damages described by the courts as *Wrotham Park* damages have also been awarded in tort cases where, unlike the *Wrotham Park* case, the right being infringed is not a contractual right, but one that derives directly from the law. In *Severn Trent Water Ltd v Barnes*, for example, the defendant had trespassed to part of the claimant's land by unintentionally laying a water main under it.[11] The Court of Appeal approved only £610 of a sum of £2170 which had been awarded by the trial judge. Of the £610, £500 had been awarded as damages on a *Wrotham Park* basis (as the court described it).[12]

Overall, the major point of the *Wrotham Park* case making it analogous to all of the above cases is only that in that case the damages had been awarded on a hypothetical negotiations basis. This suggests that where reference is made to '*Wrotham Park* damages' or 'damages on a *Wrotham Park* basis', the terminology simply indicates that the damages are based on a hypothetical negotiation between the parties whose subject matter is the release of the claimant's right.

2. Reasonable Royalties

When a claimant's intellectual property right is breached, a monetary award in response to the wrongdoing may take different forms. One kind of response is clearly based on the

[11] [2004] EWCA Civ 570, [2004] 26 EG 194.

[12] *Bracewell v Appleby* [1975] 1 All ER 993; *Carr-Saunders v Dick McNeil Associates Ltd* [1986] 2 All ER 888; *Jaggard v Sawyer* [1995] 2 All ER 189; *Sinclair v Gavaghan* [2007] EWHC 2256 (Ch); *Tamares (Vincent Square) Ltd v Fairpoint* [2007] EWHC 212 (Ch), [2007] 1 WLR 2167; *Field Common Ltd v Elmbridge BC* [2008] EWHC 2079 (Ch), [2009] 1 P & CR 1; *Bocardo SA v Star Energy UK Onshore Ltd* [2010] UKSC 35, [2011] 1 AC 380 are other examples of cases in which the damages for tortious wrongdoing have been described as '*Wrotham Park* damages'.

consequential loss suffered by the claimant, which is usually the sales lost as a result of the wrongdoing. The courts may also award an account of profits, requiring the defendant to disgorge to the claimant all the profits he has obtained as a result of his wrongdoing. There is also a third type of monetary response to the breach, which is labelled by the courts as 'reasonable royalties' or 'reasonable licence fees'. These labels describe negotiation damages, because the assessment of the damages in the cases to which they refer is based on hypothetical release negotiations between the claimant and the defendant. They are thus instances of negotiation damages in the specific context of breach of an intellectual property right.[13]

The House of Lords explained the principles governing the measure of reasonable royalties in the leading case of *General Tire & Rubber Co Ltd v Firestone Tyre & Rubber Co Ltd*.[14] In that case, General Tire had made a valuable invention. They were granted a United Kingdom patent. The patent was infringed by the defendants for several years, during which they made substantial profits. The question before the House of Lords was the measure of the damages. Lord Wilberforce, giving the leading judgment, accepted that the correct measure of damages was a reasonable royalty. The fee that the defendant infringer must pay as a reasonable royalty was, Lord Wilberforce stated, 'the sums which *he would have paid* by way of royalty if, instead of acting illegally, he had acted legally [i.e. acquired the claimant's permission]'.[15] This is simply to say that the reasonable royalty is a damages award based on a hypothetical negotiation as a result of which the claimant would release his intellectual property right for a fee paid by the defendant. After acknowledging this principle, the focus of the judgment was on what factors should and should not be taken into account in the hypothetical negotiations.

[13] This most often involves breach of patent.

[14] [1975] 1 WLR 819.

[15] ibid 825 (emphasis added).

The decision of the House of Lords in the *General Tire* case is an authoritative declaration of the approach that already existed and had been applied in numerous previous cases. The hypothetical negotiations principle has been similarly applied in the calculation of reasonable royalties in many cases decided after the *General Tire* case.[16]

3. Damages in Lieu of an Injunction

The issue of the relation between negotiation damages and 'damages in lieu of an injunction' is not as straightforward as that of their relation with the *Wrotham Park* damages and reasonable royalties. Damages described by the courts as 'damages in lieu of an injunction' are damages awarded under the jurisdiction originating from the Chancery Amendment Act 1858 (Lord Cairns' Act) and now found in s.50 of the Senior Courts Act 1981. The courts of equity at that time were not allowed to award *damages* (i.e. any form of monetary award for wrongdoing) to the claimant. Therefore, if the claimant had suffered any loss, he had to go to multiple courts to obtain full recovery. The jurisdiction was originally designed to prevent this inconvenience by enabling the courts of equity to award compensatory, retrospective, common law damages in cases in which they had jurisdiction to entertain a claim for an injunction or specific performance. Although these damages were primarily intended (in so far as the parliamentary debates can show)[17] to be awarded in 'addition to' an injunction or specific performance, the words of the Act provided that the Chancery courts also had jurisdiction to award damages in 'substitution for' an injunction. The courts soon gave this provision effect.

[16] See eg *Catnic Components Ltd v Hill & Smith Ltd* [1983] FSR 512; *Allen & Hanburys Ltd's (Salbutamol) Patent* [1987] RPC 327; *Gerber Garment Technology Inc v Lectra Systems Ltd* [1995] RPC 383; *Irvine v Talksport Ltd* [2003] EWCA Civ 423, [2003] 2 All ER 881; *Experience Hendrix LLC v PPX Enterprises Inc* [2003] EWCA Civ 323, [2003] 1 All ER (Comm) 830.

[17] HC Deb 15 April 1858, vol. 149, cc 1161–68.

The orthodox view on damages in lieu of an injunction is that they are 'equitable damages' for the claimant's consequential loss.[18] However, the correct approach seems to be to identify the nature of damages by looking at the purpose for which they are awarded.[19] Moreover, an immediate extension of this view to all of the cases in which damages in lieu of an injunction have been awarded under Lord Cairns' Act would be plausible only by ignoring the radical alteration which the *Wrotham Park* case made in the measure of damages in many of these cases. In these cases, the claimant typically suffers no identifiable, consequential loss. One should not therefore be too quick to suggest, without sufficient investigation, that all of the damages awarded in lieu of an injunction under the Act are there to provide compensation for the claimant's consequential loss. The significant point for the present purposes, however, is that whatever the nature of damages awarded under the Act, that they are certainly negotiation damages when assessed by employing a 'hypothetical negotiations' method.

II. BROAD DEFINITION– THE CASE OF 'USER DAMAGES'

'User damages'[20] are damages awarded for the wrongful use of the claimant's land or chattels. They have also been referred to by the courts as damages awarded under the 'user principle'. There are also other labels — such as 'way-leave' and 'mesne profits' — falling within this definition of user damages.[21] Traditionally, the main difficulty with awarding substantial damages in many cases of user has been that while the basic principle is that damages are

[18] See JA Jolowicz, 'Damages in Equity: A Study of Lord Cairns' Act' (1975) 34 *CLJ* 224.

[19] See eg *Leeds Industrial Co-operative Society Ltd v Slack* [1924] AC 851, 867. Also see P Birks, 'Rights, Wrongs, and Remedies' (2000) 20 *OJLS* 1; A Burrows, 'We Do This at Common Law but That in Equity' (2002) 22 *OJLS* 1; *Fusing Common law and Equity: Remedies, Restitution and Reform* (Sweet & Maxwell 2002); M McInnes, 'Gain, Loss and the User Principle' [2006] *RLR* 76.

[20] See *Kuwait Airways Corp v Iraqi Airways Co* [2002] UKHL 19, [2002] 2 AC 883 [87] – [90] (Lord Nicholls) and *Pell Frischmann Engineering Ltd v Bow Valley Iran Ltd* [2009] UKPC 45, [2010] BLR 73 [48] as two cases in which the term 'user damages' was used.

[21] User damages have also been described by terms such as 'reasonable fee damages' or simply 'damages'.

available for the financial loss suffered by the claimant, he suffers no or trivial identifiable financial loss.[22] However, the principle of user 'is established and not controversial' anyway.[23] While user damages were traditionally available only for the wrongful use of land,[24] modern cases include unauthorised use of both land and movable property.[25] In both cases, the underlying principle is the same: one cannot make wrongful use of the claimant's land or chattels without paying for that; it is no excuse for the defendant that no monetary loss to the claimant can be identified.[26] There are some decisions by the courts in which damages have been described as being for wrongful *use* of confidential information.[27] There are doubts- due to the controversial nature of information and intellectual property- about whether they can possibly be used, and hence whether those damages are user damages at all. In order to deal with the question of the taxonomy of user damages on a safe basis, I presume that these damages are awarded for wrongful use of land and chattels only. Nevertheless, considering the close similarity of these cases with cases of user damages and the reliance of the courts on the precedent cases of user damages when awarding damages for the wrongful use of confidential

[22] This was the difficulty in most but not all cases. There are also cases where user damages have been awarded while the claimant has suffered substantial identifiable loss. See eg *Strand Electric and Engineering Co Ltd v Brisford Entertainments Ltd* [1952] 2 QB 246.

[23] *Attorney General v Blake* [2001] 1 AC 268 (HL) 279 (Lord Nicholls).

[24] *Whitwham v Westminster Brymbo Coal & Coke Co* [1896] 2 Ch 538 is the leading case from the nineteenth century.

[25] *Strand Electric and Engineering Co Ltd v Brisford Entertainments Ltd* [1952] 2 QB 246 is the leading case in 20th century in which damages were awarded for the use of chattels.

[26] *Watson, Laidlaw & Co Ltd v Pott, Cassels and Williamson* (1914) 31 RPC 104, 119 (Lord Shaw).

[27] See eg *Universal Thermosensors Ltd v Hibben* [1992] 1 WLR 840 (Ch) 856; also *Seager v Copydex Ltd (No 2)* [1969] 1 WLR 809, 813 and *Vercoe v Rutland Fund Management Ltd* [2010] EWHC 424 (Ch), [2010] Bus LR D141, [344].

information,[28] it remains an open question whether the latter damages fall within the same category as the former.

Based on this brief definition of user damages, the possibility that I wish to examine in this thesis is whether these damages are a species of negotiation damages when the latter is given a broad meaning. The idea that will be examined in this thesis is that in cases of user damages, the courts award damages based on the market value of the use of property because this best reflects the sum that a reasonable person in the position of the claimant would have agreed to receive in order to allow the defendant to use the property. This is a possibility that is particularly worth examining considering that a brief examination of the courts' decisions shows that there is a significant interrelation between negotiation damages on a *Wrotham Park* basis and user damages. On one hand, the courts, in many cases in which they have discussed negotiation damages on a *Wrotham Park* basis, have found it necessary to deal with the issue of user damages.[29] On the other hand, in the absence of a market, the damages awarded in many cases of wrongful use of property have been quantified on a *Wrotham Park* basis. In *Jaggard v Sawyer*,[30] for instance, the defendants had built a house on their own land. The only means of access to the house was a cul de sac of which they did not have a right of use. Use of the cul de sac constituted a tort of trespass on land and a breach of covenant. The Court of Appeal rejected the claimant's request for an injunction to restrain the continuing trespass. It upheld the decision of the trial judge who had awarded damages based on the method employed by Brightman J in the *Wrotham Park* case.[31] There are also cases of user where the court, without

[28] See, eg, *Universal Thermosensors Ltd v Hibben* [1992] 1 WLR 840 (Ch), in which a wealth of authorities concerning user damages was relied upon by the court in justifying the award of the damages.

[29] Most importantly, see Lord Nicholls' judgment in *Attorney General v Blake* [2001] 1 AC 268.

[30] [1995] 2 All ER 189.

[31] ibid, 283.

relying on the *Wrotham Park* case, clearly states that the award is assessed on a hypothetical negotiations basis. In *Bocardo SA v Star Energy UK Onshore Ltd*,[32] for example, the defendants had unintentionally used the strata of the claimant's land. They had laid pipes in the strata, many miles under the land, in order to extract oil partly placed in the land. By the operations, they had not caused any physical or actual damage and the whole exercise had not affected the use and enjoyment of the estate at all. The tort of trespass was established by the court. It was common ground between the parties that the damages should be measured on the basis of hypothetical negotiations. Damages for the unauthorised use of the claimant's land were awarded on that basis by the majority of Supreme Court.

[32] [2010] UKSC 35, [2011] 1 AC 380.

CHAPTER TWO: EXISTING ACCOUNTS REFUTED

INTRODUCTION

For the purpose of developing my own view of negotiation damages in this thesis, it is necessary, first, to examine the existing analyses of these damages. Damages awarded by the courts in any specific case may, indeed, be susceptible to more than one interpretation; moreover, any specific account of damages may successfully explain some cases, but fail to provide a satisfactory analysis of others. The standard underlying my examination of the existing accounts cannot therefore be that they will fail altogether if they fail to explain every case where negotiation damages have been awarded. It is, rather, that an account fails if it cannot present the law in a coherent form by explaining the bulk of the cases in which these damages are awarded.

The scope of my work, here and in the next chapters, is limited to the consideration of the analyses of negotiation damages that are either based on a *factual* notion of a loss/gain or that attempt to clarify the nature of these damages in an alternative way, excluding those accounts which employ notions such as 'normative' or 'objective' loss/gain. The belief underpinning this attitude is that such concepts are 'strained and artificial',[1] at least for the purpose of explain damages, and that, accordingly, offering an analysis based on them is not a step forward.

I. EXISTING COMPENSATORY ACCOUNTS REFUTED

There is a group of judicial and academic viewpoints according to which negotiation damages — or part of them — are exclusively compensatory, in the sense that their measure is based on

[1] *Attorney General v Blake* [2001] 1 AC 268 (HL) 279 (Lord Nicholls).

the loss suffered by the claimant, even though in those cases the claimant has usually suffered little or no identifiable financial loss. Two major types of these compensatory analyses may be recognised and distinguished: (A) compensation for the loss of opportunity to bargain; and (B) compensation for the loss of the claimant's right.

A. Compensation for the Loss of Opportunity to Bargain

1. An Outline of the Thesis

This conception of negotiation damages was introduced by R Sharpe and S Waddams when they published a paper entitled 'Damages for Lost Opportunity to Bargain' in 1982.[2] According to their thesis, there is a group of cases in which the damages awarded aim at compensating the claimant for the loss he has suffered as a result of a lost opportunity to make a bargain with the defendant wrongdoer. Those cases can be explained, they suggest, 'on a simple and rational basis that is fully consistent with the compensatory theory of damages'.[3] In cases of user damages, for instance, the claimant 'does suffer a real loss, namely the opportunity to sell to the defendant the right to use' his property.'[4]

Severn Trent Water Ltd v Barnes[5] is probably the most significant case in which the negotiation damages awarded are expressly explained in terms of the claimant's lost opportunity to bargain.[6] In that case, the defendant had trespassed on part of the claimant's land by unintentionally laying a water main under it, without causing any loss or diminution to

[2] (1982) 2 *OJLS* 290; also see S Stoljar, 'Restitutionary Relief for Breach of Contract' (1989) 2 *JCL* 1, 4–5.

[3] ibid, 290.

[4] ibid.

[5] [2004] EWCA Civ 570, [2004] 26 EG 194 (Potter LJ; Parker LJ and Sir Swinton Thomas concurring).

[6] Also see *Jaggard v Sawyer* [1995] 2 All ER 189 (I will explain below (n 23) that this case should best be seen as adopting the 'loss of value of the claimant's right' thesis, rather than the lost bargaining analysis).

the value of the land. Part of the damages awarded, £500, was assessed on the basis of 'the likely reasonable outcome of any negotiations which would have taken place' for allowing the defendant to lay a water main under the land.[7] These damages were described by Potter LJ as damages awarded for a loss of bargaining opportunity.[8] Parker LJ and Sir Swinton Thomas agreed. According to this analysis, even though the claimant had not suffered any financial loss in the traditional sense of the word, he had suffered a loss in the form of a lost opportunity to sell to the defendant the right of use of the land. The claimant would have had the chance to demand a sum of money had the defendant sought his consent to use the land for laying the water main. By wrongfully acquiring the use of the land, the defendant in fact deprived the claimant of the opportunity to sell his right to him.

The authors also try to explain in terms of 'the lost opportunity to bargain' some judicial decisions, e.g. *Strand Electric and Engineering Co Ltd v Brisford Entertainments Ltd*,[9] that are believed to support a gain-based analysis. The major factor that they consider to justify this reading is the fact that the courts, in the latter case and several other cases, including the *Wrotham Park*, have measured the damages by making reference to an imaginary *bargain* between the parties.[10] According to Sharpe and Waddams, the bargaining language used in these cases reflects the principle underlying the award of negotiation damages, i.e. that these damages are designed to compensate the claimant for his lost opportunity to bargain.

[7] *Severn Trent Water Ltd v Barnes* [2004] EWCA Civ 570, [2004] 26 EG 194 [35].

[8] ibid.

[9] [1952] 2 QB 246, 252.

[10] *Strand Electric and Engineering Co Ltd v Brisford Entertainments Ltd* [1952] 2 QB 246, 254; *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 1 WLR 798 (Ch) 815. Among cases of this kind that have been dealt with in the article, there are also *Seager v Copydex Ltd (No 2)* [1969] 1 WLR 809 and *Bracewell v Appleby* [1975] 1 All ER 993.

2. Thesis Refuted

As it has been contended by several judges[11] and scholars,[12] the suggestion that the claimant has actually lost a bargaining opportunity is clearly fictional in many cases for which the thesis claims to provide an explanation. There are several reasons why the thesis must be rejected.

(a) Parties unwilling to enter a bargain

It has often been argued that the lost bargaining opportunity is fictional, because in some cases either the claimant would not have been willing to release his right for a reasonable sum or he would not enter the bargain under any circumstances. I submit that this argument is correct. I propose, however, that in addition one cannot reasonably assume that the *defendant* would have been willing to pay a reasonable sum in order to acquire the claimant's consent in all cases of negotiation damages. In any of these situations, if either the claimant or the defendant would not have entered the bargain, talking about an *opportunity* to make a bargain and therefore a *loss* of that opportunity would be fictional.

(i) The claimant unwilling to enter a bargain

In some cases, the claimant would not have released his right of authorisation. This scenario may arise both in cases of negotiation damages and of user damages. In the *Wrotham Park* case,[13] for instance, the claimant would not have consented to the building of the houses in a

[11] Eg *Surrey County Council v Bredero Homes Ltd* [1993] 1 WLR 1361, 1369–70 (Lord Steyn); *Experience Hendrix LLC v PPX Enterprises Inc* [2003] EWCA Civ 323, [2003] 1 All ER (Comm) 830: Peter Gibson LJ referred to the 'lost opportunity to bargain' theory as 'wholly fictional' (ibid [57]) and Mance LJ described it as artificial (ibid [45]).

[12] Professor Burrows was the first to suggest that the analysis is fictional: *Remedies for Torts and Breach of Contract* (1st edn, Butterworths 1987) 275; other scholars making points to the same effect include P Birks, 'Profits of Breach of Contract' (1993) 109 *LQR* 518; J Edelman, 'The Compensation Strait-jacket and the Lost Opportunity to Bargain' [2001] *RLR* 104; *Gain-Based Damages* (Hart Publishing 2002) 99–101; G Virgo, *Principles of the Law of Restitution* (2nd edn, OUP 2006) 439–40; R Cunnington, 'A Lost Opportunity to Clarify' (2007) 123 *LQR* 48, 50.

[13] *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 1 WLR 798 (Ch). See Ch 1 text to n 5–7 for facts.

way that would have infringed the covenant. Brightman J recognised in his judgment that the claimants, 'rightly conscious of their obligations towards existing residents', would clearly not have relaxed the restrictive covenant.[14] This was a fact also in the user damages case of *Penarth Dock Engineering Co Ltd v Pounds*.[15] The defendants, in that case, had purchased a pontoon from the claimants. At the time of the contract of sale, it was placed at part of the dock whose right of use belonged to the claimants. It was an express term of the contract that the defendants ought to remove the pontoon as soon as possible. The defendant company refused to comply with that term for a specific period of time. The case was brought to Queen's Bench Division and damages were sought on the basis of breach of contract or trespass. The court awarded user damages, based on the hiring charge of an alternative dock of that kind, for trespass. The claimants would not have authorised the use of the dock, by the defendants or any other party, for a reasonable sum, because they were trying to empty it.

(ii) The defendant unwilling to pay a reasonable sum

It is a fact in some cases of user damages that the claimant would not have entered the bargain. Moreover, it is always possible that also the *defendant* would not have done so. It is *possible* either way; the courts cannot take one or the other possibility for granted. A contrary view can be found in Romer LJ's judgment in *Strand Electric and Engineering Co Ltd v Brisford Entertainments Ltd*.[16] The defendants, in that case, had wrongfully possessed the claimants' switchboards. The latter wanted their full hiring value for the period of the wrongful possession. After explaining that the defendants' only substantial defence had been that the claimants might not have been able to find a hirer, Romer LJ stated:

[14] ibid 815.

[15] [1963] 1 Lloyds Rep 359.

[16] [1952] 2 QB 246.

> It does not lie in the mouth of such a defendant to suggest that the owner might not have found a hirer; for in using the property he showed that he wanted it and he cannot complain if it is assumed against him that he himself would have preferred to become the hirer rather than not have had the use of it at all.[17]

Clearly, Romer LJ is attempting to find a justification for his decision to award substantial damages in this case. One may quite plausibly agree with him on the question of the defendant's liability, but, it is submitted with respect, that he cannot reasonably found his decision on a compensatory basis. Indeed, it 'does not lie in the mouth of such a defendant to suggest that the owner might not have found a hirer', as Romer LJ states; the defendant cannot use this as a *defence* in order to get rid of liability for his wrongful use of the property. However, I cannot agree with Romer LJ's assumption that the mere use of the chattels by the defendant shows that he would have been willing to pay a reasonable sum (the full market price of hiring the switchboards, in this case) for obtaining the legal use of them. This is because the mere fact that the defendant had chosen to act wrongfully is good evidence that he had desired what he gained, but it does not establish that he had desired it so much that he would have paid a 'reasonable sum' for it.[18] There is, in fact, evidence in some cases that the defendant wold not have entered such a bargain.[19] In those cases, the lost bargaining analysis proves fictional.

(b) Thesis fails to explain the measure of damages

Both user damages and negotiation damages on a *Wrotham Park* basis are measured on an objective basis: they are assessed either by reference to the market or by reference to hypothetical negotiations between reasonable parties, where there is no market (typically in

[17] ibid 256–57.

[18] C Rotherham, in the context of a different objection to the lost bargaining thesis, describes Romer LJ's reasoning as 'a resort to counterfactual evidential presumption' that is 'indicative of an inability of the doctrine employed [i.e. the compensatory doctrine] to provide a reasoned justification for the relief in question': '"*Wrotham Park* Damages" and Accounts of Profits: Compensation or Restitution?' [2008] *LMCLQ* 25, 36–7.

[19] See eg *Gondal v Dillon Newsagents Ltd* [1998] NPC 127.

cases of negotiation damages). If one accepts that the loss suffered by the claimant is the loss of the bargain that he would have made with the defendant had the latter acted legally, there is no reason why it should be assessed on an objective basis.[20] In cases of negotiation damages, for example, if they actually follow the lost bargaining thesis, the courts must consider all circumstances surrounding the construction of the imaginary negotiations between the parties, including those (if any) putting one side of the negotiation in an extraordinarily stronger bargaining position. However, this is not what the courts do. When assessing negotiation damages, they imagine *reasonable* situations, and many facts of the case that are in conflict with this principle are ignored.

B. Compensation for the Loss of the Claimant's Right

1. An Outline of the Thesis

This analysis of negotiation damages is also based on an expanded notion of loss, but in a different way from the lost bargaining thesis. The analysis, most persuasively advocated by Professor McInnes,[21] suggests that in these cases, by committing the wrong, the defendant deprives the claimant of something which is financially valuable, i.e. his right of authorisation, and therefore the claimant suffers loss for which the defendant should compensate him. The thesis is perhaps best encapsulated in the following passage from *Tito v Waddell (No 2)*:[22]

> If the plaintiff has the right to prevent some act being done without his consent, and the defendant does the act without seeking that consent, the plaintiff has suffered a loss in that the defendant has taken without paying for it something for which the plaintiff could have required payment,

[20] Note that this criticism of the lost bargaining thesis is different from the previous one, which questioned the supposition that both parties would be willing to make a bargain. The argument, here, is that even assuming the parties' willingness to bargain, the thesis cannot explain the method actually exercised by the courts when assessing the damages.

[21] 'Gain, Loss and the User Principle' [2006] *RLR* 76; 'Account of Profits for Common Law Wrongs' in S Degeling and J Edelman (eds), *Equity in Commercial Law* (Thomson 2004) 416–18.

[22] [1977] Ch 106, 335.

> namely, the right to do the act. The court therefore makes the defendant pay what he ought to have paid the plaintiff, for that is what the plaintiff has lost.[23]

The violation necessarily entails a loss, according to McInnes, because it is a subtraction from the claimant's *dominium*, i.e. the right to use and control assets.[24] Moreover, the right is attributed a monetary value because having the right means that the claimant is in a position in which he has the power to charge the potential defendant by authorising him to enjoy the object of the claimant's right. Where the claimant's right of control/authorisation of use of property is attacked, damages are awarded based on the loss of value of that right. Despite similarities, this theory should be distinguished from the 'loss of opportunity to bargain' analysis. The difference lies in the distinction between the concepts of 'right/power' and 'opportunity'. While the latter analysis is indispensably dependent on a real opportunity to make a bargain in the specific situations of the case in issue, the former is not. Where the claimant is unwilling to exercise his right to authorise the act or omission which the defendant desires, the issue of 'opportunity to make a bargain' becomes irrelevant, but the right/power may still exist.

[23] The thesis (or at least the terminology used by it) may be traced back to cases decided long before Professor McInnes made a lucid elaboration of it. In the old leading case of *Shelfer v City of London Electric Lighting Co* [1895] 1 Ch 287, when considering the circumstances in which damages may properly be awarded in lieu of an injunction, AL Smith LJ said: 'If the injury to the plaintiff's legal rights is small... then damages in substitution for an injunction may be given' (ibid 322). According to this statement, a 'right' may be exposed to 'injury'; this makes the notion of 'loss of value of a right' possible. Among the modern cases taking a similar approach, *Jaggard v Sawyer* [1995] 2 All ER 189 is of particular significance. In that case, Bingham MR, clearly suggesting that the damages in the *Wrotham Park* case are compensatory (ibid 281), acknowledged the trial judges' decision, in which he, following AL Smith LJ's formulae, had considered the injury to the plaintiff's right and assessed the value of that injury which was declared by him as 'capable of being estimated in money'. Bingham MR never refers to the 'lost opportunity to bargain' analysis in his judgment. Millett LJ, too, confirmed the trial judge's reliance on the AL Smith LJ's analysis and confirmed the trial judge's decision (ibid 287). In his defence of the availability of negotiation damages, the following passage shows clearly the way he considered the nature of these damages: 'there is no reason why compensatory damages for future trespasses and continuing breaches of covenant should not *reflect the value of the rights which she [the claimant] has lost*, or why such damages should not be measured by the amount which she could reasonably have expected to receive for their release' (ibid 291; emphasis added). However, it has to be said that there are hints in Millett LJ's judgment implying that he fails to distinguish between the 'loss of the value of the right' thesis for which he argues and 'the loss of opportunity to bargain' thesis. When considering the judgment of the Court of Appeal in *Surrey County Council v Bredero Homes Ltd* [1993] 1 WLR 1361, he criticises the Court's position in describing 'the lost opportunity' theory as a 'fiction' (*Jaggard*, ibid 291). This gives the impression that he is advocating the 'lost opportunity' theory rather than building upon the 'loss of the value' whose roots already exist in AL Smith LJ's judgment to which he had subscribed earlier in his judgment.

[24] 'Account of Profits for Common Law Wrongs' in *Equity in Commercial Law* (S Degeling, *et al* (eds), Thomson 2004) 416.

Therefore, by committing the wrong, the defendant becomes liable whether or not there has been an actual 'opportunity' to make a bargain with the claimant at the time of breach of the right. The courts' consideration of a hypothetical bargaining between the parties is regarded simply as a method of determining the value of the right that has been lost, according to McInnes.

2. Thesis Refuted

It is submitted that also this compensatory analysis is defective for the following reasons.

(a) No loss of the claimant's right

The main difficulty with this analysis, as Professor Burrows suggests, lies at its heart, where it claims that the claimant has suffered a loss of his right: 'to say that a (proprietary) right has been lost seems to slide into a false use of the word "lost"; the claimant retains exactly the same rights as it had before the wrong; no rights have been lost.'[25] A claimant will not lose any right when, for example, his horse or land is wrongfully used by the defendant. He enjoys the same *rights* of use and control over his asset. The right, as a normative concept requiring the defendant not to engage in a wrongful interference with the claimant's property, is still there. What has happened is simply that the right has been infringed.

(b) No loss of 'value' of the claimant's right in cases of 'user'

One may suggest that McInnes' analysis may be saved by saying that it concerns the 'loss of value' of the claimant's right, rather than the loss of his right. This is based on an analytical distinction between the notion of a *right* and its *value*. Based on that, one may argue that whereas it may not be plausible to say that the claimant has lost his right in cases of negotiation

[25] 'Are "Damages on the *Wrotham Park* Basis" Compensatory, Restitutionary or Neither?' in *Current Themes in the Law of Contract Damages* (D Saidov, et al eds, Hart Publishing 2008) 173.

damages, it is possible to say that he has lost the value of his right in these cases. This argument cannot save McInnes' thesis though.

It is indeed possible to identify cases in which the claimant has lost the value of his right. The *Wrotham Park* case is an example of this: the defendants, in the *Wrotham Park* case, had breached a covenant restricting their use of land and thereby infringed the claimants' right of control over property. The court refused to order an injunction for demolition of the houses and awarded damages in lieu of it. It seems to be plausible to say that the claimant has lost the value of his right in a case like that, even though he has the same right after the trial. This is because there is no question that the houses will stay there as long as the defendants (or their successors in title) desire: the claimant has lost the power to exercise his right forever as a result of the court's denial of an injunction. The claimant's right enjoys no more protection by the law; a right without the law's protection has no financial value.[26] But the difficulty with a 'loss of value of the right' analysis is that it cannot explain most cases of user damages. A takes B's horse; he infringes B's right of control/authorisation over the use of the horse; B still has the right and it is as valuable as it was before the infringement. This is a fatal difficulty with the thesis, since cases of user damages are the typical instances of the damages whose nature McInnes proposes to clarify.

(c) The difficulty with holding the 'defendant' liable

The second objection to this compensatory thesis concerns its lack of explanatory power in relation to the *defendant's* liability to pay damages in these cases. In the cases that survive the above objection concerning the absence of loss, it is not clear why the *defendant* should be liable to pay damages. In cases such as the *Wrotham Park*, the court denies an injunction despite

[26] Other examples: *Amec Developments Ltd v Jury's Hotel Management (UK) Ltd* (2000) 82 P & CR 286, [2000] All ER (D) 1866; *Lane v O'Brien Homes Ltd* [2004] EWHC 303.

the right's infringement. This creates a situation in which, one may say, the wrongdoing can continue forever. As the wrongdoing is nothing but an infringement of the claimant's right of authorisation, the courts' decision is equal to a permanent deprivation of the claimant of the chance to have his right and its value revived. The value of the right is indeed lost, but this happens by the court's decision to deny an injunction, not by the defendant's wrongful act.

II. GAIN-BASED ACCOUNTS REFUTED

There are judicial statements clearly suggesting that negotiation damages are based on the defendant's gain, rather than the loss suffered by the claimant.[27] Many scholars also vigorously defend a gain-based view of these damages. After Goff and Jones launched the development of the law of restitution, a group of other scholars, most famously represented by Professor Birks,[28] made the next major contribution to the field by distinguishing restitution for unjust enrichment from 'restitution for wrongdoing'.[29] Among the scholars who have written on restitution for wrongdoing, Andrew Burrows' and James Edelman's works are the most notable

[27] A line of authorities can be identified in which user and/or negotiation damages have clearly been considered as being based on the benefit obtained by the defendant. Some of the most significant of these include: *Strand Electric and Engineering Co Ltd v Brisford Entertainments Ltd* [1952] 2 QB 246 (Denning LJ); *Penarth Dock Engineering Co Ltd v Pounds* [1963] 1 Lloyd's Rep 359 (Denning LJ); *Ministry of Defence v Ashman* (1993) 66 P & CR 195; *Surrey County Council v Bredero Homes Ltd* [1993] 1 WLR 1361 (Steyn and Dillon LJJ); *Kuwait Airways Corp v Iraqi Airways Co* [2002] UKHL 19, [2002] 2 AC 883 (Lord Nicholls); *Bocardo SA v Star Energy UK Onshore Ltd* [2010] UKSC 35, [2011] 1 AC 380 (Lord Brown SCJ, delivering the leading judgment, and Lord Clarke SCJ, dissenting, both agreed that 'user damages' are gain-based); *Marathon Asset Management LLP v Seddon* [2017] EWHC 300 (Comm), [2017] ICR 791.

[28] Professor Birks' thesis is based on his distinguished view of the taxonomy of remedies in private law (he would not use the term 'remedy' though: see, P Birks, 'Rights, Wrongs, and Remedies' (2000) 20 *OJLS* 1). He suggests that the correct taxonomy is that based on the distinction between 'events' and 'responses'. Based on this analysis, restitution for wrongdoing is a discrete category of damages, in that, in contrast with restitution for unjust enrichment which is a response to the event of unjust enrichment, it is a response to the event of *wrongdoing*; see, P Birks, 'The Independence of Restitutionary Causes of Actions' (1990) 16 *UQLJ* 1. It has to be noted that this thesis has been a matter of controversy since the time of its emergence. There are also scholars who reject this distinction, defending the so-called quadration theory. Burrows is one of the most influential of them: see A Burrows, 'Quadrating Restitution and Unjust Enrichment: A Matter of Principle' (2000) 8 *RLR* 257.

[29] Eg P Birks, *An Introduction to the Law of Restitution* (Revised edn, Clarendon Press 1989); 'The Independence of Restitutionary Causes of Actions' (1990) 16 *UQLJ* 1; 'Restitution for Wrongs' in *Unjust Enrichment: The Comparative Legal History of the Law of Restitution* (EJH Schrage ed, Duncker & Humblot 1995) 171; I Jackman, 'Restitution for Wrongs' (1989) 48 *CLJ* 302; J Beatson, *The Use and Abuse of Unjust Enrichment: Essays on The Law of Restitution* (OUP 1991); G Virgo, *The Principles of the Law of Restitution* (1st edn, OUP 1999).

for the purposes of this section, not least because they have specifically addressed the question of the nature of the damages I am investigating in this research in a particularly influential way. This section will deal with their accounts.

A. Burrows' Restitutionary Analysis

1. An Outline of the Thesis

Professor Burrows defends a gain-based view of negotiation damages on two grounds. The first is based on the defendant's saving of expenditure.[30] In some cases, according to Burrows, the wrongdoing saves the defendant the expenditure that he would have had to bear if he had sought to act legally. Where A has wrongfully used B's chattels, for example, he would have had to pay B a sum of money in order to acquire his consent if he wanted to act legally. He saved this expense by not doing so. This argument, as Burrows concedes in his recent work on the issue, can be fictional in some cases in the same way as the 'lost opportunity to bargain' thesis is.[31] The argument is based on the assumption that a bargain would have been made between the parties had the defendant decided to act legally. The assumption is wrong in many cases, including in *Wrotham Park*.[32] Yet, the difficulty with the 'saving of expenditure' analysis is not limited to those cases: even in cases in which it is plausible to imagine a bargain, the analysis cannot explain the measure of the damages — which is based on a *reasonable sum* —when the facts of the case shows that the parties would have agreed on a different sum.

The 'saving of expenditure' analysis is not the only gain-based explanation that Burrows offers for the nature of negotiation damages though. According to him, the cases that

[30] *Remedies for Torts and Breach of Contract* (3rd edn, OUP 2004) 373; *The Law of Restitution* (3rd edn, OUP 2011) 626.

[31] 'Are "Damages on the *Wrotham Park* Basis" Compensatory, Restitutionary or Neither?' in *Current Themes in the Law of Contract Damages* (D Saidov, et al eds, Hart Publishing 2008) 173.

[32] See *Marathon* [2017] EWHC 300 (Comm), [2017] ICR 791, [235] (Leggatt J).

cannot be encompassed by that analysis can still be explained by considering the fact that the measure of damages in such cases is based upon a proportion of the profits accrued to the defendant by the wrongdoing.[33] These are different forms of 'restitutionary damages', he suggests, forming a spectrum together with an account of profits, all of which are based on the defendant's enrichment, each depriving him of his gain to a specific degree.

2. Thesis Refuted

It is submitted that Burrows' gain-based thesis is not satisfactory, for three reasons.

(a) The purpose of taking the defendant's profits into account

Careful consideration of the courts' decisions shows that the profit-stripping thesis does not reflect why the courts take the defendant's profits into account when calculating negotiation damages. These damages are categorically different from the true profit-based damages, i.e. an account of profits, since the courts' reference to the defendant's profits in cases in which the former damages are awarded is made with a purpose different from that for which an account of profits is ordered. In Patten J's words in *Sinclair v Gavaghan,*[34] '*the remedy is not an account or share of profits as such,* but the court takes into account the profits... when calculating what he [i.e. the defendant] would have been prepared to pay for the release'.[35] This correctly suggests that the consideration of the measure of the defendant's profit-making is a peripheral instrument, employed only where appropriate, for the purpose of calculation of damages on a hypothetical negotiations basis.

[33] Some other scholars defending a profit-based restitutionary analysis include D Campbell and P Wylie, P, 'Ain't No Telling (Which Circumstances Are Exceptional)' (2003) 62 *CLJ* 605, 608; M Graham, 'Restitutionary Damages: The Anvil Struck' (2004) 120 *LQR* 26, 28.

[34] [2007] EWHC 2256 (Ch).

[35] ibid [15] (emphasis added).

(b) The nature of the profits

The second difficulty with Burrows' analysis is that if the purpose of the damages is to strip the defendant of his wrongful gain, the courts should consider the profits that he has *actually* gained. However, a consideration of authorities shows that the courts are not interested in the defendant's actual profits, but in his *anticipated* ones. This is, again, because the aim of the court is to construct hypothetical negotiations between the parties, and the role of profits is only instrumental. Considering that, it makes perfect sense for the courts to consider the profits that the parties would have *anticipated* at the time when the negotiations are imagined to have taken place.

The Privy Council case of *Pell Frischmann Engineering Ltd v Bow Valley Iran Ltd*[36] is a clear example of a case in which the basis of the measure was the defendants' anticipated profits, not their actual ones. In that case, part of the damages awarded concerned the defendants' breach of contractual obligation not to enter into a bargain with a third party. Negotiation damages were awarded in relation to this wrongdoing. The defendants had indeed made profits out of their wrongdoing, but it was established that the profit expected by the parties in the hypothetical negotiations would have been far greater than the defendants' actual profits, which were US$1.8m. The negotiation damages awarded by the Privy Council were US$2.5m. This award was obviously not intended to strip a proportion of the defendants' profits, since it substantially exceeded that amount. The damages were measured on the basis of the anticipated profits rather than the actual profits. This is because in the assessment of the measure of negotiation damages, the courts aim at understanding what the result of the parties'

[36] [2009] UKPC 45, [2010] BLR 73.

hypothetical negotiations would be, rather than responding to the defendant's wrongful profit-making.

In cases in which the court takes an interest in the defendant's actual profits, it is only because it presumes that the parties would anticipate such profits in an imaginary negotiation between them. The contrary view ignores the precise practice of the courts when assessing damages. In the *Wrotham Park* case, for instance, it is clear that what was ultimately at stake was not the actual, but the anticipated profits, and that, itself, was part of a bigger project, i.e. the construction of the imaginary bargain.[37] This is clear from Brightman J's reasoning:[38]

> I think that in a case such as the present a landowner faced with a request from a developer which, it must be assumed, he feels reluctantly obliged to grant, would have first asked the developer what profit he expected to make from his operations. With the benefit of foresight the developer would, in the present case, have said about £50,000 for that is the profit which Parkside concedes it made from the development. I think that the landowner would then reasonably have required a certain percentage of that anticipated profit as a price for the relaxation of the covenant... [39]

(c) Lack of a principled method of measurement

The profit-based account of negotiation damages does not provide a sufficiently precise principle for the measure of damages: the measure will be arbitrary if that account is adopted.

[37] Burrows and Peel considered the damages awarded in the case as restitutionary damages concerned with stripping a proportion of the defendant's gain: 'Breach of Contract, Restitution for Wrongs, and Punishment: Review of Discussions' in *Commercial Remedies: Current Issues and Problems* (OUP 2003) 129.

[38] *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 1 WLR 798 (Ch), 815.

[39] The point is also made by Bingham MR in *Jaggard v Sawyer* [1995] 2 All ER 189, 281–82: he says that Brightman J 'paid attention to the profits earned by the defendants... not in order to strip the defendants of their unjust gains, but because of the obvious relationship between the profits earned by the defendants and the sum which the defendants would reasonably have been willing to pay to secure release from the covenant'; also, in even clearer terms, Millett LJ stated in the same case that Brightman J 'did not award the plaintiff the profit which the defendant had made by the breach, but the amount which he judged the plaintiff might have obtained as the price of giving its consent. The amount of the profit which the defendant expected to make was a relevant factor in that assessment, but that was all' (ibid 291). See R Cunnington, 'Rock, Restitution and Disgorgement' (2004) 3 *JOR* 46, 49; 'The Measure and Availability of Gain-Based Damages for Breach of Contract' in *Contract Damages: Domestic and International Perspective* (Saidov, et al eds, Hart Publishing 2008) 224.

Burrows may contend that the assessment will not be on an arbitrary basis, because the measure is ascertained by reference to the hypothetical negotiations.[40] This is not correct. The courts indeed take account of what profits the parties would have anticipated to accrue to the defendant as a result of the act that constitutes a wrong without the claimant's consent. However, this involves only the *anticipated* profits, as it was mentioned above. The aim of constructing the hypothetical negotiations is not to tell us the measure of the defendant's profit-making. It is the other way round: the courts consider the measure of the defendant's *anticipated* profits in order to help construct the imaginary negotiations, i.e. to provide a reasonable approximation of the sum that the defendant would have paid to the claimant in order to acquire his consent to release his right.

Also, even if one accepts that it can reasonably be assumed that the reference to the hypothetical negotiations is the principle on which the measure of the profits is ascertained, it is not clear on what principle *that* principle is based. One could say that if the aim of the relief is truly to strip the defendant of his wrongful benefits, its measure should be based on all and any kind of benefits that he has made by committing the wrong, including a full account plus the benefit gained by the defendant as a result of his saving of expenditure (if there is any at all). Why only on a proportion of the profits that the parties would have anticipated at the time of wrongdoing? Furthermore, if the profit-stripping is not an aim in itself, its measure must be attuned to whatever principle it aims to fulfil. It is not clear how a hypothetical negotiations-based measure of profit-stripping is attuned to such principle.

As a final point, this analysis allows the avoidance of a common misreading of Arden LJ's judgment in the *Devenish Nutrition Ltd v Sanofi-Aventis SA (France)*,[41] by emphasising

[40] Also see E McKendrick, *Contract Law: Text, Cases, and Materials* (7th edn, OUP 2016) 903.

[41] [2008] EWCA Civ 1086, [2009] Ch 390.

the 'purpose' of damages. In that case, her Ladyship stated that negotiating damages 'are assessed on a basis that affords compensation to the claimant. That does not mean that such damages do not also deprive the defendant of a benefit that he has received'.[42] This simply suggests that while the 'basis'/purpose of these damages is to compensate the claimant, the defendant may at the same time be deprived of a wrongfully-gained benefit as an incidental effect of the award. This is true, for example, where, in assessing the claimant's loss on a hypothetical negotiations basis, the court takes account of a proportion of the profits that the defendant has actually gained.

B. Edelman's Thesis– Reversal of the Defendant's Enrichment

1. An outline of the Thesis

Professor Edelman's analysis of gain-based damages is an ambitious one. Not only does it purport to offer an alternative gain-based explanation for many groups of damages which are described as 'gain-based' in different ways by other scholars, but it also aims at changing our view of the boundaries between unjust enrichment and restitution for wrongdoing, and of the normative foundations of the latter.[43]

Drawing a line between damages based on the wrongful benefits obtained *from* the claimant and those awarded in the form of 'an account of profits', Edelman suggests that these are two different sorts of gain-based relief which should be seen with different lenses, when considering their measure and availability, because it makes a foundational difference whether

[42] ibid [41].

[43] One may say that Edelman has abandoned his 'transfer of value' thesis in 'The Meaning of Loss and Enrichment' in *Philosophical Foundations of the Law of Unjust Enrichment* (R Chambers, et al eds, OUP 2009), but the thesis still needs to be dealt with here, not least because it has been adopted also by some other scholars: eg R Cunnington, 'Rock, Restitution and Disgorgement' (2004) 3 *JOR* 46, 49; 'Assessment of Gain-Based Damages for Breach of Contract' (2008) 71 *MLR* 559.

the benefits are obtained from the claimant.[44] Any wrongful 'transfer of value' from the claimant to the defendant, according to Edelman, must be treated like the defendant's unjust enrichment. These two groups of damages also receive different labels in his terminology: those based on a transfer of value from the claimant are called 'restitutionary damages' — because they literally 'restore' to the claimant the benefit obtained from him — and the other group are labelled 'disgorgement damages'[45] — to emphasise that they do not involve 'giving back', but 'giving up' to the claimant the benefit gained through the wrongdoing.[46]

The damages I investigate in this thesis are included in, but do not exhaust, what Edelman labels 'restitutionary damages'. He defines restitutionary damages as 'a monetary award which reverses a transfer of value… that gives back value transferred from a claimant to a defendant as a result of a defendant's wrong and is almost always measured by the objective gain received by the defendant'.[47] Edelman launches his account of 'restitutionary damages' by putting forward a simple example: the defendant wrongfully takes the claimant's money. The claimant can recover the money by bringing a form of action traditionally called 'money had and received'. The damages awarded are 'restitutionary damages', because it is evident that in this case, the claimant has lost money and the defendant has received the same thing that the claimant has lost. Indeed, a case such as that in which the claimant's money is wrongfully taken by the defendant may be an incontrovertible instance of transfer of value from

[44] J Edelman, *Gain-Based Damages* (Hart Publishing 2002) 65; also 'The Measure of Restitution and the Future of Restitutionary Damages' [2010] *RLR* 1. Traces of a 'transfer of value' thesis may be found also in D Friedmann, 'Restitution of Benefits Obtained through the Appropriation of Property to the Commission of a Wrong' (1980) 80 *Col LR* 504 and L Smith, *The Law of Tracing* (OUP 1997) 29.

[45] L Smith used the term before Edelman did, to refer to 'giving up', in contrast with 'giving back', in 'Disgorgement of the Profits of Breach of Contract: Property Contract and "Efficient Breach"' (1994) 24 *Canadian Business LJ* 121.

[46] Professor Birks takes the rival position that the underlying Latin 'restituere/restitutio' indicates that the term 'restitution' can involve both 'giving up' and 'giving back' (See P Birks, 'Equity in the Modern Law' (1996) 26 *UWALR* 1, 28).

[47] J Edelman, *Gain-Based Damages* (Hart Publishing 2002) 66.

the claimant to the defendant. But the difficulty starts when one considers two other major groups of damages that Edelman's 'restitutionary damages' thesis claims to explain, i.e. user damages and negotiation damages. These are precisely the damages whose nature is investigated in this thesis. In these cases, where the claimant has usually suffered no loss as a result of the wrongdoing, it is not as clear as in the case of the wrongful transfer of money what, if anything at all, has been transferred from one party to the other. Edelman's response in relation to each of the user damages and negotiation damages on a *Wrotham Park* basis are considered, and critiqued, below.

2. Thesis Refuted

(a) User damages

User damages are damages awarded for the wrongful use of the claimant's property.[48] The question is whether, in these cases, anything has been 'transferred' from the claimant to the defendant, and, if so, whether it is a sort of transfer that requires a monetary response as readily as when a transfer happens in a straightforward case such as where A wrongfully takes money from B. I will explain below that difficulties with assuming this are so serious that they render Edelman's thesis as an unsatisfactory account of the nature of user damages. Since the notion of 'transfer' involves indispensably a subtraction of something from one person and the receipt of the same thing by another, the following three questions need to be answered successfully if Edelman's account is to be satisfactory: (i) what has been subtracted from the claimant? (ii) what has been received by the defendant? (iii) is the same thing subtracted from the former and received by the latter? It is submitted that the account fails to offer a clear answer to these questions.

[48] Ch 1 text to n 20–32.

(i) The problem of subtraction from the claimant

As for the question of subtraction, the answer is not an easy one, because Edelman's thesis is based on the supposition that wrongful use of property entitles the claimant to restitutionary damages, whether or not he has suffered any monetary loss as a result of the wrongdoing. Transfer of value, he suggests, 'does not mean that the claimant must have a *financial* loss to match the transfer of value'.[49] What has been subtracted in these cases from the claimant has, rather, a non-monetary and 'metaphysical' nature: it is a subtraction from the claimant's *dominium*.[50] In taking this view, he follows the view of a group of scholars who believe that any benefits gained through the wrongful use of property are appropriated from the owner's *dominium*.[51] It is in this sense that the benefits are received *from* the claimant. But, what does Edelman mean exactly when he says that benefits are subtracted from the claimant's *dominium*? He clarifies by saying that it means that 'the generation of value has come from the assets of the claimant…'[52] One difficulty with this notion of subtraction is that it still leaves it unclear whether the derivation of benefits from an owner's assets means that something has been *taken* from him. It does not seem so.[53] If not, this undermines the conception of these cases as transfers, since nothing may be transferred from A to B if nothing is *taken* from A. Yet, the major problem with using this notion of subtraction to justify the claim that a transfer occurs in these cases is even more significant: it does not seem to be in line with the normative justification underlying Edelman's thesis. The main point of his thesis is that 'restitutionary

[49] J Edelman, *Gain-Based Damages* (Hart Publishing 2002) 66, 67.

[50] ibid.

[51] Eg J Beatson, 'The Nature of Waiver of Tort' in *The Use and Abuse of Unjust Enrichment: Essays on The Law of Restitution* (Oxford Clarendon Press 1991) 232.

[52] J Edelman, *Gain-Based Damages* (Hart Publishing 2002) 66.

[53] C Rotherham views this analytical misconception of the notion of 'taking' as the major difficulty with Edelman's thesis: 'The Conceptual Structure of Restitution for Wrongs' (2007) 66 *CLJ* 172, 173.

damages' must be readily available for all causes of action, because it is required by 'corrective justice'. Corrective justice was first, and most influentially, defined by Aristotle as a principle serving to maintain or restore equilibrium in the distribution of resources.[54] It is not clear how the award of damages based on the defendant's gain that is derived from a mere subtraction from an owner's *dominium* without infliction of loss maintains or restores equilibrium in the distribution of 'resources'. Is *dominium* a resource? The answer seems to be negative. *Dominium* is a state in which an owner may claim exclusive enjoyment of the resources that he owns.[55] It is, therefore, difficult to see how a transfer of benefits based on this notion of subtraction can justify the award of user damages on a 'corrective justice' basis.

(ii) The problem of benefits received by the defendant

One more difficulty concerns the issue of what has been received by the defendant. Edelman's response is that it is the use-value of the property, which is measured by reference to the objective value of its use. But this response leaves it unclear in what sense the property's use-value has been received by the defendant (in what sense the defendant has received a financial benefit), and why that benefit is measured on an objective basis. As I mentioned above, Edelman concedes that any subtraction from the claimant has to be a 'metaphysical', non-monetary, one, but when it comes to what is received by the defendant, his thesis immediately goes on to propose that it is a benefit that has a financial value. Indeed, the market may set a value for the use of a property like that wrongfully used by the defendant. But it does not help to say that the defendant has been enriched, just because the use he has made of the claimant's property is valued by the market. This is not a step forward. The question is whether the

[54] *Nicomachean Ethics* 1130b30ff.

[55] Lon Fuller and William Purdue, in their article 'The Reliance Interest in Contract Damages: 1' (1936) 46 *YLJ* 52, developed an influential account of the principle of 'corrective justice' in the law of damages. An implication of their account is that the infliction of loss to the claimant and the enrichment of the defendant are both necessary if the damages are to be justified on a 'corrective justice' basis.

defendant has actually received that financial value. The only way to show that is if his financial wealth has actually been improved in some way. The defendant has indeed been enriched financially in many cases of user damages by gaining profits as a result of his wrongdoing, but, as it was explained above, this type of gain is not one that Edelman would want to rely upon to justify his account of 'restitutionary damages'. One other possible attempt to show that the defendant has gained an immediate financial benefit as a result of the wrongdoing would be based on the 'saving of expenditure' thesis, but this thesis is flawed too: it can, in some cases, be as fictitious[56] as its opponent, i.e. the 'lost bargaining opportunity' account.

Finally, it is not clear whether, according to Edelman, the defendant gains a benefit simply by gaining the possession of the claimant's property without actually using it. So, one may say that the defendant should have used the claimant's property if he is to be considered to have received any benefit.[57] In that case, Edelman's thesis cannot explain cases such as *Inverugie Investments Ltd v Hackett*.[58] There, the claimants were the lessee of 30 apartments within a hotel complex. The defendants had wrongfully ejected them. The Privy Council awarded damages on the basis of the going rate for the use of each of the apartments 365 days a year, even though the apartments had not been occupied 365 days a year (actually the level of occupancy had been much less than that).[59] The purpose of the damages could not therefore be to reverse the value received by the defendants for the use of the apartments. However, Edelman refers to the *Inverugie* case as one in which the award was restitutionary damages. It is therefore possible that, in his view, the notion of the 'use value' of property does not depend

[56] Text to n 30–33.

[57] See *Strand Electric and Engineering Co Ltd v Brisford Entertainments Ltd* [1952] 2 QB 246, 254 (Denning LJ).

[58] [1995] 1 WLR 713. Also see *Mediana (Owners) v Comet (The Mediana)* [1900] AC 113; *Gondal v Dillon Newsagents Ltd* [1998] NPC 127; *Costello v Chief Constable of Derbyshire Constabulary* [2001] EWCA Civ 381, [2001] 1 WLR 1437.

[59] *Inverugie Investments Ltd v Hackett* [1995] 1 WLR 713, 715.

on its actually being used by the possessor; one who wrongfully possesses the claimant's property will gain a benefit simply by gaining the *opportunity* to use the property. This interpretation of Edelman's thesis would be consistent with the decision in *Inverugie*. However, in *Marathon Asset Management LLP v Seddon*, Leggatt J rejected the view that a mere possession of information leads to the defendant's enrichment. He agreed with the decision in *Inverugie*, but used the 'saving of expenditure' analysis, arguing that in that case, the defendants obtained a benefit by avoiding payment of a going rate.[60] Moreover, Edelman believes that in *Inverugie*, the award was exclusively restitutionary.[61] If the defendant receives a gain merely by obtaining an opportunity to use the claimant's property, why does the claimant not suffer a loss by losing the *opportunity* to use his own property?

(iii) The problem of correlation between the subtraction and the benefits

Finally, the last difficulty concerns the issue of the relation between what has been received by the defendant and what has been subtracted from the claimant. If Edelman's 'transfer' account is to be successful, it has to show that there is a firm correlation between them, in a way that either the latter is precisely the same thing as the former, or it is, at least, the mirror image of it. Even if one was to accept both Edelman's subtraction thesis and that the defendant gains a benefit, in cases of user damages, simply by obtaining the possession of the claimant's property, it would still be hard to see how exactly that correlation exists. What has been subtracted from the claimant is asserted to be his *dominium* (or a 'right' of *dominium*, as one may describe it),[62] whereas the thing received is asserted to be the objective use-value of the assets.

[60] [2017] EWHC 300 (Comm), [2017] ICR 791, [270] – [274].

[61] *Gain-Based Damages* (Hart Publishing 2002) 115–16.

[62] J Beatson, 'The Nature of Waiver of Tort' in *The Use and Abuse of Unjust Enrichment: Essays on The Law of Restitution* (OUP 1991) 232.

(b) Negotiation damages on a Wrotham Park Basis

The most fatal difficulty with Edelman's account is perhaps where it claims that the 'transfer of value' thesis also explains the nature of negotiation damages. The thesis, as it was explained above, is profoundly based on a notion of subtraction which is reliant on the claimant's *dominium* over his property. The problem is that in most, if not all, cases of negotiation damages, the defendant has not used the claimant's property, and therefore it is hard to see what has been subtracted, and therefore transferred, from the claimant's *dominium*. What happens in many of these cases is simply that the claimant's right of authorisation of use of assets is infringed, where their owner is not the claimant, but the defendant.

The typical instance of this is the *Wrotham Park* case in which a restrictive covenant, controlling the use of land by the defendants, had been breached by them. In *Wrotham Park* and several other cases following Brightman J's decision in that case, what belongs to the claimant is not land or chattels, but simply a right of authorisation of specific usage of assets whose right of use does not belong to him. As it was explained above, if Edelman can show that anything has been subtracted from the claimant at all, it has to be a sort of appropriation from the claimant's *dominium*. But it is hard to identify even this notion of subtraction in cases where a breach of that nature occurs, because, as Craig Rotherham suggests, to 'characterise such cases as involving a subtraction or transfer is to elide an important analytical distinction between takings and non-appropriative interferences with proprietary rights.' [63] Oxford dictionary defines 'appropriation' as taking (something) for one's own use, typically without the owner's permission. In cases such as *Wrotham Park*, it would be artificial to say that the

[63] 'The Conceptual Structure of Restitution for Wrongs' (2007) 66 *CLJ* 172, 177; Rotherham also raises the further objection that in cases of breach of restrictive covenants, usually the claimant could have obtained an extortionate sum from the defendant by releasing his right, whereas the damages are assessed on an objective basis: damages cannot be based on the reversal of the value of the claimant's right, because the value received by the defendant is in fact larger than the measure of damages.

defendant has taken the claimant's right for his own use, because the former does not use the latter's right, but simply breaches it.[64] Therefore, although Edelman is right when he says that the 'Wrotham Park Estate Company were deprived of a valuable right (to restrict development)',[65] there is no reason also to consider that 'the market value of the right to relax the restrictive covenant… was wrongfully [appropriated from the claimant and] transferred to the defendant'[66] in a case such as *Wrotham Park*.[67]

Altogether, Edelman's account of what he labels 'restitutionary damages' does not provide a convincing explanation for the nature of negotiation damages. Indeed, as he states, many different theories have been proposed to explain these damages, without any of them being convincing enough to gain general acceptance.[68] However, the 'transfer of value' thesis is equally unsatisfactory in many respects. It is unclear how one is to understand the precise meaning of 'benefit', 'subtraction', and 'transfer' in the light of his thesis, in relation to both user damages and negotiation damages on a *Wrotham Park* basis. Academic and judicial views in the field are still very divergent.

[64] In 'The Meaning of Loss and Enrichment' in *Philosophical Foundations of the Law of Unjust Enrichment* (R Chambers, et al eds, OUP 2009) 211, Edelman has dealt with the nature of damages in the *Wrotham Park* case again. He has departed from his previous positions, conceding that the case is explicable in both compensatory and restitutionary terms.

[65] J Edelman, *Gain-Based Damages* (Hart Publishing 2002) 179.

[66] ibid; he makes the meaning of transfer of value in these cases even harder to appreciate, when he says that 'The value wrongfully transferred is contractual rights' (ibid 172).

[67] The 'transfer of value' thesis proves difficult to accept, also in relation to negotiation damages for breach of intellectual property rights, i.e. reasonable royalties/reasonable licence fees for similar reasons. See, C Rotherham, 'The Conceptual Structure of Restitution for Wrongs' (2007) 66 *CLJ* 172, 177–78.

[68] J Edelman, *Gain-Based Damages* (Hart Publishing 2002) 65.

III. STEVENS' RIGHT-BASED ACCOUNT REFUTED

A. An Outline of the Thesis

In relation to the nature of damages in English law, the compensatory and the gain-based accounts had been the only prevalent conceptions before Professor Stevens offered his ambitious, alternative account of what the damages are about in his recent book, *Torts and Rights*.[69] Viewing the claimant's *right* as the main theme of the law of damages, Stevens suggests that the monetary award for breach of tort and contract is principally concerned with providing a substitute for the claimant's right by awarding him the value of his infringed right. This is the damages awarded in *all* cases of contractual and tortious wrongdoing. Nevertheless, he suggests, additional compensatory damages are also available in cases where the claimant has suffered consequential loss as a result of the wrong.

Not surprisingly, making reference to several cases of negotiation damages has a central role in Stevens' attempt to show how the rights-based thesis *fits* the case law. The claimant, not having suffered any consequential loss as a result of the wrongdoing, is awarded substantial damages in these cases. These damages are shown by Stevens not to be based on the defendant's gain either. Therefore, these cases, according to him, provide us with the most

[69] (OUP 2007). Stevens' account may be distinguished from other 'substitutive damages' analyses, in that it is not based on the notion of a 'loss' at all. Compare his analysis with the following: A Tettenborn, 'Gain, Loss and Damages for Breach of Contract: What's in an Acronym?' [2006] *RLR* 112, 113; 'What Is a Loss?' *in Emerging Issues in Tort Law* (J Neyers et al eds, Hart Publishing 2007) 441; T Krebs, 'The Fallacy of Restitution for Wrongs' in *Mapping the Law: Essays in Memory of Peter Birks* (A Burrows, et al eds 2006) 379; D Pearce and R Halson, 'Damages for Breach of Contract: Compensation, Restitution and Vindication' (2008) 28 *OJLS* 73; F Reynolds, '*The Golden Victory*– A Misguided Decision' [2008] *Hong Kong LJ* 333; M McInnes, 'Account of Profits for Common Law Wrongs' in *Equity in Commercial Law* (S Degeling, et al eds, Thomson 2004) 416–18; 'Gain, Loss and the User Principle' [2006] *RLR* 76, 84–6; F Giglio, *The Foundations of Restitution for Wrongs* (Hart Publishing 2007); C Smith, 'Recognising a Valuable Lost Opportunity to Bargain when a Contract is Breached' (2005) 21 *JCL* 250, 259; J O'Sullivan, 'Reflections on the Role of Restitutionary Damages to Protect Contractual Expectations' in *Unjustified Enrichment* (D Johnston, et al eds, CUP 2002) 343; R Nolan, 'Remedies for Breach of Contract: Specific Enforcement and Restitution' in *Failure of Contracts* (F Rose ed, Hart Publishing 1997) 47; G Virgo, 'Restitutionary Remedies for Wrongs: Causation and Remoteness' in *Justifying Remedies in the Law of Obligations* (C Rickett ed, Hart Publishing 2008) 12–13.

obvious instances of what damages are about, i.e. providing a substitute for the claimant's infringed right. The courts, by vindicating the claimant's right in the form of awarding its value, put him in 'the next best position now achievable to the wrong not having occurred'.[70] This is the *purpose* of damages. Also, the *measure* of 'substitutive damages', as it follows from this analysis, is the value of the right infringed, that value being assessed by reference to the market or by constructing a reasonable hypothetical bargain between the parties where there is no market for the right.

B. Thesis Refuted

1. The Difficulty with the Suggested Purpose of Damages

As with McInnes' account, the main difficulty with the proposed purpose of damages according to Stevens' rights-based analysis is that in most cases in which the claimant's right is infringed, it still exists despite the infringement. Even though Stevens' thesis does not necessarily require that the claimant's right should be 'lost' if we are to hold the defendant liable to pay damages for his wrongdoing, it does require that the right should be gone in some sense as a result of the infringement by suggesting that the damages are 'substitutive'. The next best solution should require the provision of a substitute only for a right that is gone; a right that is merely infringed (or 'injured' according to some judicial decisions' terminology)[71] requires to be made good in some other way than being replaced altogether.

2. The Difficulty with the Suggested Measure of Damages

The critics' objections to Stevens' approach mainly turn around the difficulties that it encounters in explaining the doctrines that have long been established by the courts with regard

[70] R Stevens, 'Rights and Other Things' in *Rights and Private Law* (D Nolan, et al eds, Hart Publishing 2012) 145.

[71] Eg in *Shelfer v City of London Electric Lighting Co* [1895] 1 Ch 287*; Jaggard v Sawyer* [1995] 2 All ER 189.

to the *measure* of damages in private law. As the critics suggest, a 'substitutive damages' approach, especially with its emphasis on the distinction between damages for the value of the right and consequential compensatory damages, fails to explain the measure of damages in several different ways. For example, it contradicts the doctrine of the duty to mitigate,[72] is not in line with the principles adopted by the courts, governing the assessment time of damages, and encounters a difficulty in explaining the doctrine of election in some cases.[73]

Several of these difficulties, as Burrows suggests, have their origin in the flawed insistence that the measure of damages is based on the value of the claimant's right rather than the consequences of the infringement.[74] Edelman says similarly that if the damages are truly about valuing the right, the consequences of the infringement should be irrelevant.[75] He puts forward an example: A damages B's car resulting in a tiny dent in its bumper. C crashes B's car destroying it entirely. B would be entitled to the same measure of damages in the two occasions according to Stevens' thesis, because the damages would be based on the value of the claimant's right to the integrity of his car whether it was violated by a tiny dent or a colossal crash. Then he asks 'what makes the former crash a less severe infringement than the latter?' His answer is that it is the consequences of the infringement that makes the difference. Stevens' theory, Edelman suggests, fails to explain the difference between the measures of damages in

[72] The leading contract case on the duty to mitigate is *British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd* [1912] AC 673.

[73] For detailed criticism of Stevens' thesis on each of those grounds, see A Burrows, 'Are "Damages on the *Wrotham Park* Basis" Compensatory, Restitutionary or Neither?' in *Current Themes in the Law of Contract Damages* (D Saidov, et al eds, Hart Publishing 2008); *The Law of Restitution* (3rd edn, OUP 2011) 638–40; 'Damages and Rights' in *Rights and Private Law* (D Nolan, et al eds, Hart Publishing 2012) 278–80; J Edelman, 'The Meaning of Loss and Enrichment' in *Philosophical Foundations of the Law of Unjust Enrichment* (R Chambers, et al eds, OUP 2009) 219–21.

[74] 'Damages and Rights' in *Rights and Private Law* (D Nolan, et al eds, Hart Publishing 2012) 280.

[75] 'The Meaning of Loss and Enrichment' in *Philosophical Foundations of the Law of Unjust Enrichment* (R Chambers, et al eds, OUP 2009) 219.

these two kinds of incident by holding that the damages are about the value of the claimant's right rather than the consequences of the infringement.[76]

In response to the above example, Stevens may assert that the critics have misunderstood the rights-based view of the measure of the damages: even while insisting the distinction between damages for consequential loss and those based on the value of the right, the 'substitutive damages' approach explains the different measures of damages in those two incidents by focusing on a notion of 'consequence of infringement' that can convincingly be explained in terms of the value of the claimant's right. Because of the defendants' negligent actions on the two different occasions, the value of the claimant's rights of *ownership* is diminished to different degrees. The difference between the values of the claimants' right of ownership before and after the infringement, determined by reference to the difference between the market values of the car before and after the commission of the wrong, is not the same in the two cases. The measure of substitutive damages is and should be different in the two cases, because the value of the right is diminished to different degrees.

That sounds like a plausible defence of a rights-based thesis in that case. However, it will inevitably give rise to an even more fundamental objection relating again to the suggested purpose of the substitutive damages. The explanation of the damages as the difference between the market values of the claimant's right before and after the infringement obscures the idea that the damages provide a substitute for the claimant's right. The claimant's right of ownership, in the case of the damaged car, is still there after the infringement; what has happened is only that the value of the right is diminished. This may be described as a loss of/diminution in value of the claimant's right, but the 'loss of value of the right' analysis is defective, at least when it

[76] ibid.

is employed to explain cases of negotiation damages.[77] In addition, apart from this *purpose*-related objection, the general scale of the objections regarding the rights-based *measure* of damages stays intact. For example, where the claimant's car is damaged as a result of an accident and he pays for the cost of its repair, it is not clear why, according to a rights-based approach, he cannot claim cumulative damages, i.e. the consequential loss suffered in the form of the cost of repair plus the diminution in the value of his right of ownership. Moreover, where it is claimed that the measure of the cost of repair in fact reflects the value of the claimant's right,[78] it is not clear why it should be so. The same objection is valid with regard to Stevens' suggestion that in a case such as defamation, in which the claimant's right is infringed by an attack on his reputation, the measure of damages reflects the value of that right. It is difficult in cases like that to 'imagine that we sensibly can, or would want to, put a value on the right that has been infringed'.[79]

[77] See above text to n 25–27.

[78] As Stevens claims in *Torts and Rights* (OUP 2007) 61.

[79] A Burrows, 'Damages and Rights' in *Rights and Private Law* (D Nolan, et al eds, Hart Publishing 2012) 280.

CHAPTER THREE: A 'BENEFIT THEORY' OF COMPENSATION

INTRODUCTION

The thesis so far has been a negative one, a rebuttal of the views of others in relation to negotiation damages. In the rest of this thesis, I wish to propose a positive analysis as to how such damages are properly explained.

This chapter seeks to take the first and most vital step towards that purpose. It presents the initial framework for a theory of compensatory damages that, as it is shown in the next chapters, provides a solution for some of the most controversial problems in the law of damages, including 'negotiation damages'. Compensatory damages, according to the theory proposed here, exist to provide a monetary response to (what I will describe as) 'the claimant's loss of benefits' in cases in which the purpose of his primary right has been to protect/further those benefits. This chapter is an attempt to elaborate and clarify this. I will show the normative relation between the notions of 'a benefit' and 'a right'. This paves the way for clarifying, in the next step, where and why the claimant's primary right justifies his secondary right to be awarded damages in cases in which he suffers a loss of benefit as a result of breach. First, though, there is a caveat on the methodology of the argument in this chapter.

I. A NOTE ON METHODOLOGY

This is intended as a work of law, not jurisprudence or philosophy. Thus, while in this chapter I will borrow some basic tenets and notions respectively from jurisprudence and general philosophy in order to explain my understanding of compensatory damages, I will not engage

in philosophical debates concerning those tenets and concepts. However, the findings of the present and next chapters may inform those engaged in such debates by proving an account of whether/how those tenets work in law, or, how those notions are conceptualised by jurists. This is true in at least two respects.

First, while I will found my understanding of compensation on some basic tenets of the 'benefit/interest theory' (hereinafter called the 'benefit theory') of rights, the reader will not find here an exhaustive defence of the theory. My argument's departure point is the *assumption* that the benefit theory is the preferable theory of what 'a right' is there for. The varieties of the theory are not discussed either. My understanding of compensation is maximally neutral as to the question of which version of the benefit theory is most plausible: I have borrowed some basic tenets that are generally accepted by all or most versions of the theory. This is however not to say that the findings of this thesis can be of no utility for a legal philosopher working on theories of rights. After all, no conceptual analysis of a legal right can be correct a priori, without taking account of how it is conceived by those engaged with the law.[1] Those findings can accordingly be used by those who wish to consider whether and how specific performance in contract (Ch. 4), the basic measure of damages for breach of contract (Ch. 5), the law of remoteness in contract (Chs. 6 and 7), and negotiation damages (Ch. 8) reflect the benefit theory of rights. If it is successfully shown that these area of law actually reflect the benefit theory of rights, then those findings may inform the jurisprudential debate on rights by, for example, providing a response to one of Simmonds' objections to the benefit theory. While MacCormick and Raz— as two prominent advocates of the Theory— believe that primary legal rights may

[1] This is analogous to the account of the relation between analytical jurisprudence and empirical legal studies advanced, eg by W Twining, *General Jurisprudence: Understanding Law from a Global Perspective* (CUP 2009); *Globalisation and Legal Theory* (Butterworths 2010). For more on this approach and its varieties, see N Lacey, 'Analytical Jurisprudence versus Descriptive Sociology Revisited' (2006) 84 *U Texas LR* 944; B Leiter, *Naturalizing Jurisprudence* (OUP 2007); DJ Galligan, 'Concepts the Currency of Social Understanding of Law: A Review Essay on the Later Work of William Twining' (2015) 35 *OJLS* 1.

justify the recognition of secondary rights and duties,[2] Simmonds contends that 'it is far from clear that the forms of doctrinal argument whereby legal systems develop are best understood in terms of "rights"'.[3] The findings of next chapters may be seen as evidence that Simmonds is wrong in that respect.[4]

Second, my proposed understanding of compensation is partly predicated on the notion of 'benefit'. Where 'benefit/interest' is defined as an aspect of human well-being,[5] what that notion means will depend, at least partly, on one's philosophical conception of 'well-being'. Contemporary philosophical literature reflects three major accounts of well-being.[6] The so-called *desire/preference* theorists claim that humans become better off by receiving what they *desire/value*. The second account also employs a subjective test, but in a different way: Hedonists defend the idea that well-being depends only on the amount of pleasure and displeasure that a person receives. Objectivists believe, in contrast, that well-being does not depend on subjective states: a person can be better off without receiving what he desires/values. He can also be better/worse off without experiencing pleasure/displeasure.[7] But the reader will

[2] J Raz, *The Concept of a Legal System* (2nd edn, Clarendon Press 1980) 225–27; *Ethics in the Public Domain* (Clarendon Press 1994) 269; DN MacCormick, 'Rights in Legislation' in *Law, Morality and Society* (PMS Hacker, et al eds, Clarendon Press 1977) 204.

[3] NE Simmonds, 'Rights at the Cutting Edge' in *A Debate over Rights: Philosophical Inquiries* (M Kramer, et al eds, Clarendon Press 1998) 163.

[4] This provides an answer to only one of his objections of that sort, however. In addition, Simmonds contends that the benefit theory encounters 'theoretical' problems when treating 'rights as pivotal features of legal doctrine, providing reasons for the recognition of new remedies, duties, liabilities, and so forth': 'Rights at the Cutting Edge' in *A Debate over Rights: Philosophical Inquiries* (M Kramer, et al eds, Clarendon Press 1998) 114. For an account of what those problems might be, see ibid 164–5, 200–211.

[5] Text to n 19–23.

[6] D Parfit, *Reasons and Persons* (Clarendon Press 1992) 3–4; W Sumner, *Welfare, Happiness, and Ethics* (Clarendon Press 1996); R Crisp, *Reasons and the Good* (Clarendon Press 2006) 98.

[7] This is, though, the only thing that most objectivists have to offer at the level of provision of a theory of what makes something a source of well-being. What one finds in their works is merely a 'list' of sources of well-being. For this reason, their theories are famously referred to as the 'objective list theories' (See D Parfit, *Reasons and Persons* (Clarendon Press 1992) 4). For an example of an objective list theory, see: J Finnis, *Natural Law and Natural Rights* (2nd edn, OUP 2011).

not see discussions of that kind in the present thesis. Rather, what I will do is to offer a brief definition of the notion of 'benefit' in the present chapter, and then to show, throughout the next chapters, how that definition fits the way in which the *law* conceptualises that notion. The definition does not exactly follow either of the accounts of well-being mentioned above. Is this justified? The answer depends on whether the notions of 'benefit/interest' and 'well-being', which are proposed in the present thesis as being conceived by the law as what is intended to be protected/furthered by the claimants' right, have to be either 'subjective' or 'objective' in the precise sense defended by those philosophical accounts. The methodology that I have adopted is based on a negative answer. Legal analysis can have its own conceptualisation of concepts that are also defined by the analytical philosopher. In doing so, it can not only depart from analytical philosophy, but can (and must) even inform it.[8]

II. THE 'BENEFIT THEORY' OF RIGHTS

A. Context

Theories of rights may involve many different problems, ranging from the significance of rights in our moral, legal, or political thinking to the metaphysical question of what it means to say that a right exists. However, the main efforts of analytical philosophers in the English-speaking world has been focused on clarifying the *concept* and definition of 'a right' in the statement 'X has a right'. The latter question, too, has different aspects. While the acclaimed theory of rights proposed by Hohfeld[9] can be seen as an attempt to define the concept by clarifying its logical or *formal* nature,[10] various later analytical philosophers have focused on another aspect of the

[8] See above n 1.

[9] WN Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (W Cook ed, Yale UP 1923).

[10] A Harel, 'Theories of Rights' in *Blackwell Guide to the Philosophy of Law and Legal Theory* (MP Golding, et al eds, 2004) ch 13.

question. Their main concern has been to define[11] the concept of 'a right' by making reference to its *substance*, or, what exactly it is that it promotes, protects, or furthers. My focus here is on the latter issue. However, I do not seek to contribute to the longstanding battle on the question of the substance of a right. It is not necessary in the current context. My intention is only to outline briefly one of the most famous accounts of what our rights exist for, the benefit theory, the account on which my proposed understanding of compensatory damages will be based. Jeremy Bentham may be regarded as the first who offered a benefit theory of rights.[12] A revival of the benefit theory in modern times is, however, due to the debates started by HLA Hart's contribution to the study of the nature of rights in the mid-twentieth century[13]— when it was thought that legal philosophy, including theoretical analysis of rights, was dead or dying. Since the modern line of thought defending the benefit theory was mainly a response to Hart's choice/will Theory, it is useful to consider briefly what that theory stands for, before moving to the explanation of the benefit theory.[14]

B. Choice/Will Theory

The choice/will theory of rights claims that the significance of rights lies in the fact that they protect individuals' choice and its exercise. A right gives the right-holder control over another

[11] Cf NE Simmonds, 'Rights at the Cutting Edge' in *A Debate over Rights: Philosophical Inquiries* (M Kramer, et al eds, Clarendon Press 1998).

[12] See eg J Bowring, ed, *The Works of Jeremy Bentham* (11 Vols, William Tait 1843) iii. Some other early advocates of the interest/benefit theory include: WD Lamont, *The Principles of Moral Judgment* (Clarendon Press 1946); J Salmond, *Jurisprudence* (10th edn, Sweet & Maxwell 1947) s 75; R Pound, *Jurisprudence* (St Paul 1959) IV 53.

[13] See eg HLA Hart, 'Legal Rights' in *Essays on Bentham: Jurisprudence and Political Theory* (HLA Hart ed, Clarendon Press 1982) 162–93; 'Are There Any Natural Rights?' in *Theories of Rights* (J Waldron ed, OUP 1984).

[14] Benefit/interest and choice/will theory are the most acclaimed accounts of what rights are there for, but not the only ones. For an alternative view, rejecting both the theories, see Alan White, *Rights* (OUP 1984).

person's duty, making the right-holder analogous to a 'small-scale sovereign'[15], thereby promoting individuals' autonomy, self-determination, and personhood. In other words, the theory asserts that one's having a certain right depends on the recognition by the law of the pre-eminence of his choice/will over that of others in respect of a given subject.[16] Private law is often the object of particular emphasis by choice theorists, as instances of choice-protecting rights are perhaps most obvious in this area of law. Claims, correlated to duties in the Hohfeldian scheme of rights, are coupled with the right-holder's power of enforcement and waiver. An individual, having a right of exclusive use of property, for instance, is empowered to waive the correlative duty of one who wishes to use the property, a contractual right requiring the promisor to abide by positive terms of the contract can be enforced or waived by the promisee, and so on.[17] Rights accruing to the individual subsequent to an infringement are also considered by Hart: he may choose to waive the wrongdoer's obligation to pay compensation.[18] Power-rights, those giving one the ability to make a certain change in one's legal position, also directly facilitate the exercise of choice: for example, one's utterance may be recognised as a declaration of trust over certain property.

[15] HLA Hart, 'Legal Rights' in *Essays on Bentham: Jurisprudence and Political Theory* (HLA Hart ed, Clarendon Press 1982) 183.

[16] DN MacCormick, 'Rights in Legislation' in *Law, Morality and Society* (PMS Hacker, et al eds, Clarendon Press 1977) 192.

[17] Note that one may plausibly suggest that the choice theorist would not say 'a right of exclusive use of property *plus* a power of waiver' or 'a contractual right *with* a power of waiver and enforcement', because for him, a right consists of a claim plus those powers. The choice theorist would describe the individual's right in those cases simply as 'a *claim* over exclusive use of property plus a power of waiver' and 'a contractual claim with a power of waiver/enforcement' (See M Kramer, 'Rights without Trimmings' in *A Debate over Rights: Philosophical Inquiries* (M Kramer, et al eds, Clarendon Press 1998) 99). Though the main point for the present purposes is that in any event, according to choice theory, the individual's exercise of his will is *the* element making a right significant (or constituting the concept of 'a right', if you like).

[18] HLA Hart, 'Legal Rights' in *Essays on Bentham: Jurisprudence and Political Theory* (HLA Hart ed, Clarendon Press 1982) 183–84.

C. Benefit/Interest Theory– Main Tenets

The Benefit Theory of rights has various different versions. My understanding of compensation is, however, based on a few basic tenets that are accepted by most (if not all) accounts of the Benefit Theory, as explained below.

1. Rights Protect/Enhance Individuals' Well-Being

The basic idea underlying all accounts is that rights protect/enhance individuals' well-being.[19] Every right is there to protect/enhance one or more aspect of the right-holder's well-being by protecting/furthering one or more benefits/interests. This idea may be presented in one of at least three ways as follows, in terms that I will use interchangeably throughout this thesis:

- rights *are there to* protect/further certain benefits, thus protecting/enhancing the right-holder's well-being; or
- the *purpose* of a right is to protect/further one or more benefits, thus protecting/enhancing the right-holder's well-being; or
- the *reason underlying* the existence of a right is to protect/further certain benefits, thus protecting/enhancing the right-holder's well-being.

A right not to be injured without consent is there to protect the benefit of bodily integrity and therefore the right-holder's well-being. A right of property in respect of a chattel includes a bundle of rights, each of which protecting one or more benefits: the benefit of having the exclusive possession of the chattel, the benefit of having the use of it, etc. My contractual right of being delivered a vessel that I have chartered for a specific period of time is there to enhance

[19] See M Kramer, 'Rights without Trimmings' in *A Debate over Rights: Philosophical Inquiries* (M Kramer, et al eds, Clarendon Press 1998) 61; 'Refining the Interest Theory of Rights' (2010) 55 *American J of Jurisprudence* 31, 33.

my well-being by furthering the benefit of having the possession of the vessel from the time specified in the contract. And so on.

2. Not all Benefits Protected by Rights

Perhaps obviously, the theory does not hold that rights and benefits are so intertwined that, as well as all rights protect benefits, all of the individuals' interests in whatever is beneficial are also protected by rights. People may, and actually do, have many interests whose protection the law does not guarantee. This is, for example, the case where X has caused damage to Y's land, but Y does not have a right to be recompensed for it, because his claim is barred by the passage of time. Simpler examples are also abundant. I may regard having the possession of your land as a benefit, but I do not have a right to its wrongful possession. Rights determine what benefits are to be protected/enhanced for an individual in the ever existing state of conflict of interests.

3. Rights Protect/Further What is 'Normally' Regarded as a Benefit

From the benefit theorist's claim that rights are there to protect or further certain benefits, it does not follow that it is 'necessarily the case that each individual acquiring a right under the law should experience it as a benefit'.[20] A property, for instance, may be more trouble to its owner than it is worth. Another example is the worker whose right under minimum wage laws actually leaves him jobless, since he does not have the necessary skills to be employed at the level of wage set by the law.[21] The fact that the right-holder might have no interest in the benefit

[20] DN MacCormick, 'Rights in Legislation' in *Law, Morality and Society* (PMS Hacker, et al eds, Clarendon Press 1977) 202; also 'Rights, Claims and Remedies' (1982) 1 *Law and Philosophy* 337, 338; J Raz, 'On the Nature of Rights' (1984) 93 *Mind* 194, 208; J Waldron, *The Right to Private Property* (Clarendon Press 1988) 89–90; D Lyons, 'Rights, Claimants, and Beneficiaries' in *Rights, Welfare, and Mill's Moral Theory* (D Lyons, OUP 1994) 27.

[21] I have borrowed this example from M Kramer, 'Rights without Trimmings' in *A Debate over Rights: Philosophical Inquiries* (M Kramer, et al eds, Clarendon Press 1998) 94–5.

that the right is there to protect, because, for example, all things considered he finds it detrimental, is not in conflict with the benefit theory's claim, since the claim is only that that rights protect/further what would *normally* be regarded as a benefit.[22]

III. A 'BENEFIT THEORY' OF COMPENSATION

This section is explaining my understanding of compensation in private law. While the previous section drew the nature of rights, the present section clarifies whether and how it justifies the award of damages in cases where a right is infringed. In order to clarify that understanding on a solid ground, it is necessary first to define two concepts that form its core: 'benefit', and 'loss of benefit'.

A. Definitions

1. 'Benefit'

'Benefit/interest' is an aspect of human 'well-being'.[23] It is defined in this thesis as *anything that is valued*[24]*, either objectively or subjectively*.

In order for a thing to be a benefit, it needs therefore only to be valued, either subjectively or objectively. However, where a thing without objective value is claimed to be valued

[22] DN MacCormick, 'Rights in Legislation' in *Law, Morality and Society* (PMS Hacker, et al eds, Clarendon Press 1977) 202. This thesis shows that while this tenet is correct, yet it may need to be adapted somewhat in light of the existing law. The law has a more exhaustive conceptualisation of 'benefit' for the purpose of receiving protection by a legal right. For that purpose, the law considers a thing as a 'benefit' not only where it is 'normally' valued, but also, under certain circumstances, where it is subjectively valued by the right-holder.

[23] J Raz, 'On the Nature of Rights' (1984) 93 *Mind* 194, 195; 'Legal Rights' (1984) 4 *OJLS* 1, 1. As for the definition of well-being, it is described as 'what is good *for* individuals' (compared with the question of 'what is good in general'). See, GE Moore, *Principia Ethica* (CUP 1903) 98–9; TM Scanlon, *What Do We Owe to Each Other?* (Belknap Press 1998) for two major criticisms of the very notion of 'well-being'.

[24] Or (in equal terms) 'is taken an interest in' or 'desired'.

subjectively, the valuation has to be genuine 'and not merely… to secure [in contractual contexts, for instance,] an uncovenanted profit'.[25]

2. 'Loss of benefit'

A loss is always a loss of a *thing*. That thing is always a 'benefit'.[26]

This is a factual notion of loss in the sense that it relates to the deterioration/non-enhancement of the claimant's well-being by losing/not receiving the benefits to which he is entitled. A 'loss of benefit' can therefore occur in two ways. *First,* it can be suffered where the claimant becomes *worse off* by losing a benefit to which he is entitled. So, if I own a car, it is a benefit, since reasonable people value having ownership of a car; if my car is stolen and converted, I have suffered loss by losing that benefit. Similarly, if my car is damaged in an accident, I have suffered a loss of benefit equal to the difference between its value before and after the accident. *Second,* it can occur where the claimant does *not* become *better off* through receiving a benefit that he is entitled to receive. So, where I do not receive, say, £10,000 credited into my account which I was entitled to receive under a service contract, I suffer a loss of benefit equal to that amount: people reasonably value receiving £10,000, so it is a benefit; and I have suffered loss

[25] *Radford v De Froberville* [1977] 1 WLR 1262 (Ch), 1270. See Ch 8 text to n 41–48, where this point is discussed to clarify the decision of Court of Appeal in *Surrey County Council v Bredero Homes Ltd* [1993] 1 WLR 1361.

[26] Just above, I defined a benefit as something that is 'valued'. It can equally be defined in terms of what is taken an 'interest' in or 'desired'. Now, where it is regarded as something that is 'desired', my account of loss becomes similar to that proposed by James Edelman ('The Meaning of Loss and Enrichment' in *Philosophical Foundations of the Law of Unjust Enrichment* (R Chambers, et al eds, OUP 2009)). Where it is defined in terms of 'interest', the account becomes similar to that offered by A Tettenborn ('What is a Loss?' in *Emerging Issues in Tort Law* (Jason Neyers et al eds, Hart Publishing 2007)). However, despite similarities, Edelman's and Tettenborn's accounts differ from the 'loss of benefit' account of loss in some important ways. For instance, while Tettenborn believes that any attempt to provide a definition of 'loss' is doomed to fail, I have provided a definition here. More importantly, both Tettenborn's and Edelman's accounts fail to show the context to which respectively the notions of 'interest' and what the claimant 'desires' belong. These notions' normative relations to the claimant's right and the defendant's liability to provide compensation therefore remain unclear in their accounts. That context and the aforementioned normative relations are revealed immediately below.

by not receiving the benefit which I have been entitled to receive. There are infinite instances of these two possible forms of loss. I used two simple examples simply to show the patterns.

B. The Theory

It was explained that the reason underlying a right is to protect/further certain benefits, thereby protecting/enhancing the right-holder's well-being. Based on that conception of the function of a right, the understanding of compensation defended in this thesis is as follows:

where the claimant's primary right is infringed and a loss of benefit is suffered as a result, the reason underlying the existence of the right, i.e. the protection/furtherance of that benefit, does not just disappear; it remains in existence, justifying the defendant's liability to pay damages placing the claimant, so far as money can, at the level of well-being he would have been had he not lost that benefit.

Where a loss is suffered according to this definition, it is always to be recoverable when the recovery is justified by the normative force of the claimant's right. This applies whether the loss is pecuniary or not. It is the task of the next chapters of this thesis to examine this theory of compensation in many different contexts by testing its power to explain the case law and its possible advantages over some of the most significant theories of damages.

CHAPTER FOUR: SPECIFIC REMEDIES IN CONTRACT

INTRODUCTION

In order to found my thesis on a firm basis, I will attempt in the present and the next chapter to demonstrate that the 'loss of benefit' theory is by no means a theory invented solely to provide a solution for the difficult problem that I have in hand, but it also has a wider application to the law of damages. In order to accomplish this task, I could, in theory, attempt to explore the whole area of damages. However, due to the scope of my thesis, I will limit myself to only one major area. That will be *contract remedies*. It is a fertile area for my purpose, since — as it will be shown — the vast majority of it is, in fact, best explained in terms of the 'loss of benefit' thesis.

In this chapter, I will first consider the dominant conception of the purpose of remedies in contract, most famously represented by Daniel Friedmann's work, and explain how the 'loss of benefit' theory offers a revised version of it. Then I will attempt to show that this revised version is capable of offering a better explanation for 'specific remedies' in contract. In doing so, I limit myself to the discussion of the major specific remedies in this area, as Daniel Friedmann also does in his work. The other major contract remedy, i.e. expectation damages, will be discussed at further length in the next two chapters.

I. WHAT ARE CONTRACT REMEDIES THERE FOR?

The most pivotal question in contract theory is perhaps that of the purpose or function of contract *remedies*: what are they there for? Amongst the various remedies for breach of contract, however, the focal point of the debate, at least since 1936 when Fuller and Perdue wrote their

seminal article in this area,[1] has been the purpose of *damages*, in particular, the most typical of them, the so-called 'expectation damages'. Other contract remedies have also been addressed, as in the perhaps best-known response to Fuller and Perdue — 'The Performance Interest in Contract Damages'[2] — in which Daniel Friedmann draws a picture of contract remedies in which all major remedies in contract are there to serve a single purpose.

A. Friedmann's Positive Thesis

Fuller and Perdue's work involved an attempt to revolutionise the dominant conception of the nature of contract damages by attacking the very concept of 'expectation damages'. They suggested that the main concern in respect of the award of these damages is not to protect the claimant's 'expectation interest', i.e. his interest in what he expected to receive as a result of the other party's performance, but to protect the claimant's 'reliance interest' by providing compensation for the losses he has suffered as a result of relying on the defendant's promise. Several decades later, Daniel Friedmann provided a response to that argument, which has a negative and a positive aspect. Its *negative* aspect is that Fuller and Perdue' thesis, even though remarkably successful in introducing its proposed terminology to the common law world, has to fail in most of its substantive claims.[3] I fully agree with Friedmann in this respect.

However, Friedmann's work also has a *positive* aspect that is more important for the purpose of a debate on the nature of these damages in contemporary times. In Friedmann's view, the chief aim of contract remedies is to protect the claimant's expectation interest — or 'performance interest', in his preferred terminology.[4] According to him, expectation damages,

[1] Fuller and Perdue, 'The Reliance Interest in Contract Damages: 1' (1936) 46 *YLJ* 52.

[2] D Friedmann, 'The Performance Interest in Contract Damages' (1995) 111 *LQR* 628.

[3] ibid 646–54.

[4] ibid 629.

as the most significant contract remedy, are 'compensating' and 'substitutional' damages that protect the claimant's performance interest by providing a substitute for it in the form of a monetary award equal to the value of performance;[5] and furthermore that the protection of the claimant's performance interest is the main aim of other contract remedies. He presents a cohesive picture in which 'specific performance', 'an order to pay the agreed sum', 'recovery of a substitute', and 'restitution of profits' all also exist to protect that interest. It is this positive thesis that I intend to examine and revise. However, in this and the next chapters, I will limit myself to the discussion of expectation damages plus the first two of the latter remedies.

B. Friedmann's Normative Foothold

In their discussion of possible justifications for expectation damages, Fuller and Perdue referred to the 'will theory' of contract law.[6] They described it as a theory viewing 'the contracting parties as exercising, so to speak, a legislative power, so that the legal enforcement of a contract becomes merely an implementing by the state of a kind of private law already established by the parties'.[7] Then they continued: 'If a contract represents a kind of private law, it is a law which usually *says nothing at all about what shall be done when it is violated*'.[8] Making such argument was intended to pave the way for their claim that accordingly, it would be unproblematic to introduce 'a rule which limited damages to the reliance interest' rather than the expectation interest.[9]

[5] ibid 630.

[6] 'The Reliance Interest in contract Damages: 1' (1936) 46 *YLJ* 52, 58–59.

[7] ibid 58.

[8] ibid (emphasis added).

[9] ibid.

Friedmann, in contrast, argues that there is certainly a logical nexus between the parties' contractual rights on one hand and the remedies available for breach on the other hand:[10]

> It is […] an unwarranted jump to conclude that the right tells us *nothing* about the remedy and that rights and remedies raise totally unrelated issues. It is submitted that the very recognition of a legal right entails some consequences regarding the remedy.[11]

In fact, his work shows that he regards the recognition of a legal right as entailing more than just 'some consequences',[12] at least in contract. What he finds there is a remedial *principle*, which, for the present purposes, may be formulated in the following:

> (1) The recognition of X's contractual right dictates a norm, requiring Y's performance. Contract remedies are there to serve that norm by protecting X's interest in Y's performance. So, in cases of breach, specific remedies are there to ensure performance. Similarly, expectation damages are designed to serve that norm by providing a substitute for the value of performance where performance itself is out of question.
>
> (2) However, the normative aspect of the right only provides 'the initial point of inquiry' with respect to the right's value.[13] The availability of remedies 'may be *qualified or subject to exceptions*. The initial point is, however, clear'.[14]

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[10] For similar beliefs, see eg SA Smith, 'Rights, remedies, and Normal Expectations in Tort and Contract' (1997) 113 *LQR* 426; 'The Reliance Interest in Contract Damages and the Morality of Contract Law' in *Issues in Legal Scholarship* (bepress.com 2001) 36; D Wright, 'Wrong and Remedy: A Sticky Relationship' [2001] *Singapore JLS* 300; M Tilbury, 'Remedies and the Classification of Obligations' in *The Law of Obligations: Connections and Boundaries* (A Robertson ed, UCL Press 2004); D Pearce and R Halson, 'Damages for Breach of Contract: Compensation, Restitution and Vindication' (2008) 28 *OJLS* 73; R Stevens, 'Rights Restricting Remedies' in *Divergences in Private Law* (A Robertson, et al eds, Hart Publishing 2016) 167.

[11] 'The Performance Interest in Contract Damages' (1995) 111 *LQR* 628, 637 (emphasis in original); also see 'Rights and Remedies' (1997) 113 *LQR* 424, 425; 'Rights and Remedies' in *Comparative Remedies for Breach of Contract* (N Cohen et al eds, Hart Publishing 2005) 3.

[12] 'The Performance Interest in Contract Damages' (1995) 111 *LQR* 628, 637.

[13] ibid.

[14] ibid (emphasis added).

The first limb regards the remedial principle in contract, while the second limb concerns its limits. So, the recognition of a contractual right justifies a remedial *principle* in *all* cases of breach, even though there may be factors *external* to the contract that may outweigh that justification, thus qualifying the remedy. Take the issue of expectation damages for consequential losses, for instance. Consequent on Y's breach, X suffers a loss of business profits that would have resulted from Y's performance. Friedmann's principle justifies the recovery of that loss, since the value of X's right is reflected by the profits that performance would have yielded for him (less the expense, if any, of making those profits). That is 'the initial point of inquiry'.[15] However, if these damages are regarded too remote in the circumstances, the measure of recovery will be limited because of external reasons.[16]

C. The 'Purposive Approach'– Friedmann's Thesis Revised

In opposing Fuller and Perdue's belief that there is no normative link between the recognition of a contract and the available remedies, Friedmann cleverly replaced the notion of a *contract* with that of a contractual *right*. This is unproblematic.[17] However, in finding such normative relation, Friedmann does not take account of any theory of rights; he simply founds the entirety of his argument on the premise that 'a contractual promise is legally binding',[18] a premise that is compatible with various theories of rights.[19] I share Friedmann's view that the legally binding

[15] ibid.

[16] That Friedmann believes that the said principle provides the initial point of inquiry with respect to consequential losses in addition to the basic measure of recovery can clearly be inferred from his arguments in ibid 650–653. There, he explains and justifies the attitude of US law, which takes an expansionist approach to recovery for lost profits in contract.

[17] After all, it is not exactly the parties' agreement that makes them small sovereigns, but the law's recognition of it and the relevant legal rights that it confers on them.

[18] 'The Performance Interest in Contract Damages' (1995) 111 *LQR* 628, 636.

[19] What it takes to accept it is simply to be a positivist believing in the binding character of contractual rights when they are recognised by the law.

force of one's right entails a remedial principle in cases of breach. I also agree that such principle has to do with the claimant's performance interest. However, my contention is that Friedmann's positive thesis would explain more if it based itself on a more elaborate account of what it is to say that one has a right. By giving different answers to the latter question, theories of rights may provide divergent answers to the question of available remedies in a case of breach. So, for example, if Friedmann wanted to demonstrate a link between contractual rights and remedies on the basis of the 'will theory' of rights, he would probably have a difficult time.[20] This can be acknowledged simply by noting that the perhaps most prominent will theorist in contemporary times, Nigel Simmonds, rejects the plausibility of explaining remedies based on rights.[21] On the other hand, it is submitted, he would be on stronger ground if he founded his thesis on the 'benefit/interest theory' of rights. As opposed to Simmonds' view, two prominent benefit theorists, Joseph Raz and Neil MacCormick, believe that remedies can be justified based on rights.[22] The debate is a philosophical one, and I do not intend to provide a philosophical contribution to it. Rather, I will attempt to show how the *law* can be conceived and understood more clearly when viewed in the normative light shed by the benefit theory. In doing that, I first need to draw an outline of my proposed account of contract remedies

[20] It would be tempting to say that Fuller and Perdue were accordingly not plainly wrong when they believed that such relationship cannot be found by looking at the 'will theory' of contract law. At first glance, their description of the latter theory seems closely akin to the definition of the will theory of rights. In an important article on theories of contract which can have influenced Fuller and Perdue's work, MR Cohen ('The Basis of Contract' (1933) 46 *HLR* 553, 575) gives a definition of the main tenet of the 'will theory' that is similar to the definition of the will theory of rights. However, there are two difficulties with regarding Fuller and Perdue as having subscribed to the will theory. *First*, Fuller and Perdue wrote their article at a time when the will theory had not yet been introduced by HLA Hart. *Second*, the will theory is an *analytical* account, whereas Fuller and Perdue seem to have had a *normative* theory of contract law in mind.

[21] NE Simmonds, 'Rights at the Cutting Edge' in *A Debate over Rights: Philosophical Inquiries* (M Kramer, et al eds, Clarendon Press 1998) 163.

[22] DN MacCormick, 'Rights in Legislation' in *Law, Morality and Society* (PMS Hacker, et al eds, Clarendon Press 1977) 204; J Raz, *The Concept of a Legal System* (2nd edn, Clarendon Press 1980) 225–27; *Ethics in the Public Domain* (Clarendon Press 1994) 269.

(hereinafter called the 'purposive approach'), which is based on the benefit theory's main tenet, i.e. that rights are there to protect/enhance well-being. That account is as follows.

One's having a contractual right means that the other party ought to perform. However, it is an unwarranted jump to say that, accordingly, the recognition of a legal right justifies a remedy (which can be qualified or excluded by external factors) protecting a valuable performance in all cases of infringement. This is because *the right's imperative call to perform has a 'purpose', and remedies are only justified when and so far as they serve that purpose. That purpose is the protection/enhancement of the right-holder's 'well-being' by means of furthering certain benefits expected to result from the performance*. Major contract remedies are based on the said principle:

1. Specific performance ensures the claimant right-holder's well-being by giving him the exact same benefit as that which he is to receive according to the terms of his right. The remedy may be denied when damages adequately ensure the right-holder's well-being.

2. An order to pay the agreed sum ensures the claimant right-holder's well-being by giving him the exact same benefit as that which he is to receive according to the terms of his right. It may become unavailable when (a) the receipt of the agreed sum would not enhance the claimant's well-being, or (b) where the ultimate purpose of the claimant's right is not to ensure the receipt of the agreed sum, but to enhance the claimant's well-being by the receipt of a different benefit whose loss can adequately be recovered by way of damages.

3. Expectation damages put the claimant right-holder, so far as money can, in the same state of well-being as if he had received those benefits, expected to result from the performance, that it was the purpose of his right to ensure. This explains the basic measure of recovery as well as damages for consequential losses, and the latter's limits.

II. SPECIFIC PERFORMANCE

A. The Analytical Advantage of a Purposive Approach

The first question coming to mind with regards to Friedmann's approach is a simple one: if the chief aim of contract is to ensure performance, why are damages awarded at all where specific performance is possible? After all, specific performance ensures the exact same performance, while, according to Friedmann, damages only provide a substitute for it. Friedmann would respond that this is for external reasons rendering the award unfair or against good policy in situations involving a want of mutuality,[23] uncertainty,[24] a contract of personal service,[25] etc. However, a second, more difficult question would be: why is it that the specific remedy generally becomes available only when damages are inadequate? Put another way, if performance is of an inherent importance, why is specific performance not the *primary* award in common law? In responding to this question, could Friedmann go so far to claim that that is also due to external reasons? This would be to suggest that there are external reasons which justify placing what the law is there to protect (i.e. performance) in a position subordinate to the award of its substitute. This seems absurd.

A better explanation for the law's attitude can be provided by the purposive approach. While the parties to a contract expect it to be performed, the performance is not of an inherent importance, but a *teleological* one aiming ultimately at protecting/enhancing the parties' well-being to an extent required by the underlying purposes of their rights. That being so, where damages adequately protect/enhance the claimant's well-being, the two awards are normatively

[23] *Price v Strange* [1978] Ch 337, [1977] 3 WLR 943, 361.

[24] *Moseley v Virgin* (1796) 3 Ves 184, (1796) 30 ER 959; *Wilson v Northampton and Banbury Ry Co* [1874] LR 9 Ch App 279.

[25] *Scott v Rayment* [1868] LR 7 Eq 112; *Rigby v Connol* [1880] 14 Ch D 482, 487.

in an equal position. It will then be completely justified to leave the question of which remedy is to be preferred, to external considerations, such as the economic efficiency of making damages the primary remedy.[26] Where, however, damages inadequately serve that purpose, the justified remedy is specific performance, provided of course that external reasons such as fairness or policy do not bar it. This purposive account of the relation between the two remedies clarifies the underlying reason for the approach of the common law, according to which the question of adequacy is considered first and only then, it is asked whether specific performance is inappropriate due to uncertainty, etc.

B. The Purposive Explanation of Doctrine

While the purposive approach was judged above to be preferable because of its analytical advantage in explaining the primacy of damages where they are *adequate*, my aim here is simply to demonstrate that it also clarifies the attitude of the law when damages are regarded as *inadequate* just as well as Friedmann's approach would do.

The perhaps best-known situation in which damages are regarded as inadequate is believed by the orthodoxy to be where substitute performance cannot be bought in the market,[27] which notably includes cases of sale of unique goods and of shares in which the claimant has a controlling interest. However, this can, alternatively, be explained by saying that damages are inadequate when they inadequately protect/enhance the claimant's well-being, as follows.[28]

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[26] See eg RA Posner, *Economic Analysis of Law* (Aspen Publishers 2003) h 4.

[27] A Burrows, *Remedies for Torts and Breach of Contract* (3rd edn, OUP 2004) 458–66.

[28] The situations in which damages are regarded as inadequate are by no means limited to the above circumstances. My intention here is simply to analyse the most significant of them in terms of principle. One case of inadequacy, for example, which is not discussed in the text, is the House of Lords' decision in *Beswick v Beswick* [1968] AC 58. On a correct analysis, the promisee had suffered a loss in that case which was non-pecuniary and therefore difficult to assess (see Ch 5 text to n 96–135). It is suggested that similar to cases of uniqueness, specific performance was more appropriate there, since damages could not be assessed with precision. Cf *Sky Petroleum Ltd v VIP Petroleum Ltd* [1974] 1 All ER 954.

Where the claimant purchases goods but the defendant fails to deliver, the subject matter of the contract may be considered unique if it is of high importance or sentimental value for the claimant, such as things of special beauty or rarity.[29] In these situations, the purpose of the purchaser's right to the seller's performance is to ensure that the former will be made better off to an extent determined by the value of the unique object. However, no correct *monetary* value can be attributed to a unique object. Where, for instance, it is a thing of special beauty or rarity, it is often valued by the claimant for aesthetic or sentimental reasons. The monetary award would not make the claimant better off in the same way as specific performance will do. Even where the object is valued for monetary reasons, as where the buyer is a dealer, damages are often inadequate, since they cannot be measured with precision.[30] So, in the leading case of *Falcke v Gray*,[31] where the claimant was a dealer who had bought a pair of china jars that had not been delivered to him, the court said that it would be prepared to award specific performance.[32] This was because, as pleaded by the claimant and accepted by the court, while the goods could be valued in a market,[33] any measurement of their value on that basis would have been artificial and fanciful.[34] Of course, even where no precise measure can be attributed to the value of a benefit, the law is prepared to fix a measure if it has to.[35] But that is not the

[29] *Falcke v Gray* (1859) 4 Drew 651, 658; 62 ER 250, 252.

[30] This has been said to be the root justification for the specific remedy with respect to unique goods: A Burrows, *Remedies for Torts and Breach of Contract* (3rd edn, OUP 2004) 466.

[31] (1859) 4 Drew 651, 62 ER 250.

[32] Specific performance was refused on other grounds: see ibid 252–55.

[33] ibid 253.

[34] ibid.

[35] See, in general, *Simpson v London and Northwestern Railway Co* [1876] 1 QBD 274; *Chaplin v Hicks* [1911] 2 KB 786; *Allied Maples Group v Simmons and Simmons* [1995] 1 WLR 1602; *Flame SA v Glory Wealth shipping PTE Ltd, the Glory Wealth* [2013] EWHC 3153 (Comm), [2014] QB 1080.

case where specific performance is an option and serves the purpose of the claimant's right in a better way.[36]

This analysis also explains the reason for the attitude of the law with respect to the breach of a contract to transfer interests in land, where specific performance is readily ordered.[37] Regarding the vendor's obligation, this has traditionally been explained on the basis that each piece of land, in contrast with ordinary chattels, has unique features.[38] This is generally true. Even where a unique object has an objective value that can be ascertained with precision, as in typical cases of sale of land, specific performance is the appropriate remedy, since it can generally be *assumed* that a purchaser has a *subjective* interest in a unique object which cannot adequately be protected by a monetary award measured on an *objective* basis.[39] However, in the end, it is all about the claimant's well-being, not the unique object's features *per se*. This point was stressed by Sir John Leach in *Adderley v Dixon*, where he said:

> Thus a Court of Equity decrees performance of a contract for land, not because of the real nature of the land, but because damages at law, which must be calculated upon the general money value of land, may not be a complete remedy to the purchaser, *to whom* the land may have a peculiar and special value.[40]

There is, therefore, no reason to order specific performance where the aforementioned assumption is clearly wrong *and* damages can be measured with precision. Where, for example, the vendee's engagement in the contract is motivated by profit, or, *a fortiori*, it can be shown

[36] Cf *Fothergill v Rowland* [1873] LR 17 Eq 132; *Société des Industries Métallurgiques SA v Bronx Engineering Co Ltd* [1975] 1 Lloyd's Rep 465, 468, 469–470.

[37] *Sudbrook Trading Estate v Eggleton* [1983] 1 AC 444, 478.

[38] J Beatson, et al eds, *Anson's Law of Contract* (30th edn, OUP 2016) 611. An alternative explanation is that purchasers under land contracts acquire an immediate equitable proprietary interest (M Chen-Wishart, *Contract Law* (5th edn, OUP 2015) 566).

[39] Normally, the market value of land.

[40] (1824) 1 Sim & St 607, 57 E.R. 239, 240 (emphasis added).

that the land is not unique at all (which is quite possible in modern times) it is not clear why a correctly measured amount of damages would not make the claimant as well off as specific performance will do.[41] Assuming that a correct value can be determined, the Canadian approach will, accordingly, be preferable. In *Semelhago v Paramadevan*, the Supreme Court held that a claimant in a contract for the sale of land is not entitled to specific performance where the land is not unique,[42] such as where it is one of a set of subdivision lots with houses with the same design constructed on them.[43]

Another well-known situation in which damages are regarded as inadequate because of the claimant's inability to buy a substitute is the breach of a contract of sale of shares in situations where the purchaser is to obtain the control of a company by receiving the shares. Specific performance will be awarded in these situations, while it is generally not available in respect of the sale of ordinary shares.[44] In the leading decision of the House of Lords in *Harvela Investments Ltd v Royal Trust Co of Canada Ltd,*[45] the claimants were shareholders in a company in which the first defendants and the second defendants and their family also owned shares. Both of the claimants and the second defendants offered to purchase the first defendants' shares. Either of them would have gained control of the company by acquiring the shares. The claimants offered C$2,175,000 and the second defendants offered C$2,100,000 or C$101,000 in excess of any other offer. The first defendants accepted the second defendants' offer. The

[41] See A Burrows, *Remedies for Torts and Breach of Contract* (3rd edn, OUP 2004) 459.

[42] [1996] 2 SCR 415, [20] – [23]: delivering its judgment with respect to the issue of the adequacy of damages in those pages, the Court relied on the above passage from *Adderley v Dixon* (1824) 1 Sim & St 607, 57 ER 239.

[43] Eg in *Chaulk v Fairview Construction Ltd* [1977] 14 Nfld & PEIR 13 (Nfld CA).

[44] *Cud v Rutter* (1720) 1 P Wms 570, 24 ER 521. This is not to say that specific performance is never available in respect of ordinary shares. There may be reasons, other than the claimant's having a controlling interest, that justify specific performance based on the doctrine of inadequacy: see, eg *Duncuft v Albrecht* (1841) 12 Sim 189; *Langen and Wind Ltd v Bell* [1972] Ch 685; also *Doloret v Rothschild* (1824) 1 Sim & St 590 (though the case was about the delivery of certificates giving legal title to stocks).

[45] [1986] AC 207.

House of Lords held that the first defendants' presumed intention was to create a fixed bidding sale and that, therefore, no contract between them and the second defendants had come to existence. The House ordered specific performance of the contract between the claimants and the first defendants on the ground that damages based on the market value of the shares would be inadequate.[46] This decision is best explained by the purposive approach. The claimants clearly valued the promised shares over and above the value of ordinary shares because the former would give them the control of the company, whereas damages based on the market value of the shares would have only made them as well off as if they had received ordinary shares. Specific performance was, therefore, the appropriate remedy.

Part of the House's order related to a period of nearly four years between when the contract had had to be completed and when specific performance was to take place. Among other things, the House ordered the payment of 'the amount of the dividend and interest (if any)'.[47] That amount reflected the *use value* of the shares for that period.[48] Its payment was ordered since it was also a purpose of the claimant's right to ensure the benefit of his possession and use of the shares for that period.[49] This amount was trivial.[50] However, more importantly for the present purposes, section (5)(c) of the order also required an inquiry as to damages (if any) suffered by the claimants in that period.[51] One can see by considering the trial judge's

[46] Even if there had been a valid contract between the first and second defendants, it would not necessarily have meant that the claimants were not entitled to the award of specific performance: the trial judge had ordered specific performance of the contract between the claimants and the first defendants, while also believing that a second contract between the first defendants and the second defendant existed which was not possible to be specifically performed, considering the presumed intention of the first defendants with regard to the bid.

[47] *Harvela Investments Ltd v Royal Trust Co of Canada Ltd* [1986] AC 207, 238.

[48] See Ch 8 text to n 33–37.

[49] However, it may also alternatively be said that the claimant was entitled to the dividend since he had a proprietary interest in the shares since the intended completion date of the contract.

[50] *Harvela Investments Ltd v Royal Trust Co of Canada Ltd* [1986] AC 207, 227.

[51] ibid 239.

decision that this must have related to the claimants' being deprived of having the control of the company for that period. The trial judge had stated:

> Harvela [the claimants] claim damages for the failure by Royal Jersey [the first defendants] to complete on the contractual completion date and it asks for an inquiry as to damages. It is conceded by counsel for Royal Jersey and Royal London that Harvela, owning as it pleaded and has been admitted 43% of the Harveys [the company's] shares, would have had control of Harveys had completion of its contract duly occurred and that some damage to Harvela has resulted such that it is appropriate for there to be an inquiry as to damages. I, therefore, make that order.[52]

Where specific performance could not possibly protect the claimants' interest in having the control of the company, damages were to be awarded to place them in the same state of well-being as if they had had such control in that period. One question remains, though. Why was the order made in the form of an inquiry as to *whether* the claimants were entitled to damages? In order to answer that, one needs to recall the definition of 'loss' proposed in the previous chapter. In order to show that he has been made worse off, a claimant, in these situations, needs to show that the receipt of controlling shares in that period would have been a 'benefit', i.e. a thing that is reasonably valued.[53] Having the control of the company in the *future* time was certainly a 'benefit' that needed to be ensured by the award of specific performance: it is reasonable to regard having the control of a company at a time that has not yet arrived as a valuable thing because of the indefinite chances of profit-making that potentially lie in it. However, this was not necessarily true in respect of a past time. For a past time, a mere control of a company cannot be regarded as a benefit in itself, unless it can be shown that it would have been beneficial or that, at least, a chance of utilising such control would have existed that was lost as a result of the breach.

[52] *Harvela Investments Ltd v Royal Trust Co of Canada Ltd* [1985] Ch 103, 125 (Peter Gibson J).

[53] Ch 3 text to n 23–25.

III. AN ORDER TO PAY THE AGREED SUM

A. Doctrine

Where a buyer agrees to pay a certain price for the goods that he is promised, he may be ordered by the court to pay the agreed sum. This order in this and other similar contexts resembles specific performance, in that it gives the claimant the exact same benefit that he was to receive by the performance of the other party's positive obligation.[54] It also resembles damages, as it is a monetary response to the breach of contract. In the case of a non-repudiatory breach by the other party, the court will order the payment of the agreed sum if the defendant's duty to pay has fallen due. What is the situation in the case of a repudiatory breach? Where the claimant has started to perform his obligations, he has an option either to terminate the contract or to keep it in force and claim the agreed sum when it falls due.

What if the repudiatory breach occurs before the claimant starts to perform his obligations? It has been suggested that, in these circumstances, the claimant should be limited to the termination of contract and damages because of policy reasons, such as those justifying the doctrine of mitigation, and the economical undesirability of requiring the defendant to pay for an unwanted benefit.[55] However, the House of Lords, in *White & Carter (Councils) Ltd v McGregor*,[56] recognised that the claimant's option either to terminate the contract or to keep it open and perform and then to claim the agreed sum. In that case, the claimant was an advertising contractor who made a contract with the defendant to display advertisements for

[54] E Peel, *Treitel: The Law of Contract* (14th edn, Sweet & Maxwell 2015) 21–001. However, it is distinct from specific performance, in that it is a common law remedy and that it is not subject to the same bars (J Beatson, et al eds, *Anson's Law of Contract* (30th edn, OUP 2016) 606).

[55] PM Nienaber, 'The Effect of Anticipatory Repudiation: Principle and Policy' (1962) 20 *CLJ* 213; AL Goodhart, 'Measure of Damages When a Contract is Repudiated' (1962) 78 *LQR* 263; S Stoljar, 'Some Problems of Anticipatory Breach' (1974) 9 *Melb ULR* 355, 368.

[56] [1962] AC 413.

the latter's garage for 3 years. The defendant renounced the contract on the same day and before the claimant's commencement of performance. The claimant did not accept the repudiation. He elected to perform and claim the agreed price. The House of Lords decided by a bare majority that the claimant was entitled to do so, even though it had done nothing under the contract before it was informed of the repudiation. This is an unfettered option, but not completely so. In the same case, Lord Reid said that courts may decide that the contract has come to an end by the repudiation and that the claimant is limited to his damages under two circumstances: (i) where performance is not possible without cooperation of the other party;[57] and (ii) where he has 'no legitimate interest' in performing the contract rather than claiming damages.[58] It is the latter part of Lord Reid's dictum with which I am here concerned. This dictum has been approved in multiple subsequent judgments, although it has been stressed that the claimant can be limited to termination and damages only in exceptional (or 'extreme') cases and where damages are adequate.[59]

B. From Friedmann's Perspective

Let me examine how Friedmann would view the situation. He suggests that the award of an order to pay an agreed sum is there to protect the claimant's interest in the other party's

[57] A common example is contracts for supply of services. However, with respect to a time charter (which is a contract for services: see *Scandinavian Trading Tanker Co AB v Flota Petrolera Ecuatoriana (The Scaptrade)* [1983] 2 AC 694), Cooke J held in *Isabella Shipowner SA v Shagang Shipping Co Ltd (The Aquafaith)* [2012] EWHC 1077 (Comm), [2012] 2 Lloyd's Rep 61, [37] that the charterer's cooperation is not needed in order for the shipowner to fulfil his obligations and claim the hire. Also, see *Gator Shipping Corp v Trans-Asiatic Oil SA (The Odenfeld)* [1978] 2 Lloyd's Rep 357, 374. Cf. *EL Oldendorff & Co GmbH v Tradax Export SA (The Johanna Oldendorff)* [1974] AC 479, 556–557; *Attica Sea Carriers Corp v Ferrostaal Poseidon Bulk Reederei GmbH (The Puerto Buitrago)* [1976] 1 Lloyd's Rep 250, 256 (Orr LJ, *obiter*; although, the case concerned a demise charter and was distinguished by Cooke J in *The Aquafaith*).

[58] *White & Carter (Councils) Ltd v McGregor* [1962] AC 413 (HL), 431.

[59] *Attica Sea Carriers Corp v Ferrostaal Poseidon Bulk Reederei GmbH (The Puerto Buitrago)* [1976] 1 Lloyd's Rep 250; *Clea Shipping Corp v Bulk Oil International Ltd (The Alaskan Trader) (No 2)* [1984] 1 All ER 129; *Ocean Marine Navigation Ltd v Koch Carbon Inc (The Dynamic)* [2003] EWHC 1936 (Comm), [2003] 2 Lloyd's Rep 693; *Reichman v Beveridge* [2006] EWCA Civ 1659, [2007] 1 P & CR 20; *Isabella Shipowner SA v Shagang Shipping Co Ltd (The Aquafaith)* [2012] EWHC 1077 (Comm), [2012] 2 Lloyd's Rep 61.

performance.[60] This is true when the claimant has fully performed his own obligations. Even when the claimant has not even started to perform, generally the defendant's repudiation cannot put an end to the contract. The claimant can perform and then claim the agreed sum. In the latter situations, indeed the general rule in *White & Carter* may be said to be a simple reflection of Friedmann's view, as it does not even allow the above-mentioned policy and economic reasons to overshadow the principle of the protection of the claimant's performance interest. However, the exceptions to this rule are difficult to explain by Friedmann's thesis. While a mere repudiation of the contract by the other party is not allowed to leave the claimant, without his own choice, with a terminated contract and no claim for the agreed sum in most situations, the law does allow the courts to leave the claimant's performance interest unprotected where he has no legitimate interest in performance. Where a claimant is limited to his damages in the latter situations, the effect of the law is that it limits him to his damages where he does have an interest in the performance but that interest is not regarded as 'legitimate'.

It would clearly not be plausible for Friedmann to respond that, in these situations, the courts may only limit the claimant to termination of contract and damages where damages provide an adequate substitute for the promised performance; in cases of termination, damages are not based on what the claimant would have gained had the contract been performed. A plausible explanation based on Friedmann's thesis would, therefore, seem to depend solely on claiming that, due to the external factor making it illegitimate to keep the contract in force, the law does not protect the claimant's performance interest in the exceptional situations at all. Yet, it is unclear why the law would want to protect the claimant's performance interest at the cost of ignoring external factors in the majority of cases but to take the opposite approach in the exceptional cases.

[60] D Friedmann, 'The Performance Interest in Contract Damages' (1995) 111 *LQR* 628, 629–30.

C. A Purposive Approach

A purposive approach provides an alternative explanation relying on principle rather than external justifications.

When a term of the parties' contract requires the payment of an agreed sum, the purpose of the claimant's right to perform and claim that sum is *normally* to ensure his receipt of the sum and the enhancement of his well-being thereby. Thus, including in cases where the claimant has not yet started to perform, the normative force of his right requires giving him an option to perform and claim that sum. The courts are not allowed to deprive the claimant of the specific remedy by limiting him to termination and damages since damages awarded upon termination do not put the claimant in the same financial position as if he had received the benefit whose protection is the purpose of his contractual right, i.e. the agreed sum. That is the reason for the law's attitude in majority of cases in this area. The normative force requiring the recognition of that option was present, even defeating policy and economic reasons demanding termination in *White and Carter*.[61] So, the House rejected the defendant's (mainly) policy-based arguments[62] in that case where the purpose of the advertising contractor's right was clearly nothing but to enable him to perform and receive the contract price.

There are, however, exceptional situations in which the purposive approach does not justify giving the claimant that option. That is where the claimant has not started to perform in circumstances in which damages available upon termination are adequate,[63] in the sense that they will put the claimant in the same position as if he had received the benefits that it is the

[61] ibid.

[62] *White and Carter* [1962] AC 413, 423–24.

[63] *Attica Sea Carriers Corp v Ferrostaal Poseidon Bulk Reederei GmbH (The Puerto Buitrago)* [1976] 1 Lloyd's Rep 250, 255 (Lord Denning MR).

purpose of his contractual right to ensure.[64] In these circumstances, in which damages and an option to perform and claim the agreed sum *equally serve the purpose of his right*, the law favours limiting the claimant to his damages for economic and policy reasons. This is analogous to the situations where the award of specific performance is denied where damages equally serve the purpose of the claimant's right. Real-world examples are rare, but when they arise, they may fall into one of the following categories: (1) where the ultimate purpose of the claimant's right is not to ensure the benefit of the agreed sum, but to ensure another benefit whose loss can be fully compensated by way of damages available upon termination; and (2) where the receipt of the agreed sum would not make the claimant better off at all

Although the term 'no legitimate interest' has not clearly been defined by the courts, it is suggested that the three cases in which the claimants' remedy has been limited to their damages in fact fall into these categories.

1. The Claimant's Right Has a Different Purpose

In *Attica Sea Carriers Corp v Ferrostaal Poseidon Bulk Reederei GmbH (The Puerto Buitrago)*[65] the claimants where shipowners who had entered a demise charterparty with the defendant charterers for a period of 17 months. After a few months' use, the ship developed serious and recurring deficiencies, including an engine problem, which finally made the charterers tow it to Kiel for repair a few months after the end of the charterparty. The contract provided that repairs were the charterers' duty. However, they refused to have the vessel repaired knowing that the cost of this would be totally disproportionate to the value of the

[64] This conception of the compensatory principle in contract is explained in full length in the next two chapters.

[65] [1976] 1 Lloyd's Rep 250.

vessel when repaired and that the repair would accordingly be unreasonable.[66] They sought to redeliver the ship and pay damages for the owners' loss. The owners refused to accept delivery. Their claim was that the contract was still in force, and that a term of the contract requiring the charterers to repair the ship was a condition precedent to their right to redeliver. If true, this would have meant that the monthly charter rate would be payable until the repair of the vessel by the charterers. The Court of Appeal held that, based on a correct construction of the contract, the charterers had a right to redeliver the ship before repairing it and of course a liability for the owners' loss resulting from the breach of the repair term. But the important point for my present purpose is that the Court assumed that the charterers' obligation to repair was a condition precedent and that therefore the charterers' decision to deliver the ship (communicated to the claimants after the agreed expiry date of the time charter) constituted a repudiation, and considered that the owners had an obligation to terminate the contract once they knew about the repudiation. The Court relied on Lord Reid's dictum as to the 'no legitimate interest' requirement.[67] There is not much clarification in the case of how the charterers could successfully demonstrate that the owners had no legitimate interest in keeping the contract in force.[68] It cannot be that the claimants had no legitimate interest simply because repairs were extremely costly compared to the value of the ship when repaired. In *Ocean Marine Navigation Ltd v Koch Carbon Inc (The Dynamic*), the claimants could not successfully demonstrate 'no legitimate interest' merely by showing that the benefit to the innocent party was small in comparison to the loss to the other party.[69] Alternatively, it has been suggested

[66] *Attica Sea Carriers Corp v Ferrostaal Poseidon Bulk Reederei GmbH (The Puerto Buitrago)* [1976] 1 Lloyd's Rep 250, 251.

[67] Orr LJ, Browne LJ agreeing with him, also based his reasoning on the claim that the claimant could not perform without the cooperation of the other party (ibid 256).

[68] Orr LJ said they had demonstrated that (ibid 256).

[69] [2003] EWHC 1936 (Comm), [2003] 2 Lloyd's Rep 693.

that the owners had no legitimate interest in keeping the contract open since this was 'unreasonable' when the cost of repair ($2m) exceeded the value of the vessel when repaired ($1m).[70] This may also be said to be the basis of Lord Denning MR's *obiter* reasoning in the case.[71] It ties the question of legitimacy with that of reasonableness. Cooke J suggests in *Isabella Shipowner SA v Shagang Shipping Co Ltd (The Aquafaith)* that:

> [t]he effect of the authorities is that an innocent party will have no legitimate interest in maintaining the contract if damages are an adequate remedy and his insistence on maintaining the contract can be described as 'wholly unreasonable', 'extremely unreasonable' or, perhaps, in my words, 'perverse'.[72]

There are two difficulties with this view. *First*, the term 'reasonable' is (at the minimum) as unclear and imprecise as 'legitimate'. *Second*, it is not clear why the claimant's intention to keep the contract in force in a case such as *The Puerto Buitrago* was unreasonable. Any reasonable person could (and normally would) decide to perform his obligation with a view to obtain more! The shipowners indeed preferred the 'condition precedent' interpretation of the charterparty because they would have gained more by keeping it in force. What precisely did they expect to gain from keeping the contract open? Either they would have received the benefit of their vessel in good condition plus the hire charge for any period before redelivery, or they would have gained charter hire for their worn out vessel 'to the crack of doom'[73]. In contrast, termination and damages for the breach of the repair term would be a much reduced benefit to them: these damages are normally based on the difference in value between a sound and a

[70] J Beatson, et al eds, *Anson's Law of Contract* (30th edn, OUP 2016) 608.

[71] *Attica Sea Carriers Corp v Ferrostaal Poseidon Bulk Reederei GmbH (The Puerto Buitrago)* [1976] 1 Lloyd's Rep 250, 255.

[72] [2012] EWHC 1077 (Comm), [2012] 2 Lloyd's Rep 61, [44].

[73] *Attica Sea Carriers Corp v Ferrostaal Poseidon Bulk Reederei GmbH (The Puerto Buitrago)* [1976] 1 Lloyd's Rep 250, 251.

defective vessel.[74] There was nothing unreasonable (let alone 'wholly unreasonable' or 'extremely unreasonable' or 'perverse'[75]) about the owners' wanting the larger benefit. So, to say that it was 'unreasonable' for the owners to keep the contract open in the present case, can only plausibly be regarded as in fact meaning that their act was against a duty of 'good faith'. Leggatt J took this view in *MSC Mediterranean Shipping Co SA v Cottonex Anstalt*.[76] After considering a number of decisions addressing the question of 'no legitimate interest', he stated that there is 'increasing recognition in the common law world of the need for good faith in contractual dealings',[77] and that also the question of reasonability of the claimant's choice should be viewed in that wider perspective.[78] But there is one difficulty with this view. It is not clear whether there is yet a general principle of good faith in English contract law or whether a term to that effect is to be implied by the courts.[79] So, in the Court of Appeal, Moore-Bick LJ, while holding as part of majority that the question of 'no legitimate interest' was not applicable at all in *MSC Mediterranean*, opined that, in any event, Leggatt J's rationalisation of that exception based on a duty of good faith was neither necessary nor desirable.[80]

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[74] Their actual measure is not mentioned in the case though.

[75] *Isabella Shipowner SA v Shagang Shipping Co Ltd (The Aquafaith)* [2012] EWHC 1077 (Comm), [2012] 2 Lloyd's Rep 61, [44].

[76] *MSC Mediterranean Shipping Co SA v Cottonex Anstalt* [2015] EWHC 283 (Comm), [2015] 2 All ER (Comm) 614.

[77] ibid [97]; also see Leggatt J's *obiter* opinion in *Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] EWHC 111, [2013] 1 All ER (Comm) 1321; Simon Whittaker, 'Good faith, Implied Terms and Commercial Contracts' (2013) 129 LQR 463.

[78] ibid [97].

[79] *Compass Group UK and Ireland Ltd v Mid Essex Hospital Services* [2013] EWCA Civ 200, [2013] BLR 265, [105] (Jackson LJ); *Hamsard 3147 Ltd v Boots UK Ltd* [2013] EWHC 3251 (Pat), [86] (Norris J); *Greenclose Ltd v National Westminster Bank Plc* [2014] EWHC 1156 (Ch), [2014] 2 Lloyd's Rep 169, [150] (Andrews J); *Carewatch Care Services Ltd v Focus Caring Services Ltd* [2014] EWHC 2313 (Ch), [108] (Henderson J); *Ilkerler Otomotiv Sanayai ve Ticaret Anonim v Perkins Engines Co Ltd* [2017] EWCA Civ 183, [2017] WLR (D) 204; cf *Emirates Trading Agency v Prime Mineral Export Private Ltd* [2014] EWHC 2014, [2015] 1 WLR 1145.

[80] *MSC Mediterranean Shipping Co SA v Cottonex Anstalt* [2016] EWCA Civ 789, [2016] 2 Lloyd's Rep 494, [45].

While these proposed justifications seem to fail, and equally Friedmann's thesis cannot explain the attitude of the law in not protecting the value of the owners' interest in the performance of the (assumed) 'condition precedent' term, the purposive approach offers a straightforward analysis. The major aim of contract remedies is not to protect the claimant's performance interest as such, but to protect his interest in those fruits of performance that it is a purpose of his right to ensure. Now, what was the purpose of a 'condition precedent' term requiring the repair of the ship? On a proper interpretation of the contract, it was not to ensure that the ship gets repaired at whatever cost, even a totally unreasonable cost. The more plausible interpretation would be that the term was there to protect the owners' interest in having a sound vessel. That purpose could be achieved by way of damages based on the difference in value between a sound and a broken vessel. The defendants were prepared to pay that. Those damages would put the claimant in the same state of well-being as if they had a sound vessel. The claimants' true interest in keeping the contract in force, however, was to obtain the extra benefit of the charter hire to the crack of doom. It was not a purpose of their right to ensure that. Damages adequately served the purpose of the term.

2. Receipt of the Agreed Sum Does Not Enhance Well-Being

In *Clea Shipping Corp v Bulk Oil International Ltd (The Alaskan Trader) (No 2),*[81] the claimants were disponent owners of an old vessel. In October 1979, they entered a 24 months (15 days more or less) charterparty with the defendant charterers. The ship was delivered to the charterers in December 1979. In October 1980, the vessel suffered an engine breakdown. Meanwhile, the market rate of charter had fallen. Also, it was known to the parties that the repairs would take several months. The charterers, therefore, repudiated the contract. The owners did not accept the repudiation, going ahead with repairs at a huge cost. Once the repairs

[81] [1984] 1 All ER 129.

were completed in April 1981, the owners informed the charterers that the vessel was again available for their use. The charterers said that they had no further use for the vessel. The owners, however, kept the vessel ready for their use, with a full crew on board, for several months until the charter expired in December 1981, without receiving any orders from the charterers. They then sold the vessel for scrap. The charterers sought to recover the amount of hire that had been paid to the owners (under protest) between April 1981 (when the vessel was again ready for use) and December 1981 (when the time-charter expired).[82] Their arguments turned mainly around showing that the contract had been terminated either after their first or after their second repudiation. The result would be the same, as no hire had been paid during the repairs period. As for the first repudiation, they claimed before the arbitrator that the owners had repudiated the contract by failing to ensure the vessel was seaworthy and that the contract had been frustrated due to the engine breakdown.[83] Both of these arguments were rejected by the arbitrator. Regarding the second repudiation, the charterers claimed that the owners ought to have accepted the repudiation, since '[E]ven if no alternative employment could be found for the vessel, it would have been a great deal cheaper to lay the vessel up, rather than maintain her with a full crew on board'.[84] It is not clear whether they used this as an independent argument or one intended to show that the owners had no legitimate interest in keeping the contract in force. It is also not clear what the arbitrator thought about this argument. In any event, it was a weak argument. Of course, it would have been cheaper for the owners to lay the vessel up, but they were doing that with a view to receiving the hire. Moreover, had they laid

[82] This had been paid 'first under a letter of credit opened in favour of the disponent owners and thereafter by the charterers themselves without prejudice to their right to recover hire'. (ibid 131)

[83] *Clea Shipping Corp v Bulk Oil International (The Alaskan Trader) (No 1)* [1983] 1 Lloyd's Rep 315, 316.

[84] *Clea Shipping Corp v Bulk Oil International Ltd (The Alaskan Trader) (No 2)* [1984] 1 All ER 129, 131.

up the vessel, this may have been treated as acceptance of the charterers' repudiation.[85] The charterers' point may alternatively be said to have been that the owners, by keeping the full crew on board, were supplying unwanted benefits, therefore delivering a wasteful performance. However, these sorts of policy and economic considerations had already been rejected in *White and Carter*. The arbitrator finally decided that the owners ought to have accepted the second repudiation, partly because they had no legitimate interest in not doing so. The dispute was finally brought before Lloyd J who upheld the arbitrator's decision. Applying Lord Reid's dictum in *White and Carter*,[86] he decided that the owners did not have an option to keep the contract in force after the second repudiation because they had no legitimate interest in doing so. Unfortunately, Lloyd J did not clarify why precisely the owners did not have a legitimate interest in keeping the contract open. He only accepted the arbitrator's finding on this point.[87]

The purposive approach explains the result. The amount of the sum that the owners expected to receive as hire for the period between April and December 1981 was $1,853,310. However, the cost of repairing the ship was nearly £800,000, which — according to the exchange rates between October 1980 and April 1981 (the period in which the owners may be assumed to have paid the cost of repairs) — was somewhere between $1,760,000 and $1,920,000.[88] In order to receive the agreed sum, they needed to expend the latter amount plus the cost of keeping the full crew on board and other expenses necessary to keep the vessel available for the charterers' use until the expiry date of the time-charter: the cost of performance for them was greater than the agreed sum. In other words, once they learned about

[85] See *Gator Shipping Corp v Trans-Asiatic Oil SA (The Odenfeld)* [1978] 2 Lloyd's Rep 357.

[86] Also applying *Attica Sea Carriers Corp v Ferrostaal Poseidon Bulk Reederei GmbH (The Puerto Buitrago)* [1976] 1 Lloyd's Rep 250.

[87] *Clea Shipping Corp v Bulk Oil International Ltd (The Alaskan Trader) (No 2)* [1984] 1 All ER 129, 137.

[88] https://www.poundsterlinglive.com/bank-of-england-spot/historical-spot-exchange-rates/gbp/GBP-to-USD-1981.

the cost of repairing the vessel, they also learned that keeping the contract in force would not make them better off. Since that time, they had no legitimate interest in keeping the contract in force. The purpose of their right to perform and claim the agreed sum was to enhance their well-being thereby; they could not use that right as a ground for keeping the contract alive where that purpose could not be attained under the circumstances. Therefore, the charterers' repudiation in April 1981 brought the contract to an end. It is notable that if the repair had greatly increased the value of the ship, their performance of their obligations and claiming the agreed sum would probably have made them better off on a final calculation. But the repair had not (or had not substantially) increased the value of the ship: shortly after the expiry of the charter, they sold the vessel as scrap. One may contend that the decision in *The Alaskan Trader* can also be explained in terms of Friedmann's thesis. After all, what matters according to his thesis is that the *value* of the performance needs to be protected by the remedy; in the present case, the claimant's interest in the other party's performance was left unprotected, since it had no value according to the above analysis. However, the problem with this argument would be that the owners *did* have an interest in keeping the contract alive and seeking the charterers' performance. Otherwise, they would have sold the vessel as scrap once they learnt about the cost of repairs. In fact, 'the owners, being a one-ship company, might have decided to keep the charterparty on foot in order to protect their parent company from heavy claims under the charter', but the arbitrator did not regard that as a legitimate interest in claiming the performance rather than damages.[89] It is suggested that this incentive of the owners did not make it legitimate for them to keep the charterparty on foot, simply because they were seeking a benefit that it was not a purpose of their right to ensure. It was not a purpose of their right and the charterer's corresponding duty to ensure the benefit of the protection of a third party,

[89] *Clea Shipping Corp v Bulk Oil International Ltd (The Alaskan Trader) (No 2)* [1984] 1 All ER 129, 138 (Lloyd J).

not least when the terms of the contracting parties' agreement did not require such protection. *Finally*, this aspect of the case also reconfirms what was suggested before, that the term 'wholly unreasonable' cannot be used as a substitute for 'no legitimate interest'. While the arbitrator decided (and Lloyd J agreed) that the owners did not have a legitimate interest in keeping the contract open with a view to protecting their parent company, there is nothing wholly or partly unreasonable about one's wish to use a legal right to protect their parent company.

3. MSC Mediterranean Shipping Co SA v Cottonex Anstalt[90]

It the recent case of *MSC Mediterranean*, the claimants had promised to carry a quantity of raw cotton from Bandar Abbas and Jebel Ali to Chittagong. They did so, using a number of their containers. But, due to a disagreement between the defendant shippers and the purchasers of the goods, no one was willing to accept the entitlement of the goods. The goods were therefore left under the supervision of customs authorities in the port of destination who refused to release the goods without a court order. As a result, neither were the shippers willing to accept entitlement and release the containers nor were the carriers able to unpack the goods and regain the containers. There was a clause in the parties' contract providing that demurrage was to be paid in a case of late delivery for every day after a 'free use' period that had been agreed. At first instance, Leggatt J held that the defendants' failure to redeliver constituted a repudiatory breach, but that the claimants did not have a legitimate interest in keeping the contract open and enforcing the demurrage clause when there was no realistic prospect that the containers would be redelivered.

The Court of Appeal, however, held that while the contract had been repudiated by the defendants,[91] the doctrine established by *White v Carter* and its exceptions did not arise at all

[90] [2016] EWCA Civ 789, [2017] 1 All ER 483 (Comm).

[91] Although at a time later than that declared by Leggatt J.

where the contract had been frustrated and performance was impossible. The result was different from that reached by Leggatt J, in that the contract was held to be terminated at the time of frustration rather than of repudiation. Tomlinson LJ reasoned that 'the innocent party simply cannot treat the contract as subsisting because it is no longer capable of performing as agreed'.[92] Moore-Bick LJ made similar statements.[93] However, the Court's decision can be criticised on at least two grounds. *First*, it is one thing to say that the innocent party is not to be allowed to affirm, it is a different thing to say that the question does not arise at all. Of course, the question might plausibly be said not to arise where it is not possible for the innocent party to perform his own obligations; this would mean that by asking whether the innocent party has a choice to affirm, one is in fact asking the absurd question whether he has a choice to continue performance in situations where performance is not possible. This would be the situation, for example, in cases where the claimant cannot perform without the other party's cooperation.[94] However, it is not clear why the question should not arise where the innocent party can perform, or has finished the performance of, his own obligations, and it is only the other party's obligations that cannot be performed. *Second*, the Court's decision contradicts the broadly accepted legal position that the doctrine of frustration is not applicable where the impossibility of performance stems from the actions of either party, let alone when it is due to the contract-breaker's actions (it was accepted by the Court that the defendants' actions constituted a repudiation).[95]

[92] *MSC Mediterranean Shipping Co SA v Cottonex Anstalt* [2016] EWCA Civ 789, [2017] 1 All ER 483 (Comm), [63].

[93] ibid [43].

[94] However, it has been held, in the context of summary dismissals from employment, that the question does arise even in these situations and that the contract is not automatically discharged by the contract-breaker's unilateral repudiation: *Geys v Société Générale* [2012] UKSC 63, [2013] 1 AC 523.

[95] See *FC Shepherd & Co v Jerrom* [1987] QB 301. Also, see Jonathan Morgan, 'Repudiatory Breach: Inability, Election and Discharge' (2017) 76 *CLJ* 11.

While the Court of Appeal's decision is more authoritative, Leggatt J's approach is preferable. Although he said that the 'no legitimate interest' requirement is met where keeping the contract in force is 'wholly unreasonable'[96] and done without good faith,[97] both in *MSC Mediterranean* and elsewhere[98] he seems to believe that a duty of good faith is one that requires the claimant to act according to the *purpose* of the contract. In *MSC Mediterranean*, he stated that the carriers had no legitimate interest since they had not 'been keeping the contracts alive in order to invoke the demurrage clause for a proper *purpose* but in order, in effect, to seek to generate an unending stream of free income'.[99] It is difficult to say that the carriers had a *duty* to act with good faith or according to the purpose of the contract,[100] but the same result would be reached on the basis that it was not the purpose of the carriers' right to protect their interest in continuing to claim demurrage in order 'to generate an unending stream of free income'.[101] The purpose of the demurrage term (and the carriers' right) was simply to protect them against any losses from late delivery, including the loss of the containers (which actually occurred). The demurrage accruing until the repudiation time was capable of compensating that loss. Otherwise, any damages available upon termination would have adequately compensated them for that purpose. The case falls into category (1) above.

[96] *MSC Mediterranean Shipping Co SA v Cottonex Anstalt* [2015] EWHC 283 (Comm), [2015] 2 All ER (Comm) 614, [121].

[97] ibid [97].

[98] Hon Sir G Leggatt, 'A Restatement of the English Law of Contract' (2017) 133 *LQR* 521, 523, reviewing A Burrows, *A Restatement of the English Law of Contract Law* (OUP 2016).

[99] *MSC Mediterranean Shipping Co SA v Cottonex Anstalt* [2015] EWHC 283 (Comm), [2015] 2 All ER (Comm) 614, [121] (emphasis added).

[100] Text to n 75–80.

[101] *MSC Mediterranean Shipping Co SA v Cottonex Anstalt* [2015] EWHC 283 (Comm), [2015] 2 All ER (Comm) 614, [121].

CHAPTER FIVE: EXPECTATION DAMAGES– DEFINITIONS AND THE BASIC MEASURE OF RECOVERY

This and the next chapter are intended to examine the 'loss of benefit' theory of compensation in the context of expectation damages. The first section of this chapter defines the constitutive elements of my proposed compensatory principle, which is a revised version of the 'performance interest' thesis. The second section puts the principle to the test in the area of the basic measure of recovery. It deals with damages for direct losses, expounding that once a direct loss is identified, it is almost always recoverable, since the recovery is supported by the purpose of the claimant's right. To this extent, the thesis does not have an advantage over the existing conceptions of the 'performance interest' thesis. The proposed principle will, however, be more closely examined by being used to explain several key cases of the basic measure of recovery that are either inexplicable by the advocates of a compensatory version of the 'performance interest' thesis (Burrows) or attempted to be analysed on the basis of a notion of a 'loss' that is not factual (Coote's thesis), or which are only explicable based on the claim that the damages awarded in those cases do not reflect a loss at all (Stevens' thesis). It is suggested that the thesis has an advantage over these analyses by enabling a loss-based analysis of those cases. Damages for consequential losses will be discussed in the next chapter.

I. DEFINITIONS

A. The Elements of Expectation Damages

Recall the 'loss of benefit' understanding of compensation:

> The normative force of one's right requires protection/enhancement of his well-being by ensuring certain benefits. Where one's right is infringed, the right's normative force does not just disappear. If the infringement results in the *(1)*

> *loss* of a benefit that *(2) was to be ensured*, the normative force of the right will justifies damages placing the claimant right-holder, so far as money can, in the same position of well-being as if that benefit had been ensured.[1]

Expectation damages are founded on the above understanding. They are accordingly available if the following requirements are met.

1. Existence of a Loss

A mere infringement of a right does not justify the award of damages. Since the purpose of a right is to ensure the right-holder's well-being, expectation damages are only justified when the right-holder has suffered a loss. *In order to determine whether the claimant has suffered a loss, the precise question to be asked is whether he/she has lost, or not received, a benefit to which he is entitled. A 'benefit' is defined as a thing (anything) which is reasonably valued by the claimant*.[2]

Various questions may be raised with respect to this conception of a loss. The most significant of them, particularly in a contractual context, relates to the description of a *non-received* benefit as a 'loss'. Fuller and Perdue famously criticised this conception of loss many decades ago:[3] after all, how can one suffer a loss of a benefit if he does not already have it? One may accordingly contend that expectation damages — in typical cases[4] where the claimant is to receive a benefit expected to result from the other party's performance — are awarded for a thing that is a loss 'at best in a metaphorical way'.[5] This criticism has received several

[1] Ch 3.

[2] ibid.

[3] Fuller and Perdue, 'The Reliance Interest in Contract Damages: 1' (1936) 46 *Yale* LJ 52.

[4] It is explained below that expectation damages also respond to the loss of a benefit that the claimant *already possessed* where it can be shown that it was a purpose of his contractual right to protect it.

[5] Fuller and Perdue, 'The Reliance Interest in Contract Damages: 1' (1936) 46 *YLJ* 52, 53.

replies.[6] The view accepted by the courts and most scholars is to regard the non-receipt of a benefit to which one is contractually entitled, as a loss and the law's response as compensation. This thesis takes the same view. The credibility of some other aspects of the proposed definition will be examined through the discussion of several key cases in the present chapter. One significant aspect, for instance, is that since compensation is justified as a response to the defendant's attack on the claimant's well-being, it is not awarded for 'objective' or 'notional' losses that are said to occur while the claimant has not actually been made worse off (or not better off where he has been entitled to receive a benefit). A recoverable loss is a *factual loss*. This is a loss of what is sometimes described as 'benefits in fact' or (in the contractual context) 'fruits of performance'.[7]

2. Purpose of the Right

The purpose of a right is to protect/enhance well-being by ensuring *certain* benefits. Once it is known that a loss has been suffered as a result of an infringement, the second question will, therefore, be whether the loss relates to a benefit that it was a purpose of the right to ensure. If so, then the normative force of the right justifies damages based on the value of that lost benefit. In other words, *while a promised performance may be valuable because of various benefits expected to result from it, a failure to deliver the promised performance entitles the claimant to damages when and so far as the loss relates to a benefit that it was a purpose of his right to ensure*. Ascertaining what benefits were supposed to be ensured will require a case-by-case analysis. The answer will not be difficult where the question is whether a 'direct loss' is recoverable. With respect to 'consequential losses', however, a construction of the right and its

[6] For one powerful response, see P Benson, 'The Expectation and Reliance Interests in Contract Theory: A Reply to Fuller and Perdue' in *Issues in Legal Scholarship: The Journals of Legal Scholarship* (R Cooter, et al eds, Bepress.com 2001).

[7] B Coote, 'Contract Damages, *Ruxley* and the Performance Interest' (1997) 56 *CLJ* 537, 550.

purpose may be necessary, which is a sensible task particularly in contract, where there is often much context to interpret.

B. Forms of Loss

Depending on (1) the nature of the benefit that is expected to result from the performance (2) and how immediately it is to result from it, the loss may be classified in two ways.

1. 'Purely Contractual' and 'Non-Contractual' Losses

(a) Purely contractual losses

Not receiving a benefit that the claimant *did not already possess,* constitutes a loss when he is *entitled* to it.[8] In contract, an entitlement to such benefits derives from the claimant's contractual right. His non-receipt of a benefit does not, therefore, constitute a loss if there is no contract between the parties. For this reason, a loss suffered in these situations is a 'purely contractual loss'. So, where, say, D promises to sell a cargo of wood to C but fails to deliver, C's not receiving the goods constitutes a purely contractual loss.

(b) Non-contractual losses

Performance is sometimes expected to protect a benefit that is *already possessed* by the promisee. Losing such benefits will constitute a loss independently from the contract. It is only in this sense that a loss of such benefits is described here as a 'non-contractual loss'. Where there is a question of whether these losses can be claimed *under a contract,* however, the question of recovery follows the same compensatory principle as that governing the availability of purely contractual losses: in order to be recoverable, the loss has to be a result of misperformance and relate to a benefit whose protection was a purpose of the claimant's right.

[8] Ch 3.

So, if electrical equipment that C has in his basement gets damaged by a flood, he suffers a loss independently from a contract which he has with D, requiring D to take reasonable care in installing a ball valve in the basement. However, this loss will be recoverable in contract if it can be shown that the loss is a result of D's misperformance and that it was a purpose of C's right (and D's correlative duty) to ensure the benefit of protection of the equipment against possible floods.[9]

If awarded, expectation damages in these situations will protect the claimant against becoming *worse off*. In this sense, contract damages can also have a retrospective effect, looking back on how wealthy the claimant was before the breach, aiming to maintain the *status quo*. This function of expectation damages sometimes tends to be overlooked[10] due to the fact that in typical situations these damages compensate the claimant for his purely contractual losses, i.e. where the other party has failed to make him *better off*.

2. Direct and Consequential Losses

'Direct loss'– whether purely contractual or not, the loss suffered due to the infringement may relate to a direct benefit, a benefit that was to be an immediate fruit of performance or (in other words) to be ensured according to a *term* of the contract. Where, for example, it is a term of C's contract with D that C must receive a 2017 Carrera Porsche, the receipt of the car will be a direct benefit. Non-delivery, in these situations, will result in a 'direct loss'.[11]

[9] This was, in fact, the case in *Supershield Ltd v Siemens Building Technologies FE Ltd*, [2010] EWCA Civ 7, [2010] 1 Lloyd's Rep 349.

[10] See eg E Peel, ed, *Treitel: The Law of Contract* (14th edn, Sweet & Maxwell 2015) 1–011.

[11] For the use of the same terminology in case law, see eg *Burdis v Livsey* [2002] EWCA Civ 510, [2003] QB 36, [87]. However, a 'direct loss' may also be described by using different terminology, such as 'normal loss' (see eg H McGregor, *McGregor on Damages* (15th edn, Sweet & Maxwell 1988) para 26).

‘Consequential loss’– A benefit can yield other benefits. The loss relating to a benefit that a direct benefit is expected to yield is described here as a ‘consequential’ loss. So, where D promises to sell a boiler to C that C intends to use in his laundry business, the delivery is expected not only to have the immediate effect of C's receipt of the chattel but also to enable him to make profits by using it. As well as a direct loss, C will suffer a consequential loss of the profits in a case of non-delivery.

II. THE BASIC MEASURE OF RECOVERY

‘The basic measure of recovery’ describes expectation damages for direct losses.

A. Measure

Once it is known that a direct loss is suffered and recoverable, the next question will be how to measure it. This will be a question of the value of the lost benefit to the claimant since it reflects the quantum by which the claimant's well-being ought to have been enhanced or protected according to the purpose of his right. In addition, it will be a question of the *reasonable* value of that benefit. Damages for direct losses are therefore typically measured by reference to the *market value* of the benefit lost. So, where the defendant is paid the contract price for the sale of a 2017 Carrera Porsche worth £70k in the market but fails to deliver the car, he will be liable to pay £70k as damages. Similarly, where he promises that car but in fact delivers a 2016 model worth £66k, the measure of loss is the difference in market value between the benefit promised and that actually received (£4k), this amount reflecting the measure by which the claimant was to be made better off but was not. Depending on the circumstances surrounding the case, this may not be the appropriate assessment method, but the question will always be one concerning the reasonable value of the promised benefit. The loss may, for instance, be assessed by reference to the sum a reasonable person in the position of the claimant would have been willing

to receive in order to give up the promised benefit.[12] Alternatively, the reasonable value of the lost benefit may be fixed by the court. This method may be appropriate where, for example, the value of the direct benefit lost is difficult to ascertain because it is of a non-monetary nature.[13]

B. Availability

The significance of identifying a direct loss is that we almost always know how it is to be compensated: by an award of the basic measure of recovery. This is because when a loss relates to a benefit to which one is entitled according to a term of his contract, it can readily be established that it was a purpose of the contractual right to ensure the benefit since this was clearly intended by the parties.

For this reason, the controversy, in most cases in which the availability of the basic measure has been the main issue, revolves around the first element of expectation damages, that is whether a (direct) loss has been suffered at all. Among the academics addressing these cases, Robert Stevens' 2009 book chapter on contract damages is most notable for my present purposes. There, in an attempt to expand the theory of 'substitutive damages' that he had already developed in torts,[14] Stevens attempt to explain several key cases concerning basic measure of recovery based on his proposed version of the 'performance interest' thesis, in situations where, according to him, no direct loss is suffered at all. He argues:

> sometimes the substitutive award is termed 'direct loss' and is contrasted with 'consequential loss'. The label 'direct loss' is misleading, however, as the substitutive award is available even though no loss is suffered as a

[12] See Ch 8.

[13] See eg *Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344 (discussed below text to n 17–43).

[14] *Torts and Rights* (OUP 2007).

> matter of fact. Substitutive damages are not compensatory for loss, properly so-called, at all.[15]

Importantly, it is essential for Stevens' purpose of justifying his proposed thesis to show that the claimants, in the cases that he offers to explain, have suffered no direct loss. This is because the thesis seems to lose a great deal of its attraction if a factual, direct loss can be shown: the force of a radical theory such as his lies in its power to explain court decisions that are said[16] to be inexplicable by the orthodox, compensatory principle. However, in what follows in this chapter, I will attempt to clarify that the courts' decisions in those cases have been correct *and* consistently in line with the loss-based conception of damages. This is intended to demonstrate both of the 'loss of benefit' theory's advantages: first, that it has an advantage over Stevens' thesis by offering a loss-based analysis of those cases; second, that it has an advantage over the existing compensatory conceptions of expectation damages, by using a conception of damages and a factual loss that illuminates what they fail to explain.

1. Ruxley Electronics and Construction Ltd v Forsyth

In what is perhaps the most famous 'contract damages' case in modern times, *Ruxley Electronics and Construction Ltd v Forsyth*,[17] the House of Lords awarded substantial damages despite the fact that the difference in market value between what had been promised by the defendants and what they had actually supplied was nil. The defendant contractors had promised to build a swimming pool for the claimant. They did build the pool, but not with the

[15] 'Damages and the Right to Performance' in *Exploring Contract Law (*J Neyers, et al eds, Hart publishing 2009) 173.

[16] Of the cases that Stevens attempts to explain, Andrew Burrows believes that *Rodocanachi Sons & Co v Milburn Bros* [1887] 18 QBD 67, *Joyner v Weeks* [1891] 2 QB 31, *Mediana v Comet (The Mediana)* [1900] AC 113, *Williams Bros v Ed T Agius Ltd* [1914] AC 510, *Jamal v Moolla Dawood Sons & Co* [1916] 1 AC 175, *Slater v Hoyle and Smith Ltd* [1921] 2 KB 11, *Campbell Mostyn (Provisions) Ltd v Barnett Trading Co* [1954] 1 Lloyd's Rep 65, and *Semelhago v Paramadevan* [1996] 2 SCR 415 have been wrongly decided. Some of these cases are discussed below.

[17] [1996] AC 344.

particular depth that had been agreed between the parties. It was 6 feet deep instead of 7 feet 6 inches, although it was still safe for diving. The main concern, both in the court of Appeal and the House of Lords, was that while it seemed necessary to respond to the breach by means of an award of damages, the recoverable measure of damages was *nil* based on the difference-in-market-value method. The market did not value the extra depth which the claimant had not received. The trial judge had awarded £2,500 for the claimant's loss of 'pleasurable amenity'. The Court of Appeal, believing that it is not possible to award the basic measure of recovery but finding it necessary to compensate the claimant, reversed the trial judge's decision and awarded the full 'cost of reinstatement' of the pool. The House of Lords, however, did not believe that it was bound to award damages on that basis, since, in the circumstances of the case, it would be unreasonable. They reversed the Court's decision unanimously and restored the amount awarded by the trial judge.[18]

Much ink has been spilled on the nature of the £2,500 award. Lord Mustill and Lord Lloyd took different approaches in explaining it.[19] Stevens believes that the award was substitutive damages according to Lord Mustill's approach.[20] However, his Lordship clearly stated that damages were awarded for the claimant's *loss* of benefit:

> where the contract is designed to fulfill a purely commercial *purpose*, the *loss* will very often consist only of the monetary detriment brought about by the breach of contract. But […] the law must cater for those occasions where the value of the promise to the promisee exceeds the financial enhancement of his position which full performance will secure. This excess […] is usually incapable of precise valuation in terms of money, exactly because it represents a personal, *subjective* and *non-monetary*

[18] The 'cost of reinstatement/cure' aspect of the case is significant and discussed in most textbooks on contract. But it is not necessary for the present purposes to discuss it separately. However, for a critical discussion of the remedy in the light of the 'loss of benefit' theory, see the final section of the present chapter.

[19] There was, though, no suggestion in any of the speeches in the House that their approaches were different.

[20] 'Damages and the Right to Performance' in *Exploring Contract Law (*J Neyers, et al eds, Hart publishing 2009) 190–92.

> *gain* [or *benefit*]. Nevertheless where it exists the law should recognise it and compensate the promisee if the misperformance takes it away.[21]

The above statements align perfectly with the 'loss of benefit' view of the basic measure of recovery. The outcome turns on the direct 'gain'[22] (or benefit) that was to be accrued to the claimant as a result of the performance, its *loss* as a result of misperformance, and the *purpose* for which the contract (and therefore the claimant's contractual right) was designed.[23] The extra depth was a benefit,[24] since it was reasonably valued by the claimant.[25] It was a direct benefit: the claimant expected to receive it according to the terms of the contract. The non-receipt of this benefit constituted a direct loss, even though the benefit and therefore the loss were 'subjective and non-monetary'[26]. Lord Mustill's main point is simply that even though contractual rights often have 'purely commercial purpose[s]'[27], damages were to be awarded for the loss of the subjective and non-monetary benefit in issue, since it was clearly the purpose of the parties' contract to ensure that benefit. Similar statements were made by Lord Bridge.[28] Also, Lord Jauncey, while not finding it necessary to consider the award of the trial judge (since

[21] *Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344, 360–61 (emphasis added).

[22] ibid 361.

[23] Also see *Farley v Skinner* [2001] UKHL 49, [2002] 2 AC 732, [79] (Lord Scott) for a judicial analysis of the award in *Ruxley* which is very similar to the 'loss of benefit' view of Lord Mustill's above statements.

[24] Lord Mustill famously referred to Harris, Ogus and Phillips, 'Consumer Remedies and the Surplus' (1979) 95 *LQR* 581, regarding the claimant's loss as a loss of 'consumer surplus'; also the definition of 'consumer surplus' in that article tells us that it is a kind of subjective 'benefit' (or 'utility', in the article's terms).

[25] Whether or not one values having the extra depth is a question of fact. In the present case, it is quite plausible to say that, as a fact, the claimant valued having the extra depth, because of its potential for giving him the pleasure of diving deeply rather than simply safely. The said pleasure, according to Lord Mustill's approach, is not the benefit for whose loss damages are awarded; it is simply the *reason* why the claimant valued the extra depth.

[26] *Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344, 361.

[27] ibid 360.

[28] ibid 353.

the defendants had not challenged it), favourably quoted[29] the following statements by Oliver J in *Radford v De Froberville*:

> If he [the claimant] contracts for the supply of that which he thinks serves his interests [i.e. for the supply of a benefit] — be they commercial, aesthetic or merely eccentric- then if that which is contracted for is not supplied by the other contracting party I do not see why, in principle, he should not be compensated.[30]

His Lordship's view that compensation is to be available for a direct, subjective loss is perfectly in line with the rationale of many cases in the area of mental distress in which damages have been awarded for the loss of subjective benefits. It is true that while Lord Mustill viewed the award as compensation for a direct loss, damages for mental distress often relate to consequential losses, but the underlying principle is the same in both situations: when the claimant's loss relates to a benefit that it is a purpose of his right to ensure, it is to be compensated.[31] In the leading case on damages for mental distress, *Farley v Skinner*,[32] the claimant was considering buying a house. The defendant surveyor was obliged to provide information, including whether the house was affected by aircraft noise. The defendant breached the contract by not taking reasonable care in supplying the latter information. The claimant bought the house. It turned out that the house was markedly affected by such noise. Damages were awarded for the claimant's loss of the benefit of enjoyment of property free from aircraft noise, even though the market value of the property had not been diminished by the noise.[33] There was evidence that the noise 'interfered with his enjoyment of a quiet, reflective breakfast, a morning stroll in his garden or pre-dinner drinks',[34] while 'many,

[29] ibid 358.

[30] [1977] 1 WLR 1262, 1270.

[31] See Ch 6 for the discussion of damages for consequential losses, including mental distress.

[32] [2001] UKHL 49, [2002] 2 AC 732.

[33] ibid [71].

[34] ibid [69].

perhaps most, of the residents in the area were not troubled by the noise'.[35] The House of Lords unanimously restored the trial judge's award of £10,000 for the claimant's loss,[36] since an important purpose of the claimant's right was clearly to ensure the benefit of protection against that loss.

As for Lord Lloyd's judgment, he had no difficulty in founding his judgment directly on the traditional line of authorities awarding damages for consequential mental distress.[37] In contrast with Lord Mustill, who saw the £2,500 award as damages for the claimant's direct loss, he viewed it as damages for the claimant's consequential loss of pleasure[38] in being able to dive into a deep pool rather than a simply safe one.[39] That loss was consequential because no term of the parties' contract required the supply of that extra pleasure. In line with cases of consequential mental distress,[40] the loss was to be compensated since it was the main purpose of the claimant's right to provide pleasure. I was a contract to build a pool, and an important (if not the sole) purpose of such contracts is to provide pleasure.

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[35] ibid [68].

[36] Although, their Lordships agreed that the measure of the award was perhaps too high (ibid [28] (Lord Steyn), [61] (Lord Hutton), [110] (Lord Scott)).

[37] *Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344, 374.

[38] The loss (mental distress) may alternatively be described as the feeling of 'apprehension when diving' (see J Poole, 'Damages for Breach of Contract— Compensation and "Personal Preferences": *Ruxley Electronics and Construction Ltd* v *Forsyth*' (1996) 59 *MLR* 272, 275). This may be supported by the trial judge's statements quoted in the judgment of the Court of Appeal ([1994] 1 WLR 650, 654). The benefit in question, according to the latter analysis, would not be the pleasure that the claimant expected to receive from diving into a pool of the promised depth, but the measure of mental serenity that he would lose by feeling the apprehension. The purpose of his right, accordingly, would not be to *further* the benefit but to *protect* it.

[39] See A Burrows, *Remedies for Torts and Breach of Contract* (3rd edn, OUP 2004) 326. One may contend that there is no evidence that the claimant's mental satisfaction while diving had been affected by the breach. However, as notified by A Burrows and E Peel ('Compensatory Damages– Review of Discussions' in *Commercial Remedies: Current Issues and Problems* (A Burrows, et al, OUP 2003) 25), Staughton LJ refers, in the Court of Appeal ([1994] 1 WLR 650, 654), to such a finding by the trial judge.

[40] *Jarvis v Swans Tours Ltd* [1973] QB 233; *Farley v Skinner* [2001] UKHL 49, [2002] 2 AC 732.

So, while most commentators seem to regard the divergence between Lord Lloyd's and Lord Mustill's approaches as fundamental and therefore prefer one over the other,[41] both approaches, in fact, followed the same principle of compensation for the loss of a benefit that it is a purpose of the claimant's right to ensure.[42] One final question has to be answered, though. If their Lordships awarded damages for different losses, how did they both reach the same figure? The answer is that in rare cases, the value of direct and consequential benefits expected to result from the same performance, and therefore the measure of their loss, is the same. We value things for their utility. When I am promised a car, it is a direct benefit whose value is different from that of the consequential benefit of (say) renting it out, because a car is not valued solely for that purpose. Its market value reflects the reasonable value of the totality of various consequential benefits that it has the potential to yield. However, in those rare situations where a thing cannot be exchanged in the market and is valued solely for a single instance of utility, its value will correspond to that of its consequential benefits. This was the case in *Ruxley*, in which the value of the direct benefit of the extra depth corresponded to that of the pleasure of diving deeply rather than simply safely.

2. White Arrow Express Ltd v Lamey's Distribution Ltd[43]

Just two weeks before the *Ruxley* case was decided, the basic measure of recovery had been awarded in the area of supply of services. In *White Arrow*, the defendants were carriers who

[41] For instance, A Burrows (*Remedies for Torts and Breach of Contract* (3rd edn, OUP 2004) 221, 326) and J Edelman ('The Meaning of Loss and Enrichment' in *Philosophical Foundations of the Law of Unjust Enrichment* (R Chambers, et al eds, OUP 2009) 222) prefer Lord Lloyd's approach, whereas J O'Sullivan ('Loss and Gain at Greater Depth: The Implications of the *Ruxley* Decision' in *Failure of Contracts* (F Rose ed, Hart Publishing 1997) 15) prefers Lord Mustill's.

[42] For the view that both of their Lordships' reasoning was based on the same principle, see eg E Peel, 'Loss and Gain at Greater Depth: The Implications of the *Ruxley* Decision– A Comment' in *Failure of Contracts* (F Rose ed, Hart Publishing 1997) 30**)**; E Peel, ed, *Treitel: The Law of Contract* (14th edn, Sweet & Maxwell 2015) 20–045.

[43] [1995] CLC 1251.

had agreed with the claimants (a mail order company) to provide enhanced carriage services. In breach of contract, they provided services that met basic standards, but were inferior to what had been promised. The claimants could not show that they had suffered any consequential loss as a result of the breach, but argued that, 'if a party contracted and paid for a benefit which, because of the other party's breach, it did not receive, then it had suffered a loss for which a claim in damages would lie'.[44]

The defendants argued that, in the absence of evidence of consequential losses, no loss had been suffered at all. They referred to *McGregor on Damages*, contending that 'In the case of an ordinary service contract, however, there is no clear basic loss: perhaps most loss will be consequential'.[45] But, it is not clear why the non-receipt of a direct, tangible benefit (such as a car) should constitute a direct loss without proof of consequential losses, but the non-receipt of a valuable service should not. The promisor fails in both situations to give the promisee a benefit that the latter is entitled to receive. The Court of Appeal in fact clearly accepted this view. Sir Thomas Bingham MR — with whom both Rose and Morritt LJJ agreed — stated:

> It is […] obvious that in the ordinary way a party who contracts and pays for a superior service or superior goods and receives a substantially inferior service or inferior goods has suffered loss. If A hires and pays in advance for a four-door saloon at £200 per day and receives delivery of a two-door saloon available for £100 per day, he has suffered loss. If B orders and pays in advance for a five-course meal costing £50 and is served a three-course meal costing £30, he has suffered loss. If C agrees and pays in advance to be taught the violin by a world famous celebrity at £500 per hour, and is in the event taught by a musical nonentity whose charging rate is £25 per hour, he has suffered loss.[46]

Stevens contends that in the examples given by Sir Thomas Bingham MR, 'the claimant is not, or at least is not necessarily, left in a factually worse position after performance than if

[44] ibid 1253.

[45] H McGregor, *McGregor on Damages* (15th edn, Sweet & Maxwell 1988) para 39.

[46] *White Arrow Express Ltd v Lamey's Distribution Ltd* [1995] CLC 1251, 1254–55. Also, see *Giedo van der Garde BV v Force India Formula One Team Ltd* [2010] EWHC 2373 (QB), [474].

he or she had received the bargained-for service'.[47] However, it is a *fact* that they did not receive the superior service, which they reasonably valued over and above the inferior one. The difference in market value between the enhanced and inferior services showed the equivalent in money terms of the level by which they had been left in a worse position.

The defendants also relied on Sunley (B) & Co Ltd v Cunard White Star Ltd.[48] *In that case, the defendants had, in breach of contract, delivered the claimants' machinery later than promised. In the absence of any convincing evidence that the claimants had suffered consequential losses of more than £14, the Court of Appeal refused to award substantial damages as the basic measure of recovery. However, although not mentioned by the Court in White Arrow, it has to be noted that while the Court decided the Sunley case in 1940, since then the law had been developed in the landmark case of Strand Electric and Engineering Co Ltd v Brisford Entertainments Ltd,*[49] so that the basic measure of recovery could be awarded for wrongful use of chattels without proof of consequential loss. 'User damages' reflect the value of the direct benefit of exclusive control and possession of chattels for the period in which they are wrongfully detained. They are therefore awarded based on the market value of that benefit regardless of whether consequential losses (such as the loss of actual *use* of property) have been suffered.[50] While the *Strand Electric* case concerned *tortious* use of property, it is completely analogous to *Sunley*. A term of contract, specifying the delivery time of the machinery, created a contractual right whose immediate purpose was to ensure the claimant's exclusive control and possession of the machinery from that time onwards, including the period

[47] 'Damages and the Right to Performance' in *Exploring Contract Law (*J Neyers, et al eds, Hart publishing 2009) 185.

[48] [1940] 1 KB 740.

[49] [1952] 2 QB 246, 252.

[50] See Ch 8 text to n 30–37 for the analysis of user damages.

in which the defendant failed to deliver. A loss of that benefit for the period of late delivery was, therefore, a direct loss which could be measured by reference to its market value (which is commonly called 'use value'). This is to say that if *Strand Electric* had been decided before *Sunley*, the Court should have awarded substantial damages without proof of consequential losses. The law would be defective if it allowed the basic measure of recovery based on the use value of property in tort, but refused the same award under completely analogous situations in contract.

So, having identified the claimants' direct loss in *White Arrow*, the Court of Appeal rightly acknowledged that the claimants would have been entitled to the basic measure of recovery; it, however, rejected their claim, for a different reason. The claimants' argument was confused and misdirected.[51] While claiming that they were 'entitled to damages based on the difference in value of the services which the defendants agreed to provide and the services they in fact provided', they simultaneously argued that 'such damages [are] to be calculated by reference to [part of] the consideration agreed by the parties for those services'.[52] The 'difference in value' method relates to the measure of direct losses, which can be made good by way of the award of damages, whereas the alleged waste of part of the consideration paid by the claimants may be made good, in appropriate situations, by way of restitution. The Court, therefore, believed that the claimants' 'presentation of this claim, as particularised in the report, was an attempt, in defiance of established principle, to dress up as a claim for damages what was really a claim based on a partial failure of consideration'.[53]

[51] See H Beale, 'Damages for Poor Service' (1996) 112 *LQR* 205.

[52] *White Arrow Express Ltd v Lamey's Distribution Ltd* [1995] CLC 1251, 1257.

[53] ibid 1254 (Sir Thomas Bingham MR). The counsel for the claimants contended that in the circumstances, their reference to the contract price was simply intended as a reference to the best evidence of the difference in market value between what was to be supplied and what was actually supplied (ibid). This argument was not accepted by the Court.

3. Sub-Sale Cases

Direct and consequential losses resulting from the same breach cannot be recovered together. The claimant can only choose between the two, for the following reason. If he chooses damages for his direct loss, this is to say that he has chosen recovery based on the reasonable value attached to the totality of all consequential benefits that the direct benefit in question has the potential to yield. On the other hand, if he chooses damages for his consequential losses, damages are measured based on the assumption that he would have received a direct benefit and utilised it. He cannot be assumed to have received a benefit but claim damages for its loss at the same time. So, where the claimant's consequential loss is bigger than his direct loss, he is entitled to choose damages for his consequential loss (so far as recovery is not limited by such doctrines as mitigation[54] and remoteness[55]). The opposite is also true: he ought to be entitled to choose the basic measure of recovery where it is larger than his consequential losses. The same formula is true also in cases of sub-sale: where the claimant's consequential loss is bigger than his direct loss, the bigger amount is recoverable,[56] unless this is barred by the doctrine of mitigation (as in the case of goods that can readily be bought in the market in order to fulfil the sub-sale) or where the consequential loss is too remote.[57] Additionally, where, in cases of sub-sale, the basic measure of damages has been larger, the courts have consistently awarded it for over a century.

[54] *British Westinghouse Electric v Underground Electric Rlys Co of London Ltd* [1912] AC 673, 689 (Viscount Haldane LC).

[55] See Ch 6 and 7.

[56] *R&H Hall Ltd v WH Pim (Junior) & Co Ltd* (1928) 33 Com Cas 324; *Household Machines Ltd v Cosmos Exporters Ltd* [1947] KB 217.

[57] *Williams v Reynolds* (1856) 6 B & S 495, 122 ER 1278; *Burgoyne v Murphy* [1951] 2 DLR 556 (NBSC); *Aryeh v Lawrence Kostoris & Son Ltd* [1967] 1 Lloyd's Rep 63.

This position in cases of sub-sale is viewed, however, with scepticism among some critics, since they find it difficult to identify a direct loss. In their view, the correct decision in those cases would be to limit the claimant to damages for his consequential losses (if any) rather than to award the difference-in-value measure for direct losses which, according to them, are not suffered. Stevens, on the other hand, believes that while no direct loss is suffered in these cases, the basic measure is correctly awarded by the courts as a substitute for the value of the claimant's right.[58]

One leading case in this area is *Williams Bros v Ed T Agius Ltd*.[59] It was a case of non-delivery by the defendants of a consignment of coal that they had promised to sell to the claimants. The contract price was 16s 3d per ton. The claimants were obliged to sell coal of the same quantity and description for 19s to a third party. They intended, though they were not obliged, to use the goods that they expected to receive from the defendants to fulfill their obligation under their contract with the third party. The defendants failed to deliver the coal. The market value at the time of breach was 23 6d per ton. The claimants sought the basic measure of recovery based on the market value of the coal less the original contract price (which had not been paid), i.e. 7s 3d. The defendants, however, contended that the claimants' true loss was reflected by the amount that they would have received from the sub-purchasers less the original contract price, i.e. 2s 9d. The House of Lords awarded the basic measure. Burrows[60] and Stevens both suggest that the amount awarded did not reflect the claimant's true loss. They agree with the defendants that the claimants' true loss was their purely contractual and consequential loss of the benefit of the sub-sale. Therefore, Stevens justifies the award as

[58] The basic measure has also been attempted to be justified for pragmatic reasons or the desirability of preventing the defendant from obtaining a windfall: see eg M Bridge, 'Markets and Damages in Sale of Goods Cases' (2016) 132 *LQR* 405.

[59] [1914] AC 510.

[60] *Remedies for Torts and Breach of Contract* (3rd edn, OUP 2004) 213.

substitutive damages[61] while Burrows believes that the House's decision was wrong.[62] They both found their arguments on the basis that no other consequential losses had been suffered that could reflect the damages actually awarded by the House. The claimants had not purchased substitute goods at the higher market price, nor had they intended to do so; there was also no chance of any claims being brought by the sub-purchaser.

It is submitted that the House's decision was correct and based on the claimants' direct loss.[63] Obviously, if I am promised a car but do not receive it, I have suffered a direct loss; the promisor is not in a position to claim that I have not suffered a loss just because he can show that the car would have probably been lost later anyway by my own act or by natural causes. Similarly, he cannot reduce his liability by showing a possibility that I would have later lost part of the value of the car by selling it in a very bad bargain. What then makes one doubt the same result in a case such as *Williams Bros*? The controversy seems to have its roots in the fact that the loss-sceptics take it for granted that the value of the direct benefit promised in such a case is only reflected in its utility for the purpose of fulfilling the sub-sale. This may be supported by the fact that in *Williams Bros* (and most of other debated cases of a similar nature) the defendant could show that the claimant had *intended* to use the goods for the sub-sale contract. There is, however, a difficulty with this assumption. That the claimants *intended* to use the goods for the sub-sale does not mean that necessarily they would have done so; it is merely to say that *probably* (or most probably) they would have done so. One other possibility is, however, that the claimants in *Williams Bros* would have changed their mind and retained

[61] 'Damages and the Right to Performance' in *Exploring Contract Law (*J Neyers, et al eds, Hart publishing 2009) 176–179.

[62] *Remedies for Torts and Breach of Contract* (3rd edn, OUP 2004) 213.

[63] For the same view but different analysis of how the buyer suffered a direct loss in this and other similar sub-sale situations, see eg GH Treitel, 'Damages for Breach of Warranty of Quality' (1997) 113 *LQR* 188; C Hawes, 'Damages for Defective Goods' (2005) 121 *LQR* 389, 391.

the goods for later use. The reasonable value of the direct benefit of exclusive control and possession of the goods included the totality of these and similar possibilities. Is one justified in ignoring the possibility that they would have retained the goods? This is ruled out by the normative force of a right of exclusive control and possession, which gives the right-holder a choice to do whatever he wants to do with the goods. The claimant lost that choice,[64] whose value was reflected by the market value of the goods at the date of breach; they were not bound to use them solely for the sub-sale.[65] Stevens argues that '[I]f, as is commonly thought, contract damages are only awarded to compensate for actual loss suffered, ignoring the sub-sale contract wrongly over-compensates the plaintiffs'.[66] The above analysis demonstrates that the basic measure of recovery does not over-compensate the claimants since the measure by which it is larger than damages for consequential losses, in fact, reflects the possibility that the claimants would have preferred the benefit of retaining the goods rather than using them for the sub-sale.[67]

[64] It would be misleading to think that this bases the analysis on the 'choice/will theory' rather than the 'benefit/interest theory' of rights (see Ch 3 for a definition of these theories). The interest theorists have no difficulty in accepting that a choice can be a benefit. The important point for them is that the purpose of one's right is not to protect one's choices *per se*, but to protect/enhances one's *well-being* by ensuring one's choice.

[65] Burrows contends that it is not 'satisfactory to say that, if the contract had been performed, other goods could still have been bought to fulfil the resale leaving the claimant free to sell the goods that should have been delivered by the defendant at the market selling price; for those other goods would still have to be bought at the higher market price and resold at the lower resale price, therefore producing an identical loss' (*Remedies for Torts and Breach of Contract* (3rd edn, OUP 2004) 213). However, the claimants could have retained the goods without buying at the higher market price and reselling at the lower resale price: they could have ignored the sub-sale without suffering any loss from that contract (there was no chance of their being sued by the sub-purchaser).

[66] 'Damages and the Right to Performance' in *Exploring Contract Law (*J Neyers, et al eds, Hart publishing 2009) 177.

[67] The same analysis explains the decision of Court of Appeal in the area of carriage of goods in *Rodocanachi Sons & Co v Milburn Bros* [1886] 18 QBD 67, assuming that the claimants in that case were not under an obligation to use the exact same goods for the sub-sale contract they had made with a third party (they had 'sold' the goods to the third party). For the effect of an obligation to use the goods for the sub-sale, see below text to n 95–96. Also, see *Ströms Bruks Aktie Bolag v John & Hutchison* [1905] AC 515; *Attorney General of Ghana v Texaco Overseas Tankships Ltd (The Texaco Melbourne)* [1994] 1 Lloyd's Rep 473, 479; cf *Watts, Watts & Co v Mitsui & Co Ltd* [1917] AC 227.

The same analysis applies in sub-sale cases where goods are actually delivered, but they are of inferior quality to what has been promised. In *Slater v Hoyle and Smith Ltd*,[68] the claimants purchased a quantity of unbleached cotton cloth from the defendants. Cloth of inferior quality was actually delivered.[69] The claimants used some of it, after bleaching, in order to fulfill their obligation under a sub-sale contract with a third party. They suffered no consequential loss, as they had fulfilled the sub-sale with no claims brought against them by the sub-buyers. The Court of Appeal followed *Williams Bros,* ignoring the sub-sale and unanimously awarding the basic measure of recovery based on the difference in value between what had been promised under the original contract and what was actually delivered by the defendants (the contract price had fully been paid). This reflected part of the value of the direct benefit of possession and control of cloth of the promised quality that they had not received.[70] One may argue that the claimants would not have enjoyed the benefit of goods of the promised quality anyway since they would have used them to fulfill the sub-sale. However, as was suggested with respect to *Williams Bros,* the latter argument would ignore the possibility that the claimants would have had a choice to retain the promised goods and purchase goods of inferior quality in the market to fulfill the sub-sale. Stevens contends that 'in quantifying loss we are interested in what actually did happen: on the facts the buyers did not go into the market in this way'.[71] However, in quantifying loss, we are certainly interested in considering hypotheses: we are always interested in what *would* have happened had the contract been performed. Once receiving the goods, the buyers could have used the for the sub-sale or

[68] [1920] 2 KB 11.

[69] Of 3,000 pieces promised, they delivered 1625 pieces, but the claimants refused to take the remaining 1375.

[70] Cf A Burrows, *Remedies for Torts and Breach of Contract* (3rd edn, OUP 2004) 215.

[71] 'Damages and the Right to Performance' in *Exploring Contract Law (*J Neyers, et al eds, Hart Publishing 2009) 179.

retained them. The value of this choice exceeds the value of a choice that comprises only one of the two possibilities.[72] Moreover, the former value exceeded the latter in an additional way in *Slater*. Even assuming that the claimants would have used the goods for the sub-sale, any reasonable person in their position would normally value the receipt and delivery to the sub-purchaser of sound goods over and above the benefit of the sub-sale and avoidance of consequential losses from claims brought against them because they would care about their business reputation. Note that in this analysis, a claimant does not need to show proof of consequential loss of business reputation, since the analysis is based on his *direct* loss;[73] saying that he would normally value things such as reputation is, merely, to demonstrate that it is *reasonable* for him to value the receipt of sound goods over and above inferior goods.[74]

In the light of this analysis, the correct decision for the Court of Appeal would have been to compensate the claimants for their direct loss in *Bence Graphics International Ltd v Fasson UK Ltd*,[75] a case whose facts are materially similar to *Slater*. The claimants had purchased a quantity of vinyl film from the defendants. They received goods that were of inferior quality. They used them to manufacture decals that were sold to third parties. However, while the claimants sought damages based on the difference in market value between the inferior and the promised film (£564,328.54), the Court of Appeal merely awarded £22,000

[72] Alternatively, it has been suggested that the claimant's loss in these situations consists of his paying too much (in the form of contract price) for defective goods (see eg C Hawes, 'Damages for Defective Goods' (2005) 121 *LQR* 389, 391). For a convincing criticism of this analysis, see R Stevens, 'Damages and the Right to Performance' in *Exploring Contract Law (*J Neyers, et al eds, Hart publishing 2009) 185.

[73] For an alternative compensatory view of *Slater*, see eg S Waddams, *The Law of Damages* (3rd edn, Canada Law Book 1997) 1.2570–1.2580.

[74] Failing to see the claimants' direct loss, one could use the different but somewhat similar analysis that the basic measure of recovery in these situations is there to provide a rough measure of compensation for the claimant's consequential losses, such as his loss of business reputation, where these losses cannot be proved with the necessary precision or where it is not known when they might be suffered: see M Bridge, 'Markets and Damages in Sale of Goods Cases' (2016) 132 *LQR* 405, 418; 'Defective Goods and Sub-Sales' [1998] *JBL* 259, 260–61.

[75] [1998] QB 87.

with respect to a quantity of unused film which had been returned to the defendants and remitted the case for assessment of damages for (relatively small) consequential losses from any claims by end users. With respect, that decision was wrong. Similar to the situation in *Slater*, the value of the direct benefit promised exceeded that of its utility for fulfilling the sub-sale: it also included the value of a choice to retain the promised goods, buy goods of the same description in a falling market, and still receive the sub-sale contract price. The claimants were under no obligation to use the promised goods for the sub-sale contract.[76] Again, similar to the case in *Slater*, even supposing that they would have certainly used the sound goods for the sub-sale contract, it does not follow that the value of sound and defective goods were the same for that purpose, simply because no substantial claims were brought against them by the sub-purchasers. The majority's reasoning for taking the sub-sale into account is completely unsatisfactory. It was reasoned that the 'difference in market value' rule provided by section 53(3) of the Sale of Goods Act 1979 'would be displaced where it had been in the contemplation of the parties at the time the warranty [of quality] was given that the goods sold would be used in making the product which would be sold on'. However, the 'contemplation' test is to be used to determine *consequential* losses that are not too remote.[77] It is wrong to limit a claimant to his not-too-remote consequential losses where he has also suffered a direct loss which is larger in scale. In the defence of the Court of Appeal, it may be suggested that it had a different reason for using the 'contemplation' test. The Lord Justices probably meant that since it was in the contemplation of the parties that the goods would be used for the sub-sale contract, the purpose of the contract (and therefore the claimant's right) was limited to ensuring

[76] For a similar analysis, see GH Treitel, 'Damages for Breach of Warranty of Quality' (1997) 113 *LQR* 188, 192; E Peel, ed, *Treitel: The Law of Contract* (14th edn, Sweet & Maxwell 2015) 20–051.

[77] ibid.

the benefit of the sub-sale.[78] But, this is not convincing, since, as indicated above, the purpose of the right was to ensure the benefit of exclusive control of the goods, which, of course, included a choice to use them for the sub-sale, but was by no means limited to that. While the Court's decision has obscured the state of the law in England and Wales with respect to defective goods, the situation is different elsewhere. In Australia, the majority of the High Court came to a decision similar to that in *Slater* in *Clark v Macourt*.[79] Also in Canada, the courts are bound by the decision of the Supreme Court in *Bainton v John Hallam Ltd*,[80] in which the basic measure of recovery was awarded in a situation identical to those in *Slater*. There is hope, however, there that the legal situation may change in England and Wales. Christopher Clarke LJ, giving the judgment of the Court of Appeal in the tort case of *OMV Petrom SA v Glencore International AG*,[81] stated that *Bence* is inconsistent with *Slater*,[82] and that if the case before him was brought in contract, he would follow *Slater*. Additionally, contract cases subsequent to *Bence* clearly require that it is not to be followed in cases of non-

[78] This view of the Lord Justices' purpose for employing a contemplation test may be supported particularly by Otton LJ's judgment, where he indicates that the use of the film for making decals was not only in the parties' *reasonable* contemplation, but they were both in fact 'aware of the precise use to which the film was to be put' (*Bence Graphics International Ltd v Fasson UK Ltd* [1998] QB 87, 99).

[79] [2013] HCA 56 (HC). Although, the High Court's analysis is in line with the view that the damages awarded are not compensatory for the claimant's loss, but substitutive for his right to performance. Also, the decision has been criticised on the basis that, while the market-value rule is, in general, the correct measure of damages in similar situations, the High Court should have ignored it due to policy concerns arising from the peculiar facts of the case: see E Barnett, 'Contractual Expectations and Goods' (2014) 130 *LQR* 387 for a critical note on the case.

[80] [1920] 60 SCR 325.

[81] [2016] EWCA Civ 778, [2017] 3 All ER 157, [45].

[82] For a view that *Bence* is reconcilable with *Slater*, see A Summers and A Kramer, 'Deceit, difference in value and date of assessment' (2017) 133 *LQR* 41, 45.

delivery.[83] Yet, the need is felt for a conclusive decision in a future contract case of defective delivery.[84]

In both *Slater* and *Bence*, the judgment of the Privy Council in *Wertheim v Chicoutimi Pulp Co*[85] had to be considered. While Scrutton LJ refused to follow it in *Slater*,[86] the case was relied upon by Auld LJ in *Bence*.[87] It was a case of late delivery. The contract involved sale of 3,000 tons of moist pulpwood. The claimant's action was with respect to three alleged breaches by the defendants: late delivery, delivery of goods of inferior quality, and deficiency in weight. The main claim before the Council, however, related to the first claim. The defendants had promised to deliver the goods by November 1900, but in fact delivered in June 1901. Meanwhile, the market value of the goods had fallen from 70s to 42s 6d per ton. The claimant sought damages based on the difference in market value, i.e. 27s 6d per ton. The Privy Council rejected that claim, awarding damages based on the difference between the market value of the goods at the date of due delivery (70s) and the sub-sale contract price (65s).

Stevens suggests that the decision is reconcilable with *Williams Bros* and *Slater*.[88] This is surprising, as the Privy Council's decision was not to award the difference-in-value measure.

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[83] *Bear Stearns Bank Plc v Forum Global Equity Ltd* [2007] EWHC 1576 (Comm), [204] *et seq*; *Oxus Gold v Templeton Insurance Ltd* [2007] EWHC 770 (Comm), [66] – [83].

[84] A group of key cases subsequent to *Bence* that require the consideration of post-breach events, including *The Golden Victory* (*Golden Strait Corporation v Nippon Yusen Kubishika Kaisha* [2007] UKHL 12, [2007] 2 AC 353), may be thought to have in fact acknowledged the Court's approach in *Bence*. However, it is suggested that while they are correctly decided, they have no application in one-off-transaction cases such as *Bence* and *Slater*. See Ch 8 (text to n 85–88) for a brief discussion.

[85] [1911] AC 301.

[86] *Slater v Hoyle and Smith Ltd* [1920] 2 KB 11, 24. Other members of the Court preferred to distinguish it.

[87] *Bence Graphics International Ltd v Fasson UK Ltd* [1998] QB 87, 103–05.

[88] 'Damages and the Right to Performance' in *Exploring Contract Law (*J Neyers, et al (eds), Hart Publishing 2009) 183.

It awarded the 5s measure, whose basis is a mystery, as Stevens concedes.[89] In any event, his defense of a difference-in-value measure in *Wertheim*, based on 'substitutive damages' thesis, does not seem convincing. He says:

> What was the difference in value between what was promised and what was received *at the time of* breach? More precisely, what was the difference in value between a delivery on 1 November and a June delivery for a person without knowledge of the future events, at the start of November 1900? At that time the market fall had not yet occurred, and so the difference would either have been nil or very small. If the plaintiff wished to claim damages for the loss suffered as a result of the market fall subsequent to the breach, this loss would actually have had to have been suffered which it was not.[90]

But, *first*, the second question that is put forward in the above passage is not *a more precise* form of the first question. What was promised was, of course, a 1 November delivery. But, what was received at the time of breach, i.e. 1 November, was not 'a June delivery for a person without knowledge of the future events at the start of November 1900'.[91] The truth is that nothing was received at the start of November 1900. *Second*, supposing that what was received at the time of breach was 'a June delivery for a person without knowledge of the future events at the start of November 1900', the value of such delivery was not equal (or roughly equal) to a timely delivery, and therefore the difference would not have been nil or very small. Stevens would disagree on the ground that '[A]t that time the market fall had not yet occurred'.[92] But, while the market fall had not yet occurred on 1 November, a risk of a fall was there. Any reasonable person in the position of the claimant would value a timely delivery over a late delivery, not least because the risk of a fall is always present. That is precisely why one would put a term of timely delivery in their contract. The truth is that a lack of knowledge of

[89] ibid.

[90] ibid.

[91] ibid.

[92] ibid.

future events means that the difference in value between a late and a timely performance cannot be determined (or cannot be determined with precision) at the time of breach; but this is by no means to say that the difference was nil or very small. *Third*, Stevens' analysis is at odds with established authority. There seems to be no reason why he should not want to apply his view of the method of establishing the measure of damages in *Wertheim* to other cases of late delivery of goods that are wanted for resale. Such application would require either nominal or very small damages in the absence of consequential losses or damages based on the claimant's consequential losses where such loss exists. However, the authorities show that in these situations, the basic measure of recovery is generally awarded.[93]

It is submitted that the case was wrongly decided. The correct measure of damages would have been based on the claimant's direct loss, measured based on the difference in value between what was promised *(November delivery)* and what was actually received *(July delivery)*. The 70s per ton figure reflected the value of the benefit of the exclusive control of the goods in November that they had not received and to which they were entitled according to their contractual right. They would have been entitled to damages based on that if they had not received the goods at all. However, since later they actually received part of that value by way of the June delivery, the 42s 6d per ton ought to have been deducted. The defendants' claim, among other things, was that the claimant had not suffered that loss, as he had successfully resold the same goods and delivered them after the time of their actual receipt from the defendants. But similar to the defendants' arguments in the cases discussed above, this argument is based on the false presumption that the value of a November receipt was only reflected by its utility for the purpose of fulfilling the sub-sales. This is not true. Had the claimant received the promised benefit by the promised date, it would have been possible for

[93] See eg *Elbinger Aktiengesellschaft v Armstrong* [1874] LR 9 QB 473.

him to retain the goods (or sell them in the market) and fulfil the sub-sale contracts later by purchasing goods of the same description in the market at the lower price: it seems that he was not under an obligation to use the same goods for the sub-sale contracts. He would have then had the benefit of the November value of the goods plus the sub-sale benefits. The latter fact is not changed by saying that he in fact used the goods for the sub-sales.[94] There is no reason to believe that since he used the goods for sub-sales when he received them in June, he would have necessarily done the same had he received them in November. Using them for sub-sales in June was the most reasonable thing to do: the market had fallen sharply by then; In November, however, the market was high: it would have been less prudent for the claimant to pass on the goods in a rising market when he would have had a chance to wait and deliver sub-sale goods from another source in a low market.

Finally, there is a common thread running through the courts' decisions in the area of sub-sales. The courts have been of the opinion that the sub-sale is not to be counted so far as the claimant is not under an *obligation to sell the same goods* to the sub-purchaser.[95] This can be viewed as an acknowledgment of this section's analysis of the logic underlying the decisions in these cases. The lower or (in a case like *Slater*) non-existent consequential losses of the benefit of the sub-sale contract price are ignored where the claimant suffers a larger, direct loss. Where, however, the claimant is under an obligation to sell the same goods, he does not suffer a direct loss at all, for the following reason. A direct loss in this context would be a purely contractual one; a purely contractual loss can only be suffered when the claimant does not receive a benefit to which he is *entitled*. Saying that the claimant has an obligation to pass on

[94] Cf M Bridge, 'Markets and Damages in Sale of Goods Cases' (2016) 132 *LQR* 405, 416.

[95] GH Treitel, 'Damages for Breach of Warranty of Quality' (1997) 113 *LQR* 188, 192; cf C Hawes, 'Damages for Defective Goods' (2005) 121 *LQR* 389, 391.

the benefit of control of the goods, is to say that he is not entitled to retain them; where I do not receive something that I am not entitled to retain anyway, I have not suffered a loss.

5. Third-Party Cases

This section deals with an area of the law, with respect to the basic measure of recovery, that should be reconsidered by the courts according to the compensatory principle defended in this chapter.

Where a benefit is promised for one who is not a party to the contract, the promise cannot, in English common law, be enforced by the third party.[96] This is an aspect of what is known as the principle of privity of contract. While this principle does not affect the fact that the contract is valid and enforceable between the parties, one question that has proved highly controversial is whether the promisee is entitled to damages for the breach of the term requiring the promisor to give a benefit to the third party. The courts, in these situations, generally award nominal damages. The suggested reason for this is that due to the principle of privity of contract, the promisee cannot recover damages for a loss that he has not himself sustained,[97] or a 'theoretical loss'[98]. So, exceptions to this rule mainly revolve around situations in which the promisee is conceived by the courts to have suffered a loss, or he is an agent or a trustee for the third party.

However, it is suggested that this attitude of the law is not justified, since, in identifying the promisee's loss, the courts take a view of the notion of a factual loss that (borrowing Lord

[96] This has been modified by the Contracts (Rights of Third Parties) Act 1999. Here, however, I am concerned with the common law rule (and its exceptions), which is still applicable in cases not covered by the Act: J Beatson, et al eds, *Anson's Law of Contract* (30th edn, OUP 2016) 647.

[97] J Beatson, et al eds, *Anson's Law of Contract* (30th edn, OUP 2016) 650.

[98] *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 AC 518, 535 (Lord Clyde).

Mustill's words) is based on 'too narrow and materialistic a view of the transaction'.[99] The theory introduced in this thesis shows that one suffers a loss when he is promised but does not receive a thing (anything) that is reasonably valued. Where one pays for a promise that a third party will receive a benefit, the general rule should be that the promisee reasonably values the receipt of that benefit by the third party. Accordingly, the third party's enjoyment is a benefit to the promisee, and therefore the latter suffers a loss if he does not receive what is a benefit to him. So, if I am a villager who, for charitable reasons, pays a contractor to renovate the village hall,[100] I certainly value the trustees' or the parish council's receipt of the benefit of a renovated hall. If the contractor does a defective job, I will certainly suffer substantial loss, even though my loss is non-pecuniary and therefore not necessarily reflected by the value of the monetary benefit not received by the third party. That is what the orthodoxy fails to recognise when adhering to the general rule. So, for instance, the authors of *Anson's Law of Contract* say,[101] in line with the majority of the House of Lords in *Beswick v Beswick*[102] which is the major authority for the rule, that the promisee's estate in that case had suffered no loss. The promisee had agreed to transfer his business to his nephew in consideration of the nephew's promise to use him as a consultant and to pay an annuity to his widow after his death. Would it make sense to say that he did not value his wife's receipt of the annuity? He (or his estate) suffered a loss that can be sustained by any reasonable person in his position who cares about the financial security of his future widow. It was also a recoverable loss since it was a purpose of his right to the nephew's performance to ensure that direct, non-pecuniary benefit. This analysis is in

[99] *Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344, 361. For instance, one situation in which the courts may be convinced that a loss is suffered by the promisee is where the loss consists of his not being discharged of an obligation that he owes to the third party, as in *Price v Easton* [1883] 4 B & AD 433, 110 ER 518.

[100] Example given by Lord Goff in *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 AC 518, 547.

[101] (30th edn, OUP 2016) 651.

[102] [1968] AC 58.

line with Lord Pearce's opinion in the case that the estate had suffered a loss.[103] Certainly, both there and in the villager example, the measure of loss would not be easy to ascertain, as the promisees' non-monetary losses are not necessarily reflected by the third party's monetary losses. But it should be clear — according to the 'loss of benefit' notion of loss — that the question is not whether a loss is suffered at all, but that of its quantum. That this view is correct can be acknowledged by considering the decisions of the House of Lords in *Ruxley Electronics and Construction Ltd v Forsyth*[104] and cases of damages for mental distress, in which substantial damages have been awarded for the loss of non-pecuniary and difficult-to-assess benefits in situations where it was clearly a purpose of the parties' contracts in those cases to ensure them. *The general rule is, therefore, that the promisee in third-party-beneficiary cases is to be awarded substantial damages for his own loss; and the answer to whether he is to be awarded damages for the third party's loss should follow the basic principle that one cannot recover losses suffered by another*, unless he is an agent or trustee for the third party.[105]

This neatly explains the result in *Jackson v Horizon Holidays Ltd*.[106] It is a case of damages for mental distress, which the courts have found relevant with respect to whether damages are available for losses suffered by a third party. The claimant had been promised holiday accommodation for himself and his family. The accommodation actually provided was of inferior quality. As a result, the whole family suffered mental distress and discomfort. The claimant was awarded damages for mental distress at first instance. This was approved by the Court of Appeal, but there was a difference in reasoning: while James LJ believed that the damages reflected the claimant's own loss, Lord Denning MR (with whom Orr LJ agreed)

[103] ibid 88.

[104] [1996] AC 344.

[105] See *Woodar Investment Development Ltd v Wimpey Construction UK Ltd* [1980] 1 WLR 277.

[106] [1975] 1 WLR 1468.

thought that they would be excessive if they were only for the claimant's loss, and that they were in fact for the claimant's loss plus his family's. Lord Denning MR's view was later disapproved by the House.[107] His Lordship's belief seems, with respect, to stem from a failure to identify the claimant's loss (in addition to the loss of the mental satisfaction that he was to receive by being provided the promised accommodation for himself) of the benefit of ensuring that his family will enjoy pleasure and comfort. That was different from his family's loss, considered independently of the claimant, which was not recoverable by him.

Unfortunately, the existing law keeps avoiding the recognition of a general rule with respect to the promisee's own loss. In *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd*,[108] the House of Lords decided that the case fell within the *exceptions* to the general rule that the promisee can only recover nominal damages. Later, in *Alfred McAlpine Construction Ltd v Panatown Ltd*,[109] the majority of the House of Lords thought it appropriate only to award nominal damages because the promisees were not entitled to recover substantial damages where the third party had a right of enforcement against the promisors. In that case, the defendants owed a contractual obligation to the claimants to build an office block and a multi-storey car park on a site belonging to a third party (the claimants' holding company). At the same time, the promisors owed to the third party a contractual duty to take reasonable care in performing the building contract. The building work was done, but the claimants and the third party alleged that the building was seriously defective. The claimants' argument was that they were entitled to damages on behalf of the third party (the 'narrow ground')[110] or for their own

[107] *Woodar Investment Development Ltd v Wimpey Construction UK Ltd* [1980] 1 WLR 277, 293–94, 283, 297.

[108] [1994] 1 AC 85 (*sub nom St Martins Property Corporation Ltd v Sir Robert McAlpine Ltd*).

[109] [2001] 1 AC 518.

[110] Relying on *Dunlop v Lambert* (1839) 6 Cl & F 600; 7 ER 824, its modification in *Owners of Cargo Laden on Board the Albacruz v Owners of the Albazero* [1977] AC 774, and their application in building contracts in *Linden*

loss (the 'broad ground'). The majority held that they would be entitled to damages on the narrow ground, but not in the present case where the third party could enforce the promise in their own right. Lord Millet and Lord Goff, dissenting, were ready to award damages on the broad ground. Lord Jauncey[111] and Lord Browne-Wilkinson[112] also expressed their sympathy with the broad ground, but were part of the majority in believing that the claimants were not entitled to substantial damages in any event since the third party had a right of enforcement. With respect, their Lordships' view seems inconsistent with an acceptance of the broad ground. It is not clear why the third party's right of enforcement should deprive the promisee of damages unless these damages are merely seen as being for the third party's loss (recoverable, in principle, by the third party by bringing an action in his own right).[113]

When seen simply as the view that the claimants were entitled to substantial damages in their own right, the 'broad ground' is preferable according to this section's proposed analysis. However, once it is accepted that the claimants were entitled to substantial damages, the main question is how to measure them. The answer is not obvious. The only obvious thing is that they are not necessarily based on the third party's loss.

It is suggested that any answer to the question of quantum of damages in *Panatown* will be contingent on one's view of the nature of expectation damages. It appears to have been common ground between their Lordships that if the claimant is to be entitled to damages on

Gardens Trust Ltd v Lenesta Sludge Disposals Ltd [1994] 1 AC 85 and *Darlington Borough Council v Wiltshier Northern Ltd* [1995] 1 WLR 68.

[111] *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 AC 518, 998.

[112] ibid 1002.

[113] On the facts of the case, even the third party's direct right did not necessarily enable him to recover damages for his loss, because it was not co-extensive with the claimants' right (A Burrows, *Remedies for Torts and Breach of Contract* (OPU 2004) 227).

the broad ground at all, this will be justified based on the 'performance interest' thesis. Yet, the answer will depend on what version of that thesis one subscribes to.

Brian Coote's work was cited by their Lordships on multiple occasions. He makes a distinction between 'benefits in fact' (or fruits of performance) and 'benefits in law' (or the bargained-for rights), believing that substantial damages should be available in third-party situations to compensate the claimant for the *loss of his right to the other party's performance*, not for a factual loss of the fruits of performance (which, according to him, is not suffered).[114] However, the difficulty with this analysis is that the claimant does not suffer a 'loss' of his right in these situations. The right is still there; it has simply been infringed. This point was in fact made by Lord Clyde when he stated:

> […] while frustration may destroy the rights altogether so that the contract is no longer enforceable, a failure in the obligation to perform does not destroy the asset. On the contrary, it remains as the necessary legal basis for a remedy. A failure in performance of a contractual obligation does not entail a loss of the bargained-for contractual rights. Those rights remain so as to enable performance of the contract to be enforced, as by an order for specific performance.[115]

Robert Stevens, also subscribing to the 'performance interest' thesis,[116] believes that the claimants in *Panatown* had not suffered a loss at all,[117] but that substantial damages would have been justified as a substitute for the value of the claimant's right.[118] There are a number of difficulties with this view. *First*, as a *substitutive* damages thesis, it suffers from the same

[114] B Coote, 'Contract Damages, *Ruxley* and the Performance Interest' (1997) 56 *CLJ* 537, 550; also see his note on *Panatown*: 'The Performance Interest, *Panatown*, and the Problem of Loss' (2001) 117 *LQR* 81.

[115] *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 AC 518, 534.

[116] 'Damages and the Right to Performance' in *Exploring Contract Law (*J Neyers, et al eds, Hart publishing 2009) 172.

[117] ibid 189. Burrows takes the same position in *Remedies for Torts and Breach of Contract* (3rd edn, OUP 2004) 227–8.

[118] 'Damages and the Right to Performance' in *Exploring Contract Law (*J Neyers, et al eds, Hart publishing 2009) 188.

difficulty as that with Coote's thesis: damages cannot be a substitute for a right that is not gone but simply infringed. *Second*, it is hard to understand how Stevens' proposed measure of damages in *Panatown* reflects the value of the claimant's right. Rejecting a 'cost of cure' measure of damages as well as a measure based on the difference in value between the defective building and the building as promised, he suggests that the appropriate measure of damages would have been based on the difference in value between the *work* promised and that actually performed.[119] Let us suppose that the value of the work for an objective observer was equal to £N million. This is, however, in normal situations in which such observer would be the one receiving the end-result of the work, i.e. the building. Would the same observer pay £N million for a work that is to be received by someone else? The answer seems to be negative. A useful distinction can be made here between the situation in *Panatown* and that in *White Arrow*. One could contend that the 'market value of the work' measure was accepted above as the correct measure of damages in *White Arrow*, even though in that case, the work was received by third parties, not by the claimants. However, the claimants in *White Arrow* were engaged in a typical mail order business in which the market value of the defendant carriers' work normally reflected its value to the claimants when provided to third parties. Accordingly, any damages awarded based on an objective value of the work in *Panatown* might be a substitute for the value of the performance (and a right to it), but not a substitute for the value *to the claimants* of the right. This is to say that Stevens' proposed measure cannot be based on a *compensatory* view of damages.[120] However, one fundamental question with regard to such view of damages would be that if expectation damages are not compensatory, why should they be awarded to *the claimant*? *Third*, as with respect to other cases of the basic measure of recovery discussed

[119] ibid 190.

[120] In theory, it would be possible to take a view of damages that is compensatory but not loss-based.

so far, a loss-based analysis of damages will be preferable if a factual loss can actually be identified.

The ‘loss of benefit' theory offers such analysis. The work (and the third party's receipt of the building) was indeed a benefit to the claimants since they reasonably valued it (not least because they had paid for it). They suffered a loss of that benefit as a result of the breach. The question of the quantum of damages in these situations, however, depends on the reasonable value of that benefit for the claimants, or, in other words, how much a reasonable person in the position of the claimants would value it. This could not be determined by the utility of the building (which was not to be received by them) or, as it was discussed just above, the utility of the work for an objective market observer (the market value of the work). The claimants argued that they should be awarded a ‘cost of cure' measure of damages. They relied on Lord Griffiths' example in *Linden Gardens* of a husband contracting with a builder to renew the roof of his wife's house.[121] There, his Lordship had asked: ‘Is it to be said that the husband has suffered no damage because he does not own the property? Such a result would in my view be absurd’,[122] going on to say that if ‘the roof turns out to be defective the husband can recover from the builder the cost of putting it right and thus obtain the benefit of the bargain that the builder had promised to deliver’.[123] Coote suggests that the cost of cure reflects the claimant’s loss, regardless of whether he has an intention to cure.[124] Burrows correctly contends that an emphasis on the intention prevents overcompensation of the claimant.[125] However, the problem a ‘cost of cure’ measure is that a risk of overcompensation is there even with an emphasis on

[121] [1994] 1 AC 85, 96.

[122] ibid 96–97.

[123] ibid 97.

[124] ‘Contract Damages, *Ruxley* and the Performance Interest’ (1997) 56 *CLJ* 537, 549–52.

[125] A Burrows, *Remedies for Torts and Breach of Contract* (3rd edn, OUP 2004) 211.

the claimant's intention. That measure does not have a meaningful or (at least) necessary relation with the value of a claimant's lost benefits. Based on the compensatory principle proposed in this chapter, the cost of cure is to be relevant only when the money is in fact used to procure substitute or remedial performance, thereby serving the purpose of a claimant's right by making him as well off as if he had received the intended benefit; however, an *intention* to use the money for that purpose does not change anything. What if he does not use the money to cure?[126] The result may be that he will be overcompensated. In fact, this could have been the case in *Panatown*, in which the 'cost of cure' measure (supposing that it would have been reasonable and therefore a possible remedy) may have amounted to £40m (had the demolition of the building been necessary).[127] It does not seem likely that the value of the claimant's expected benefit was as much as £40m when the contract price was about £10m[128].

It is suggested that a correct answer will consider the reason for which the claimants valued the work and the third party's receipt of the building. In contrast with the situation in cases like *Beswick v Beswick, Jackson v Horizon* and other cases of mental distress, and Lord Goff's and Lord Griffiths' examples, the aforementioned reason seems to have been of a commercial nature in *Panatown*; yet, the complexity of identifying that reason (which resulted from the nature of the claimants' relationship with their holding company) makes the assessment of the loss a difficult task. One suggestion would be to use a hypothetical negotiations method,[129] which — as will be discussed in Chapter 7 of this thesis — is a way of measuring the reasonable value to the claimant of the direct benefit lost in circumstances in

[126] The idea of an undertaking to do the work, suggested by Megarry V-C in *Tito v Waddell (No 2)* ([1977] Ch 106, 333) has been rejected by the House in *Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344.

[127] *Alfred McAlpine Construction Ltd v Panatown Ltd* [1998] CLC 636, 637 (CA).

[128] ibid.

[129] S Waddams, *The Law of Damages* (2nd edn, Canada Law Book 1991) para 553.

which this is difficult due to the absence of a market or the market value's being irrelevant. Coote contends (in 1997)[130] that this solution has been rejected in *Tito v Waddell (No. 2)*[131] and *Surrey County Council v Bredero Homes Ltd*.[132] This might have been true when he wrote it,[133] but, subsequent to his article, the Court of Appeal has, on multiple occasions, applied this method in assessing damages for breach of contractual obligations, whether the obligation be negative[134] or positive[135] (as it was the case in *Panatown*). In imagining a hypothetical negotiation in which the claimants would have been willing to give up their benefit, though, the contract price seems like a relevant factor in *Panatown*. It shows how much, in the least, they were willing to pay for it in the first place; so, it can also be an indicator of the minimum value of the work to the claimants at the time of breach, depending on whether and to what extent the situations changed between the time of contracting and of breach.

[130] 'Contract Damages, *Ruxley* and the Performance Interest' (1997) 56 *CLJ* 537, 549.

[131] [1977] Ch 106 (Megarry V-C).

[132] (1993) 1 WLR 1361.

[133] For the contrary view that the application of this method in contract was justified even back then, see eg W Goodhart, 'Restitutionary Damages for Breach of Contract' [1995] *RLR* 3.

[134] *Experience Hendrix LLC v PPX Enterprises Inc* [2003] EWCA Civ 323, [2003] 1 All ER (Comm) 830; *Lunn Poly Ltd v Liverpool and Lancashire Properties Ltd* [2006] EWCA Civ 430, [2006] 2 EGLR 29; *Pell Frischmann Engineering Ltd v Bow Valley Iran Ltd* [2009] UKPC 45, [2010] BLR 73.

[135] *Giedo van der Garde BV v Force India Formula One Team Ltd* [2010] EWHC 2373 (QB).

CHAPTER SIX: DAMAGES FOR CONSEQUENTIAL LOSSES 1

The analytical importance of making a distinction between direct and consequential benefits is to highlight that while it is almost always a purpose of the claimant's right to ensure the former, there is no reason to assume that it is also its purpose in every case to ensure the latter. The intention of this chapter and the next is, accordingly, to show that damages may or may not be available depending on the correct construction of the purpose of the claimant's primary right. In this chapter, I first explain the importance of damages for mental distress in showing that this thesis is already in play in justifying the award of damages in an area in which they have traditionally been refused due to policy reasons. Then, I will consider the background for the law's developments in the twenty-first century with regard to the question of remoteness.

I. DAMAGES FOR MENTAL DISTRESS

The attitude of the law in the area of damages for mental distress is simply a manifestation of the purposive approach to the question of damages for the claimant's consequential losses. The purposive approach does not only explain why damages have traditionally been denied for mental distress, but also where and why they are awarded.

Starting with the denial of damages, it is well established by the law that no damages are awarded for the claimant's mere disappointment at breach. It is necessary to define the nature of this loss. It is the loss that the claimant may suffer simply because his right has been attacked and disrespected. It has to be distinguished from the loss of a mental benefit — such as pleasure or satisfaction — that the claimant expects to *receive* as a result of the performance. It is therefore not a purely contractual loss. Rather, it is a loss of a mental benefit that the claimant already has, e.g. his relative contentment before the breach. This accordingly must to be distinguished from a loss of the pleasure or satisfaction that one is not already enjoying but

expects to receive from the defendant's promise, for instance, to be given a ride on a merry-go-round or to be provided with a pleasurable amenity[1] or other pleasurable services.[2] The latter are pure contractual loss. The next question is why this loss is not recoverable. Several rationalisations have been offered for the rule. For example, it may be argued that, as contracts often concern commercial transactions, mental distress is not in the contemplation of the parties.[3] But this cannot be true. In commercial contexts, too, it is not difficult to imagine cases in which a reasonable defendant, if contemplating the breach, would foresee that it will cause disappointment or frustration, although disappointment may be less severe in commercial contexts. Besides, this general rule is also applicable in other contexts where the loss is even more easily foreseeable: employment, consumer contracts, etc. Friedmann cannot explain the rule in terms of principle. Damages are not available for this loss, whereas they would provide a substitute for a valuable performance. Performance would have prevented frustration or injured feelings resulting from a disrespect of the right. In line with the dominant rationalisation of the rule,[4] Friedmann can only explain the situation by making reference to policy considerations. But this is unnecessary according to the purposive approach. Damages for a mere disappointment are generally not recoverable, simply because, in typical contractual situations, it is not a purpose of the claimant's right to ensure protection against such disappointments or against an injury to the claimant's feelings arising just because his right has been infringed.

Even more importantly, the purposive approach offers a better analysis of the case law where damages are *awarded* for mental distress resulting from the breach of a contract whose

[1] See eg *Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344 (Lord Lloyd).

[2] See eg *Jarvis v Swans Tours Ltd* [1973] QB 233.

[3] *Diesen v Sampson* 1971 SLT (Sh Ct) 49.

[4] *Watts v Morrow* [1991] 1 WLR 1421, 1445 (Bingham LJ).

main object is to provide mental satisfaction. Despite the discrepancies between the purposive approach and Friedmann's thesis, both share the idea that looking at the claimant's contractual right is only the initial point of inquiry. More precisely, this is to say that having a right does not *entail*[5] damages in the case of an infringement, but *justifies* it. Reasons that are external to the proposed principle of recovery may qualify the availability of compensation where they are more compelling than the normative force of the right. For example, policy reasons generally justify the denial of damages for mental distress, even when the latter relate to losses that are not too remote (though, as just said above, it is unnecessary to justify the denial of damages for a mere disappointment at breach on the basis of policy). As stated by Bingham LJ in *Watts v Morrow*,

> A contract-breaker is not in general liable for any distress, frustration, anxiety, displeasure, vexation, tension or aggravation which his breach of contract may cause to the innocent party. This rule is not, I think, founded on the assumption that such reactions are not foreseeable, which they surely are or may be, but on considerations of policy.[6]

They are, however, available where the main object of the contract is to provide pleasure. The question then is how Friedmann would explain the law's preference for policy reasons over the protection of the claimant's performance interest in general when the main object of the contract is to provide pleasure. According to his thesis, damages should be awarded as a substitute for the lost performance. If policy reasons such as the difficulty of ascertaining a monetary equivalent for mental distress require denial, it should require it in all cases. All like cases should be treated alike. There is no role for the object of the contract in this analysis. Whatever that object, it does not affect the value of the performance. In order to clarify the foundation of this 'exception' to the general rule, Friedmann's theory will therefore

[5] Friedmann says that 'the very recognition of a legal right *entails* some consequences regarding the remedy' (D Friedmann, 'The Performance Interest in Contract Damages' (1995) 111 *LQR* 628, 637; emphasis added), but that can only be an imprecise use of the word.

[6] [1991] 1 WLR 1421, 1445.

need to give way to a more elaborate account of the normative conception of a contractual right to performance.

The said exception to the rule is in fact a manifestation of the purposive approach in contract, since the latter approach provides a straightforward explanation for it. To say that the main object of the contract is to provide pleasure is almost equivalent to saying that the main object of the claimant's right is to provide pleasure. Damages are justified where *a* purpose of the contract/contractual right was to provide the benefit (pleasure in the present context) that is lost as a result of the infringement. But policy reasons outweigh the normative force of the right in cases of mental distress. However, that normative force is stronger when the provision of pleasure is not simply *a* purpose of the claimant's right, but its main purpose. For that reason, in such cases it outweighs policy and justifies the courts to compensate the injured party even though this task may involve difficulties such as the encouragement of further lawsuits, and uncertainty in assessment of damages etc. This also shows why the courts first started awarding these damages by compensating the claimant where the provision of pleasure was the 'sole object' of his right:[7] the normative force of the right is most compelling in such a situation. It was therefore easier for them to justify their departure from a rule that had been regarded as good law at least since the decision of the House of Lords in *Addis v Gramophone Co Ltd*.[8] It is an open question whether the courts will be content in the future to decide that policy reasons are not powerful enough to defeat the normative force of the right even where the provision of the non-received mental satisfaction was only *a* purpose of the claimant's right. It is, for example, still a point of controversy whether the claimant should be compensated for defective performance under a construction contract where he does not receive a promised aesthetic

[7] *Jarvis v Swans Tours Ltd* [1973] QB 233.

[8] [1909] AC 488.

feature which does not affect the market value of building. But, at least, the purposive approach provides a roadmap.

II. REMOTENESS

It has been said, in respect of the remoteness rule in contract, that the 'difference between a loss that is too remote and one that is not appears to be one of degree, and not kind'.[9] This section argues that, as Lord Hoffmann once suggested,[10] the difference is in fact one of kind; it is, however, in contrast with his Lordship's approach, not a difference between the kind of losses for which responsibility has not been assumed and those for which it has been assumed. The difference is, rather, one between the kind of losses whose recovery is justified by the normative force of the claimant's contractual right (or its corresponding duty) and those whose recovery is not justified by it.

The intention of this section and the next chapter is to show that the remoteness rule is based on the purposive principle, rather than on policy.[11] If this can successfully be shown, it will add a great deal to the explanatory power of the 'loss of benefit' theory. First, as Andrew Burrows has put it, 'the interest of the law on compensatory damages is generated… perhaps *primarily*, by the numerous limitations on compensatory damages that the law has

[9] E McKendrick, *Contract Law: Text, Cases, and Materials* (7th edn, OUP 2016) 862.

[10] In his judgment in *South Australia Asset Management Corp v York Montague Ltd (SAAMCO)* ([1997] AC 191, 211), also referring to it later in the leading case of *Transfield Shipping Inc v Mercator Shipping Inc* ([2008] UKHL 48, [2009] 1 AC 61, [14]): 'Much of the discussion [in the proceedings in the lower courts] is about the correct measure of damages for the loss which the lender has suffered… I think that this was the wrong place to begin. Before one can consider the principle on which one should calculate the damages to which a plaintiff is entitled as compensation for loss, it is necessary to decide for what *kind* of loss he is entitled to compensation' (emphasis added). However, his conception of the *kind* of loss for which the claimant is responsible is different from what is defended in the present chapter.

[11] For a concise formulation of the major approaches to the remoteness rule in contract in the form of a debate between policy-based and agreement-centred analyses, see A Burrows, 'Lord Hoffmann and Remoteness in Contract' in *The Jurisprudence of Lord Hoffmann* (PS Davies, et al eds, Hart Publishing 2015). As it is shown in the next chapter, the 'loss of benefit' account of remoteness in contract is not an agreement-centred analysis, but shares one of its main features, i.e. that the remoteness rule is based on principle not policy.

developed'.[12] Second, the correct conception of the remoteness rule in contract has been subject to significant controversy for at least a decade now:[13] this is a rule for which a satisfactory explanation will be greatly valued.

This argument will be developed in four steps. *First,* an outline of the orthodox view of the remoteness rule in contract is drawn. *Second,* the dominant conception of the modern — as against the orthodox — approach of the English courts to that rule, which is based on the notion of 'assumption of responsibility' by the defendant and the parties' intentions, is expounded. *Third,* it will be shown that the 'assumption of responsibility' approach is seriously flawed. *Finally*, an interpretation of the modern approach, based on the 'loss of benefit' theory, is offered. This section covers the first three of these steps.

A. The Law Before *The Achilleas*: The Orthodox Approach

The status of the law regarding the remoteness rule in contract may best be investigated by comparing the eras before and after the House of Lords' decision in *Transfield Shipping Inc v Mercator Shipping Inc* (*The Achilleas).*[14] The first era reflects the so-called orthodox view of the remoteness rule, characterised by the belief that the sole test of remoteness in contract is that of the reasonable foreseeability/contemplation by the parties of the loss at the contracting time. This began with the nineteenth century decision of the House of Lords in the well-known case of *Hadley v Baxendale*[15] and was later developed by three other leading cases.

[12] Andrew Burrows, 'Limitations on Compensation' in *Commercial Remedies: Current Issues and Problems* (A Burrows, et al, OUP 2003) 27 (emphasis added).

[13] Since the decision of the House of Lords in *Transfield Shipping Inc v Mercator Shipping Inc* ([2008] UKHL 48, [2009] 1 AC 61.

[14] [2008] UKHL 48, [2009] 1 AC 61.

[15] *Hadley v Baxendale* (1854) 9 Exch 341, 156 ER 145.

In *Hadley*, the claimants were mill owners who made a contract with the defendant carriers, according to which the latter were required to carry a broken crankshaft from the mill to the engineers who had made it and needed it as a pattern for a new one, and then to deliver it back to the claimants. As a result of the defendants' neglect, the delivery to the engineers was delayed, and consequently the delivery of the new shaft to the claimants was also delayed for several days. This constituted a breach of contract. The claimants had no other shaft and therefore the mill was shut down. The claimants sought damages for the loss of the profits that they would have made had the delivery been made in a timely manner. The defendants argued that the loss was too remote and therefore unrecoverable. The court decided in favour of the defendants, considering the loss as too remote, on the basis of the following principle:

> Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.[16]

According to these principles, the claimants were not entitled to damages for their lost profits. The loss had not flowed 'naturally from the breach of this contract in the great multitude of such cases occurring under ordinary circumstances'.[17] Nor was it in the reasonable contemplation of the parties at the time they entered into the contract, since the special circumstances, i.e. the mill owners' possession of only one shaft, had not been communicated to the defendants.[18]

[16] ibid 355 (Alderson B).

[17] ibid 356.

[18] ibid.

The principles set in the above passage have since been considered as constituting the core of the remoteness rule in contract. However, their precise conception has been the subject of controversy and continued inquiry in the courts — except for the principle that the loss should have been in the reasonable contemplation of the parties (or merely the defendant) *at the contracting time*. During the previous era, three main cases took the leading role in attempting to clarify the true meaning of the principles asserted in *Hadley*. Together, they represent the orthodox view of the remoteness rule.

The first aspect of *Hadley* which required clarification was whether it reflected two different rules or whether they could be merged into a single rule. The leading case on this issue is *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd*[19] in which Asquith LJ, delivering the judgment of the Court of Appeal, reasoned that there is in fact a single rule governing the law of remoteness in contract: the so-called 'reasonable contemplation/foreseeability' test.[20] The accuracy of this view may particularly be observed by considering that whatever loss that arises 'naturally, i.e. according to the ordinary course of things' from the breach of contract can be presumed to have been in the reasonable contemplation of the parties.[21] The second rule is inclusive of the first. It is however not exhausted by it: not all losses that can be presumed to have been in the reasonable contemplation of the parties arise according to the ordinary course of things. There are losses

[19] [1949] 2 KB 528.

[20] This view has dominated the judicial thought after *Victoria Laundry*. Some explicit confirmations of it include: *Koufos v C Czarnikow Ltd (The Heron II)* [1969] 1 AC 350, 385 (Lord Reid), 421 (Lord Upjohn); *Parsons (Livestock) Ltd v Uttley Ingham & Co Ltd* (1978) QB 791, 806 (Scarman LJ); *Satef-Huttenes Albertus SpA v Paloma Tercera Shipping Co SA, The Pegase* [1981] 1 Lloyd's Rep 175, 182 (Robert Goff J); *Kpohraror v Woolwich Building Society* [1996] 4 All ER 119, 127–28; *Hotel Services Ltd v Hilton International Hotels (UK) Ltd* [2000] 1 All ER (Comm) 750, 755 (Sedley LJ); *Jackson v Royal Bank of Scotland* [2005] UKHL 3, [2005] 1 WLR 377, [46] – [49], even though the rules have sometimes been regarded as mutually exclusive: see eg *President of India v La Pintada Compania Navigacion* SA [1985] AC 104.

[21] M Chen-Wishart, *Contract Law* (5th edn, OUP 2015) 541.

that arise due to special circumstances and therefore do not occur according to the ordinary course of things. In these cases, the law considers that the loss is in the reasonable contemplation of the parties if those special circumstances have been communicated to the defendant.

The second issue relates to the degree of likelihood of the occurrence of loss that must reasonably be contemplated in order for the loss not to be too remote. The most well-known judgment on this point is the House of Lords' decision in *Koufos v C Czarnikow Ltd (The Heron II).*[22] However, the case has received mostly negative comments due to its relative failure to clarify the issue, considering the length at which their Lordships discussed the topic.[23] There was no consensus on the issue and different terms were employed by their Lordships to describe the required degree of probability. For the present purpose of providing a summary of the state of the law on the issue, it should suffice to quote Professor Burrows' view of 'the essence of their Lordships' reasoning': '*a serious possibility* of the loss occurring is required in contract'.[24] This would render the judgments in *The Heron II* even more redundant, considering that the language of 'serious possibility' had already been employed by Asquith LJ in *Victoria Laundry*[25] and earlier than that by Lord du Parcq in the House of Lords decision in *A/B Karlshamns Oljefabriker v Monarch Steamship Company Limited*.[26] In any event, this terminology was recognised in the leading decision on remoteness in contract subsequent to

[22] [1969] 1 AC 350.

[23] See eg A Burrows, 'Limitations on Compensation' in *Commercial Remedies: Current Issues and Problems* (A Burrows et al, OUP 2003) 33; *Contract Law: Text, Cases, and Materials* (5th edn, OUP 2016) 877.

[24] 'Limitations on Compensation' in *Commercial Remedies: Current Issues and Problems* (A Burrows et al, OUP 2003) 33 (Emphasis added).

[25] *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 KB 528, 540.

[26] [1949] AC 196, 233.

The Heron II, i.e. *Parsons (Livestock) Ltd v Uttley Ingham & Co Ltd*,[27] in which not only all of the judges employed it, but it was also considered by Scarman LJ as reflecting the view of the judges in *The Heron II* on the required degree of probability.[28]

The *Parsons* case, however, did not stop there. According to the majority view,[29] reaching a correct decision in that case required resolving a third aspect of the decision in *Hadley*, i.e. whether 'a serious possibility' is a reference to the likelihood, from the viewpoint of reasonable parties, of the occurrence of the specific loss in issue or whether it is a reference to that of the *type* of loss. In that case, a contract had been made between the parties according to which the defendants sold a pig hopper, for the bulk storage of pignuts, to the claimant pig farmers. When being installed by the defendants, the hopper's ventilator was not left open. This constituted a breach of contract by the defendants. Some of the pignuts got mouldy as a result, and this caused the outbreak of a rare intestinal infection in the pigs which killed a great number of them. The claimants sought substantial damages including damages for lost profits. The Court of Appeal held that it is the 'type' of loss that should be in the reasonable contemplation of the parties at the contracting time, not the specific loss suffered.[30] On the facts of the case, the defendants could reasonably have contemplated that a hopper unfit for the purpose of the storage of food would result in the *illness* of the pigs, even though the *death* of the pigs was

[27] (1978) QB 791.

[28] ibid 806.

[29] Scarman LJ's view with which Orr LJ completely agreed; Lord Denning took a different approach to the solution of the case.

[30] *Parsons (Livestock) Ltd v Uttley Ingham & Co Ltd* (1978) QB 791, 813 (Scarman LJ), agreed by Orr LJ. Denning LJ employed a different reasoning to reach the same results as those reached by the other members of the Court.

not reasonably foreseeable. The death and the illness of the pigs were both considered as the same type of loss.[31]

B. *The Achilleas:* [32] The 'Assumption of Responsibility' Approach and *SAAMCO*

1. Academic Background

In 1936 Fuller and Perdue said that 'the test of foreseeability is less a definite test itself than a cover for a developing set of tests'.[33] In 1990s and the early 2000, there was a rising volume of scholarship that aimed at uncovering such tests by explaining the parties' liability under the remoteness rule on the basis of criteria internal to the parties' agreement.[34]

Kramer's 2005 paper on remoteness,[35] for example, proposed that it is the parties' agreement that sets the paramount test for the remoteness of damages, and that it also gives meaning to, and limits the applicability of, the doctrine of 'reasonable foreseeability/contemplation' that had been established in the previous era. Wishing to revive 'the long discredited tacit agreement/implied promise theory of remoteness',[36] supported most notably by the 1868 case

[31] The 'type of loss' requirement has been acknowledged by multiple cases after *Parsons*, such as *Transworld Oil Ltd v North Bay Shipping Corpn (The Rio Claro)* [1987] 2 Lloyd's Rep 173 , 175 (Staughton J); *Jackson v Royal Bank of Scotland* [2005] UKHL 3, [2005] 1 WLR 377.

[32] *Transfield Shipping Inc v Mercator Shipping Inc* [2008] UKHL 48, [2009] 1 AC 61.

[33] 'The Reliance Interest in Contract Damages: 1' (1936) 46 *YLJ* 52, 85.

[34] See eg F Dawson, 'Reflections on Certain Aspects of the Law of Damages for Breach of Contract' (1995) 9 *JCL* 125, 125; J Cartwright, 'Remoteness of Damage in Contract and Tort: a Reconsideration' (1996) 55 *CLJ* 488, 505; D Campbell and H Collins, 'Discovering the Implicit Dimensions of Contract' in *Implicit Dimensions of Contract: Discrete, Relational and Network Contracts* (D Campbell, et al eds, Hart Publishing, 2003) 45; H Collins, *The Law of Contract* (4th edn, Butterworths, 2003) 413; GH Treitel, *The Law of Contract* (11th edn, Sweet & Maxwell 2003) 970; D Harris, et al, *Remedies in Contract and Tort* (2nd edn, CUP 2005) 90–91;.

[35] 'An Agreement-Centred Approach to Remoteness and Contract Damages' in *Comparative Remedies for Breach of Contract* (N Cohen et al eds, Hart Publishing, 2005) 249.

[36] ibid 250.

of *British Columbia Saw-Mill Co Ltd v Nettleship*,[37] Kramer attacks the bases on which it had been discredited. According to him, the parties to a contract, in the absence of express terms of the contract, implicitly allocate the risk of and the responsibility for the consequences of breach: the modern understanding of the interpretation of contracts does not reject the idea of a tacit allocation of the risk by the parties, where it can be found 'by looking to the factual matrix, the surrounding norms and the reasonable expectations' of the parties.[38] The foreseeability test, he suggests, 'is not a strict rule originating outside the contract for reasons of efficiency, fairness or proportionality', but 'a rule of thumb that is justified when and to the extent that it indicates what the parties wanted'.[39] It is one indicator, along with other norms, that, in the absence of express disavowal, provides an indication that the promisor has tacitly intended to assume responsibility for the loss in question — a conclusion that can be rebutted in the case of the presence of stronger indicators, such as the disproportionality of the loss to the contract price and insurance,[40] implying the contrary. Kramer argues that this is because often the parties can reasonably be regarded to have intended to assume responsibility for those losses that can be foreseen at the contracting time.

[37] [1868] LR 3 CP 499; also Blackburn J (at 141), Lush J (145–46) and Martin B (139–40) in *Horne v Midland Railway Co* [1872–73] LR 8 CP 131; *cf.* Blackburn J's position in *Cory v Thames Ironworks Company* [1867–68] LR 3 QB 181, 191.

[38] 'An Agreement-Centred Approach to Remoteness and Contract Damages' in *Comparative Remedies for Breach of Contract* (N Cohen, et al eds, Hart Publishing 2005) 250; for his more extended views on contractual implication and interpretation, see 'Implication in Fact as an Instance of Contractual Interpretation' (2004) 63 *CLJ* 384.

[39] 'An Agreement-Centred Approach to Remoteness and Contract Damages' in *Comparative Remedies for Breach of Contract* (N Cohen, et al eds, Hart Publishing 2005) 250.

[40] ibid 269–70.

2. Facts and Reasoning

Following this line of scholarship, the majority reasoning in the modern case of *Transfield Shipping Inc v Mercator Shipping Inc* (*The Achilleas)*[41] aspired to change the shape of the law of remoteness in contract by providing authoritative support for the modern, agreement-centred approach.[42] Lord Hoffmann, giving the leading judgment of the majority of House of Lords and also citing Kramer's paper, decided that under the circumstances of that case, reasonable contemplation by the parties of the occurrence of lost profits was not good reason to make the compensation for that loss available where it could not be discerned from the parties' agreement that the defendant had assumed responsibility for it. In justifying his decision, he also relied on the principle of 'the scope of the defendant's duty' which he had already elaborated in *South Australia Asset Management Corp v York Montague Ltd (SAAMCO).*[43]

The facts of *The Achilleas* were as follows. The defendants had chartered the claimants' vessel, promising to redeliver it on 2 May 2004. They failed to fulfil their promise. Meanwhile, when the market hire rates had risen in April 2004, the claimants had made a follow-on charter with another company for a rate of $39,500 per day. Realising that the defendants would not be able to redeliver the vessel before 8 May, when the party to the follow-on contract had the right to cancel, and considering that the market had fallen sharply, the claimants had to agree a reduced rate of $31,500 per day in order to convince them not to cancel until 11 May when the vessel was supposed to be returned according to the revised redelivery date. The claimants

[41] [2008] UKHL 48, [2009] 1 AC 61.

[42] Before *The Achilleas*, while there was support for this approach in academic writings, there was little support for it in modern court decisions (one modern example includes Waller LJ's opinion in *Mulvenna v Royal Bank of Scotland plc* [2003] EWCA Civ 1112, [2004] CP Rep 8, [26]). In fact, it had clearly been rejected by Lord Upjohn's dictum in *Koufos v C Czarnikow Ltd (The Heron II)* [1969] 1 AC 350, 422: if 'parties enter into the contract with knowledge of some special circumstances, and it is reasonable to infer a particular loss as a result of those circumstances that is something which both must contemplate as a result of a breach. It is quite unnecessary that it should be a term of the contract'.

[43] [1997] AC 191.

sought damages for lost profits based on the difference between the original and the reduced rate under the follow-on charter, i.e. $8000 per day for 191 days (the duration of the follow-on charter). The defendants contended that damages for the lost profits in that case is too remote and therefore the claimant's recovery should be limited to a much smaller amount based on the difference between the market rate and the charter rate for the 9 days of delayed redelivery. The House of Lords decided for the defendants, holding that the damages for lost profits are too remote. There was no unified basis for this conclusion however.

According to Lord Hoffmann, with whom Lord Hope fully agreed, that was because the defendants, if they had thought about the extent of their liability for breach at the contracting time, would not have assumed responsibility for the loss of a follow-on fixture, where the nature of such a fixture was totally unknown to them and therefore the loss was 'completely unquantifiable'.[44] Further, he argued, they could not be taken to have assumed responsibility for the larger amount of loss in circumstances where there was a general understanding in the shipping market that damages for late delivery are limited to the difference between the market and the charter rate for the period of late delivery.[45] He also believed that since no responsibility had been accepted by the defendants, the reasonable foreseeability of the loss by the defendants was immaterial: it is a valid test only so far as it signifies an implicit undertaking of responsibility by the defendants.[46] This reasoning was found by him also to be in line with the *SAAMCO* principle.

[44] Lord Hope made the same conclusion by considering that the defendants would not have assumed responsibility for the loss, since the follow-on charter 'was something over which they had no control' and the nature of any deal between the owners and the charterers was 'completely unpredictable' at the time of entering into the contract. (*Transfield Shipping Inc v Mercator Shipping Inc* (*The Achilleas*) [2008] UKHL 48, [2009] 1 AC 61, [34]).

[45] ibid [67].

[46] ibid [9].

Lord Rodger, while agreeing with Lord Hoffmann's view of the remoteness rule, believed that in order to limit the scope of damages in the case before them, it was not necessary to engage with the 'assumption of responsibility' rider to the 'reasonable foreseeability' test and that the same conclusion could be reached simply by applying the latter test. According to him, since the loss of profits had resulted from the unusual rise and fall of the market, it could not be presumed to have been in the reasonable contemplation of the parties when they entered the charter agreement.[47] Baroness Hale was hesitant to support the conclusion reached by the other judges but said that if she was to agree with the conclusion, she would agree on the ground of the reasons provided by Lord Rodger, as she was 'not immediately attracted' to Lord Hoffmann's approach. Lord Walker agreed with both Lord Hoffmann and Lord Rodger.

3. Ratio

Lord Hoffmann's view of the remoteness rule undoubtedly has the support of the majority, even though academic writers seem generally to disagree. They assume that Lord Rodger's view is inconsistent with that of Lord Hoffmann and Lord Hope. On this assumption, it has been thought necessary to consider whether Lord Walker supports the agreement-centred approach[48] McKendrick, for example, believes that Lord Rodger 'did not support the analysis

[47] This view has been criticised on two grounds: *first*, as Lord Hoffmann said extra-judicially, 'there was […] no evidence about the extent to which the fall in the market between […] was historically unusual. It does not seem to have been unusual enough to make the arbitrators or the commercial judges in the lower courts think that those in the industry would have regarded it as unlikely' ('*The Achilleas*: Custom and Practice or Foreseeability?' (2010) 14 *Edinburgh LR* 47, 51); *second*, even supposing that the extent of the loss was not reasonably foreseeable by the parties, the *type* of loss was reasonably foreseeable as not unlikely: it was quite likely that as a result of late redelivery, the claimants would suffer a loss of a follow-on fixture (Lord Hoffmann, ibid 51–52; A Burrows, 'Lord Hoffmann and Remoteness in Contract' in *The Jurisprudence of Lord Hoffmann* (PS Davies, et al eds, Hart Publishing 2015) 255). A faithful application of the traditional approach based on the 'reasonable foreseeability' test would therefore result in the availability of the larger amount of damages. This is actually the conclusion that had been reached by Rix LJ in the Court of Appeal: [2007] 2 Lloyd's Rep 555.

[48] See eg PCK Wee, 'Contractual Interpretation and Remoteness' [2010] *LMCLQ* 150; M Stiggelbout, 'Contractual Remoteness, "Scope of duty" and intention' [2012] *LMCLQ* 97; A Burrows, 'Lord Hoffmann and Remoteness in Contract' in *The Jurisprudence of Lord Hoffmann* (PS Davies, et al eds, Hart Publishing 2015) 255.

adopted by Lord Hoffmann'[49] and continues: 'Lord Walker's analysis is more difficult to discern. He stated […] that he agreed with reasons given by Lords Hoffmann, Hope, and Rodger'; and then he asks: given 'Lord Walker's apparent endorsement of both approaches, what is the ratio of the case?'[50]

But this seems, with respect, to be all unnecessary and based on a misunderstanding of Lord Rodger's reasoning. There is nothing in Lord Rodger's judgment suggesting that he disagrees with Lord Hoffmann's approach. To the contrary, he emphasised that he was in agreement with his [i.e. Lord Hoffmann's] reasons. Lord Rodger only chose to follow the 'reasonable foreseeability' route to justify his judgment, since he believed that the same result as was reached by Lords Hoffmann and Hope could be reached even without exploring 'the issues concerning *South Australia Asset Management Corpn v York Montague Ltd* [1997] AC 191 and assumption of responsibility'. It was therefore, in his view, *unnecessary*, but not *wrong*, to explore these issues. He was also not inconsistent in thinking that it is possible to endorse the 'assumption of responsibility' approach and employ the 'reasonable foreseeability' test. As was said above, the employment of the 'reasonable foreseeability' test is not *per se* inconsistent with that approach. What is inconsistent with it is the orthodox view of that test, as the orthodox view does not require conceptualizing it in the light of the 'assumption of responsibility' thesis. This conception of Lord Rodger's reasoning also sheds light on Lord Walker's position. Given that Lord Rodger's analysis is not inconsistent with the 'assumption of responsibility' approach, it is incorrect to conclude that Lord Walker endorses both the orthodox and the modern approaches by agreeing with both Lord Hoffmann and Lord Rodger. By endorsing both, he in

[49] *Contract Law: Text, Cases and Materials* (OUP 2014) 884.

[50] ibid; PCK Wee ('Contractual Interpretation and Remoteness' [2010] *LMCLQ* 150, 155–56) and M Stiggelbout ('Contractual Remoteness, "Scope of duty" and intention' [2012] *LMCLQ* 97, 109), considering that Lord Walker's view is in fact more accordant to that of Lords Hoffmann and Hope, conclude that Lord Hoffmann's view had the support of the majority.

fact acknowledged the 'assumption of responsibility' approach while believing, like Lord Rodger, that it is unnecessary directly to apply it to the facts of *The Achilleas*. It can therefore safely be said that Lord Hoffmann's approach to the question of remoteness has the support of all of their Lordships except for Baroness Hale's.

C. Judicial Reasoning after *The Achilleas*

The position of the courts, in major cases subsequent to *The Achilleas*, on the correct approach to the question of remoteness in contract has sometimes been regarded as more or less unclear. McKendrick claims, for instance, that one problem on which the courts have focused and which needs clarification is the relation between the orthodox and the modern approach. It is shown here that such a problem has not been a source of ambiguity in the cases. As the orthodox approach is based on the belief that the only test of remoteness is that of the 'reasonable foreseeability' of losses, it is inherently inconsistent with the 'assumption of responsibility' approach. The *first* theme which is clarified in the discussion of cases in the present section is that the courts have shown awareness of that, by clearly preferring Lord Hoffmann's modern approach. The *second* theme concerns the courts' clear understanding of (and adherence to) the latter approach's suggestion that there is no inherent inconsistency between it and the 'reasonable foreseeability' test,[51] that the latter can be an indicator of the acceptance of responsibility by the defendant in appropriate situations, and that it can and must be ignored in situations where it is not a good indicator, as the paramount test of remoteness is that of the defendant's assumption of responsibility. The *third* theme that is expounded through the discussion of these cases is that one major focus of the courts has indeed been on the question

[51] Or, in Lord Hoffmann's words, that the 'reasonable foreseeability' rule is 'intended to give effect to the presumed intentions of the parties and not to contradict them' (*Transfield Shipping Inc v Mercator Shipping Inc* (*The Achilleas*) [2008] UKHL 48, [2009] 1 AC 61, [71]).

of the relation between the 'assumption of responsibility' test and that of 'reasonable foreseeability' of losses, at a *practical* level.

The first significant case after *The Achilleas*, i.e. *Supershield Ltd v Siemens Building Technologies FE Ltd,*[52] is a clear instance of the Court of Appeal's adherence to Lord Hoffmann's approach. This case has a particular significance, not least because it supports the House of Lords' decision in *The Achilleas,* this time by making damages on the basis of the defendant's acceptance of responsibility *available* rather than excluding them. Supershield, the appellant sub-contractor, was found in breach of contract and liable for the improper installation of a ball float valve which caused a flood in the basement of a building which in turn caused substantial damage to the electrical equipment in the basement. Siemens, the respondent contractor, had sub-contracted with another party who had in turn subcontracted with the original contractor. Siemens, while settling the claims with the parties further up the contractual chain, claimed damages for the loss which Supershield had caused. The appellant claimed, *inter alia,* that, considering the defences that had been available to the respondent, the amount for which the settlement had been made (£2,864,080) was not reasonable. One of the allegedly available defences was in respect of the remoteness of loss. Hence, one of the issues before the Court was whether the loss was too remote and therefore the respondent had made an unreasonable settlement based on the recognition of their liability for the loss. The significant point in respect of the question of remoteness in this case is that the loss was not in the reasonable contemplation of the partiers as a serious possibility. This is because measures other than the installation of the ball valve had also been taken in order to prevent the flood, but, in a quite unlikely manner, they failed simultaneously. The Court of Appeal decided for Siemens that even though the loss was not in the reasonable contemplation of the parties, it

[52] [2010] EWCA Civ 7, [2010] 1 Lloyd's Rep 349.

was not too remote, since it was within the scope of Siemens's duty to prevent the flood, and that they can therefore be taken to have assumed responsibility for the loss that it caused. This conclusion clearly reflects the Court's adoption of the principle of 'assumption of responsibility' and the *SAAMCO* principle of 'scope of duty' as paramount. While the application of that principle resulted in the 'exclusion' of damages in the presence of the reasonable foreseeability of the loss in *The Achilleas*, it required the 'inclusion' of damages in the absence of the reasonable foreseeability of the loss in *Supershield*.[53] In both cases, where it was reasonable, considering the commercial background of the contract, to presume the defendants' assumption of responsibility for the loss, it was irrelevant whether the application of the 'reasonable foreseeability' test would have led to a different conclusion.

In the same case, Toulson LJ stated that *Hadley* remains a standard rule. This has led some commentators to the opinion that the courts' position on the relation between the modern and the orthodox approach is not exactly clear. As they have pointed out, one major question for the courts in *Supershield* and other major cases decided after *The Achilleas* has indeed been that of the relation between *Hadley* and the 'assumption of responsibility' account of remoteness. But that question has been understood by them in the following way: should the 'assumption of responsibility' approach be applied to some cases, leaving the decision about others to the orthodox approach? And if so, what are the criteria for determining which cases should be decided under which approach?[54]

It has to be said, with respect, that this formulation of the case law on the relation between the modern approach and the 'reasonable foreseeability' rule is fundamentally

[53] *Supershield Ltd v Siemens Building Technologies FE Ltd* [2010] EWCA Civ 7, [2010] 1 Lloyd's Rep 349, 253–54. On the 'exclusive' and 'inclusive' effects of the 'assumption of responsibility' test, see A Burrows, 'Lord Hoffmann and Remoteness in Contract' in *The Jurisprudence of Lord Hoffmann* (PS Davies, et al eds, Hart Publishing 2015).

[54] See eg E McKendrick, *Contract Law: Text, Cases, and Materials* (6[5h] edn, OUP 2014), 884–87.

distorted. This case law should not be seen as indicating the courts' hesitation about fully embracing the modern approach or its paramount status. One may indeed ask how it is possible to see *Hadley* as providing the 'standard rule' while, simultaneously, embracing the 'assumption of responsibility' as the sole solution to the problem of remoteness in contract. The answer is that *Hadley* provides the standard rule in the sense that, in their *practical* attempt to solve the problem of remoteness, the courts take the question of the 'reasonable foreseeability' of losses as their *point of departure*. They have had no doubt about whether the approach defended by the majority in *The Achilleas* is intended to provide a rationale for *all* cases of remoteness. Their inquiry has rather involved the different question of whether it is justified, in deliberation about the question of remoteness, to depart from the rebuttable assumption that the defendant has accepted responsibility for losses that are reasonably foreseeable, and *vice versa*. Their positive answer to that question may best be explained on the ground that the 'reasonable foreseeability' test provides in fact an indicator of the defendant's acceptance/non-acceptance of responsibility in the great majority of cases and therefore it is a proper strategy to take it as a point of departure. It assists by (a) smoothing the break with the orthodox approach by only investigating, in the great majority of the cases, the 'reasonable foreseeability' of the loss — just like they did in the old era — while acknowledging, in principle, the paramount state of the 'assumption of responsibility' test,[55] and (b) discouraging the flood of new claims based on the claim that the defendant has not assumed responsibility for losses that are reasonably foreseeable at the contracting time.

[55] Seen in that light, judicial statements that '*The Achilleas* has caused no major change in the old approach to the recoverability of damages in contract' will make perfect sense. For similar statements, see also Flaux J in *ASM Shipping Ltd of India v TTMI Ltd of England* (*The Amer Energy)* [2009] 1 Lloyd's Rep 293; *Pindell Ltd v Air Asia Bhd* [2010] EWHC 2516, (2011) 2 ALL ER, [85].

This is how the courts have viewed the law of remoteness in cases subsequent to *The Achilleas*. Thus, in *Sylvia Shipping Co Ltd v Progress Bulk Carriers Ltd (The Sylvia),*[56] a major concern of the court was to ascertain under what circumstances the courts do not need 'specifically' to address the question of assumption of responsibility[57] and whether the case before it met those criteria. It was clear for the court that their task did not involve determining the type of cases in which the orthodox approach provides a test for remoteness of losses, and that the 'reasonable foreseeability' of losses is an indication of the defendant's assumption of responsibility. The defendant (appellant) ship owners had breached their maintenance obligations under a time charter, as a result of which a delay had occurred in the readiness of the vessel for the claimant (respondent) charterers' use. The charterers consequently missed the laycan date for a sub-charter, which led to the cancellation of the sub-charter. The court had to decide whether the loss of profits on the cancelled sub-charter was too remote.[58] Since the case (unlike *The Achilleas*) was decided to fall within the ambit of the great majority of cases in which 'the fact that the type of loss arises in the ordinary course of things or out of special known circumstances will carry with it the necessary assumption of responsibility',[59] there was no need specifically to consider the question of assumption of responsibility. Considering the facts, the application of the reasonable foreseeability test led to the court's decision that damages were recoverable for the lost profits.

[56] [2010] EWHC 542 (Comm), [2010] 1 CLC 470.

[57] ibid 479.

[58] Damages on that basis, if awarded, should have had to be measured on the basis of the net revenue from the sub-charter minus the earnings by the charterers from a substitute time charter.

[59] *Sylvia Shipping Co Ltd v Progress Bulk Carriers Ltd (The Sylvia)* [2010] EWHC 542 (Comm), [2010] 1 CLC 470, [41]; as it was explained above, these all boil down to the 'reasonable contemplation/ foreseeability' test.

The last case to be considered is the decision of Court of Appeal in *John Grimes v Gubbins.*[60] The claimants in that case were assistant engineers who had promised to provide, by a specified time, a scheme for the road that the defendants intended to build on their land. It was being built as part of a development plan on the defendants' land. The claimants had performed their duty only with egregious delay, and subsequently the defendants had only been able to complete the houses on their land and sell them at a time when the market price of the houses had fallen. The claimants sought part of the fee that the defendants had not paid them. The defendants brought a counterclaim, contending that they had suffered loss as a result of the claimants' breach of contract and the consequent diminution in the value of the houses. The amount of compensation for the breach of contract, if awarded, was much larger than the unpaid part of the fees. The trial judge decided for the defendants. The claimants appealed on the ground that the loss was too remote a consequence of the breach. The Court, taking into consideration particularly the modern cases such as *The Achilleas* and *Supershield,* held that the loss was not too remote and therefore dismissed the appeal. Sir David Keene, with whom also Tomlinson and Laws LJJ agreed, pointed to the paramount state of the 'assumption of responsibility' principle by saying that normally, 'there is an implied term accepting responsibility for the types of losses which can reasonably be foreseen at the time of contract to be not unlikely to result if the contract is broken', and that if, in a particular case, there is evidence that the 'reasonable foreseeability' of the loss cannot be taken as an implied assumption of responsibility, then the contract-breaker cannot be held liable. He believed that this also reflected the law as stated by Toulson LJ in *Supershield*. Applying these principles to the case before him, he found that the loss was not too remote: the loss, resulting from the fall of the market price of the houses, was foreseeable at the contracting time by the defendants, so

[60] [2013] EWCA Civ 37, [2013] PNLR 17.

the claimant could normally be taken to have assumed responsibility for it. There was also no reason to consider that this case did not fall in same category as the majority of cases in which the 'reasonable foreseeability' of losses is an indicator of the defendant's acceptance of responsibility.

D. Criticism of the 'Assumption of Responsibility' Approach

Despite the position defended in *The Achilleas* and major cases subsequent to it that the 'assumption of responsibility' approach explains the remoteness rule in contract, it is contended, with respect, that it does not, since it is flawed at least in two respects. This section is devoted to the development of this argument.[61]

1. Inconsistency with the 'Type of Loss' Requirement

The 'assumption of responsibility' approach seeks to explain the bulk of the cases decided in the previous era mainly by holding that it leads, in the great majority of cases, to the same result as can be reached by the application of the 'reasonable foreseeability' test, a test which provides the basis of the decisions made in that era. However, it is submitted that the approach fails to explain a significant number of those cases, because it is inconsistent with one significant aspect of the 'reasonable foreseeability' test, i.e. the 'type of loss' requirement.

[61] In this section I have only considered the most powerful (in my opinion) objections to the 'assumption of responsibility' approach. One may also criticise the approach on other grounds. For example, one may contend that it potentially introduces a great level of uncertainty to the contract law of remoteness (see PCK Wee, 'Contractual Interpretation and Remoteness' [2010] *LMCLQ* 150, 166). Lord Hoffmann has extra-judicially responded to this objection, saying that it is the orthodox approach that is uncertain. In *Transfield Shipping Inc v Mercator Shipping Inc* (*The Achilleas*) [2008] UKHL 48, [2009] 1 AC 61, for example, he says, the conclusion reached by the majority arbitrators and the Court of Appeal based on the orthodox approach required that the defendant would be liable for losses that were extremely unquantifiable; he had no control over a follow-on fixture, so he, or his lawyers, had no way to predict what loss would result from the breach. This involves a great degree of uncertainty (see L Hoffmann, 'The Achilleas: Custom and Practice or Foreseeability?' (2010) 14 *Edinburgh LR* 47).

As it was expounded above, one major aspect of the 'reasonable foreseeability' rule, first recognised in *Parsons*, is that the defendant has, at the contracting time, to be able reasonably to foresee the 'type' of loss in question in order for it to be recoverable. The 'type of loss' principle may indeed be susceptible to criticism. For instance one may argue that it is a loose or vague term conferring an unduly wide scope of discretion to the courts in deciding what losses count as the same 'type' as that actually suffered by the claimant.[62] But, justifiable or not, this requirement has been employed by the courts in some significant cases of the past, to reach specific results. In order to be successful, the 'assumption of responsibility' approach has (1) to show how it can explain that principle or, if it does not accept the principle as it stands, (2) to explain the results of those cases.

(a) Inconsistency in principle

It is submitted that the approach fails in explaining the principle. In addition to its positive side, requiring the foreseeability of the type of recoverable losses, the 'type of loss' requirement has a negative side, as follows: in cases in which the type of the loss in question has been reasonably foreseeable, the foreseeability of the *extent* of the loss is *not* material for the purpose of the question of recoverability. The difficulty with the 'assumption of responsibility' approach starts here. On one hand, the defendant cannot be taken to have assumed responsibility for the specific losses suffered, as he could not have reasonably foreseen them at all. On the other hand, he cannot be taken to have accepted responsibility for the *type* of loss either. According to Lord Hoffmann's (plausible) suggestion in *The Achilleas*,[63] the defendant cannot be taken to have

[62] See eg L Hoffmann, '*The Achilleas*: Custom and Practice or Foreseeability?' (2010) 14 *Edinburgh LR* 47, 52–53. For example, one may plausibly contend that in *Victoria Laundry*, the loss suffered by the defendants as a result of losing the exceptionally lucrative contracts and the losses that were decided by the Court as being reasonably foreseeable were both 'lost profits' and therefore of the same type and that compensation for the former losses should have therefore been available.

[63] *Transfield Shipping Inc v Mercator Shipping Inc* (*The Achilleas*) [2008] UKHL 48, [2009] 1 AC 61.

assumed responsibility for losses that are 'completely unquantifiable' at the contracting time;[64] Lord Hope, in the same case, made the similar suggestion that the defendant cannot be taken to have accepted responsibility for 'completely unpredictable' losses.[65] Now, what is unforeseeable at the contracting time is also unquantifiable and unpredictable at that time. Assuming responsibility for a type of loss whose extent is unforeseeable would therefore require assuming responsibility for unquantifiable and unpredictable losses. Losses that are not too remote according to the 'type of loss' requirement have to be regarded as too remote according to the 'assumption of responsibility' approach.

(b) Inconsistency in Practice

Lord Hoffmann seems to have intended to explain the 'type of loss' requirement in the light of the 'assumption of responsibility' approach:

> What is the basis for deciding whether loss is of the same type or a different type? It is not a question of Platonist metaphysics. The distinction must rest upon some principle of the law of contract. In my opinion, the only rational basis for the distinction is that it reflects what would reasonably have been regarded by the contracting party as significant for the purposes of the risk he was undertaking.[66]

On that basis, Lord Hoffmann might indeed contend that he has not intended to suggest that the 'type of loss' requirement, as viewed by the courts in the old era, is consistent with the 'assumption of responsibility' approach, but to offer an alternative explanation of it. However, in order for an alternative interpretation of a doctrine to be successful, it needs successfully to explain the results of the past cases (or the most significant of them) which are suggested by the courts to have been reached on the basis of that doctrine. It is submitted that the 'assumption

[64] ibid [23].

[65] ibid [34]; also Lord Walker [86].

[66] ibid, 70; *Wellesley Partners LLP v Withers LLP* [2015] EWCA Civ 1146, [2016] 2 WLR 1351, [69] (Floyd LJ).

of responsibility' approach fails to do so. In other words, it overlooks the problem of *fit* with the results of preceding cases.

Consider, for instance, the leading case on the 'type of loss' requirement, i.e. *Parsons*.[67] The defendants could not reasonably foresee that leaving the ventilator open would lead to the death of the pigs. Even the claimants, knowing that the pig nuts had gotten mouldy, fed them to the pigs, since he could not predict that this would kill the pigs: the disease that was spread through the herd was a rare one. On what basis can the defendants be taken to have assumed responsibility for the loss occurred? They could not have assumed responsibility for the death of 254 pigs, not least because they could not have foreseen and therefore quantified the loss at all. One may potentially argue that although the *specific* loss suffered had not been reasonably foreseeable, the *type* of loss, i.e. the *illness* of the pigs, had been foreseeable and therefore the defendant can be presumed to have accepted responsibility for *that*. But he would have not blindly assumed responsibility for all sorts of loss resembling the illness of the pigs whose nature and extent he could have not foreseen and quantified. This is partly because acceptance of responsibility in those circumstances would involve assuming responsibility for losses that may be disproportionate to the contract price. This in fact seems to accord with the facts of case: the loss of 254 pigs does not seem to be proportionate to price of selling and installing a hopper. The 'assumption of responsibility' approach cannot therefore explain the result of the most significant decision about the 'type of loss' requirement.

One even more explicit example is presented by *Brown v KMR Services Ltd*.[68] The claimant in that case was an underwriting name at Lloyds'. The defendants, his members' agent, were in contractual and tortious breach of duty owed to him by advising him to join excess of

[67] *Parsons (Livestock) Ltd v Uttley Ingham & Co Ltd* (1978) QB 791.

[68] [1995] 4 All ER 598.

loss syndicates without warning him of their high-risk nature, knowing that he only intended to follow a conservative underwriting policy. The claimant sought damages for the losses suffered as a result. The Court of Appeal upheld the trial judge's decision for the claimant, that he was entitled to losses caused by the breach of his right. He was awarded part of the losses he suffered by allocating his premium to such syndicates, an amount that he would not have allocated had he been advised by the defendants about the nature of the syndicates. Regarding the remoteness element of the claim, the Court decided, confirming the trial judge's decision, that the type of losses suffered by the claimant was reasonably foreseeable by the defendants, as high risk syndicates can be affected by catastrophe and extreme losses can result, even though the extent of loss was unprecedented and unforeseeable, as the loss had occurred due to a financial collapse of unprecedented magnitude. The defendants were completely unable, at the contracting time, to predict what kind of financial disasters would happen and what extent of loss would result from them. The losses *actually* suffered were therefore not reasonably foreseeable and thus completely 'unquantifiable' and 'unpredictable'; the defendants cannot be taken to have assumed responsibility for them.[69] They cannot be presumed to have accepted responsibility for the *type* of loss either, as it would involve accepting responsibility for a type of loss whose extent was unquantifiable and unpredictable. Following Lord Hoffmann's proposed explanation of the 'type of loss' requirement, the Court should have denied recovery for those very substantial losses as not belonging to a type of loss that the defendants would have reasonably foreseen. But it did not regard the loss as too remote.

A further example is the decision of the House of Lords in *Jackson v Royal Bank of Scotland*.[70] The claimants imported dog food from a supplier in Thailand, selling it to their

[69] PCK Wee, 'Contractual Interpretation and Remoteness' [2010] *LMCLQ* 150, 165.

[70] [2005] UKHL 3, [2005] 1 WLR 377.

customer in the UK. The defendant bank, facilitating the payments through LCs, mistakenly revealed to the customer information, including documents regarding the claimant's substantial mark-up on the value of the goods, which constituted a breach of contract by the bank. The customer decided to stop doing business with the claimants and purchase directly from the supplier. The House decided that it was reasonable to assume that but for the defendants' breach of their duty the customer would have done business with the claimants for four more years and awarded damages for the loss of profits on that basis. As had been found by the Court of Appeal, the duration of relationship between the claimants and the customers, and therefore the extent of the loss of profits, was not foreseeable by the bank. Despite that, the House decided that what mattered was only the type of loss, i.e. the loss of profits, which was foreseeable by the bank. It therefore awarded damages for losses for which the defendant bank could not be taken to have accepted responsibility: not only would they not have assumed responsibility for the *specific* losses of profit suffered, since they could not foresee and therefore predict and quantify it at all, but they also would not have undertaken responsibility for a *type* of loss, i.e. lost profits, whose extent is completely unpredictable and unquantifiable.

The only major case whose result seems to be explainable by Lord Hoffmann's proposed approach to the 'type of loss' requirement is *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd*.[71] His Lordship actually used this case in *The Achilleas* in order to bolster his approach. There, the claimants had a laundry business. Among other things, they suffered losses of particularly lucrative contracts consequent on the defendants' breach of contract. Damages for the latter losses were denied by the Court of Appeal, in a situation where the defendants did not have special knowledge of the lucrative contracts and therefore could not reasonably foresee the extent of the loss but could reasonably foresee that the breach would

[71] [1949] 2 KB 528.

cause some loss of profits. The claimants argued that these losses were of the same type as the loss of profits from the laundry business and therefore recoverable. The Court, however, denied damages for them, rejecting the latter argument. Lord Hoffmann's suggested reason, in *The Achilleas*, for the Court's decision to distinguish those losses as a different type was that they 'would only be [regarded as the same type and] recoverable if the defendants had sufficient knowledge of them *to make it reasonable to attribute to them acceptance of liability for such losses*.'[72] His Lordship seems to be correct, indeed, to the extent that he regards the 'assumption of responsibility' approach to the 'type of loss' requirement as consistent with the result of the *Victoria Laundry* case: without being able, at the contracting time, to foresee and therefore predict and quantify the losses, the defendants could not be taken to have assumed responsibility for that type of loss. However, this case does not bolster the latter approach, since, as it will be discussed below, the decision in that case was wrong according to the theory of remoteness preferred by this thesis. The correct result would be recovery for the loss of particularly lucrative contracts, which would be unexplainable by the 'assumption of responsibility' approach.

2. The Problems of 'Counter-factuality' and 'Factual Lacuna'

(a) Counter-factuality

The intention-based 'assumption of responsibility' approach faces even more fundamental difficulties. As Professor Robertson has explained,[73] where it is regarded as a theory intended to replace the external, default rules of remoteness, it is based on the wrong presumption that in *all cases*, the parties have actually intended to allocate the risk of the occurrence of losses.

[72] *Transfield Shipping Inc v Mercator Shipping Inc* (*The Achilleas*) [2008] UKHL 48, [2009] 1 AC 61, [22] (emphasis added).

[73] A Robertson, 'The Basis of the Remoteness Rule in Contract' (2008) 28 *LS* 172.

As is usually said, it is natural for the parties to a contract to turn their minds to the performance of the contract and their primary rights and obligations.[74] This is however not true when it comes to the consequences of breach and the secondary rights and obligations. This is because contracts are made to be performed, not to be breached. Of course the parties may also think of some consequences of breach and address them in the form of express exclusion or limitation clauses in their contract. But the question of remoteness arises where those express terms have nothing to suggest about the parties' liability for losses in question. Some terms may be implied by the courts using the 'officious bystander' test in order to give business efficacy to the contract. But this test does not have much to offer about the question of remoteness of damages. In *Hadley*, the carrier defendant was not even aware of the situations giving rise to the loss: he had no idea that the shaft was the only one that the claimant had and therefore his mill would stop without it. Would an officious bystander, if asked whether the parties intended to allocate the risk of occurrence of losses caused by the stoppage of the mill, be testily suppressed with a common 'oh, of course!'? The answer is negative. Kramer would defend the 'assumption of responsibility' approach on the alternative ground that a person does not in all situations have to turn his mind to something in order to intend it. Someone can step out of his office without actually asking himself whether there is a step there; one can book a hotel room without turning his mind to whether the room has a bed. But, as Robertson responds, the issue of the defendant's liability for losses, at least in typical situations in which the question of remoteness arises, is not so fundamental to the contract to be capable of being treated like the latter examples.

[74] *R&H Hall Ltd v WH Pim (Junior) & Co Ltd* (1928) 33 Com Cas 324, 333; *Kienzle v Stringer* (1981) 35 OR (2d) 85, 90; *Fraser Shipyard and Industrial Centre Ltd v Expedient Maritime Co Ltd (The 'Atlantis Two')* (1999) 89 ACWS (3d) 642, [178]; *Bemar Construction v Mississauga* (2004) 133 ACWS (3d) 71, [423]; K Swinton, 'Foreseeability: Where Should the Award of Contract Damages Cease?' in *Studies in Contract Law* (B Reiter et al eds, Butterworths, 1980) 61, 65.

Therefore, the presumption that the parties have intended to allocate the risk is counterfactual in many, if not most, situations.

Responding to critics, Lord Hoffmann has contended that the 'assumption of responsibility' approach is based on the parties' *objective*, rather than actual, intention.[75] But, this provides no answer to the so-called problem of counter-factuality.[76] While the orthodox approach can, and actually is, applied on an objective basis, the 'assumption of responsibility' seems to lose its justificatory force by relying on parties' objective, rather than actual, intentions. Under the orthodox approach, the courts decide whether or not the loss is too remote, by imagining whether the loss would be foreseeable in the hypothetical case in which a reasonable defendant would think about the results of a breach. This is explained in the following passage from Scarman LJ in *Parsons*:

> …the breach does not have to be foreseen, or contemplated. In a breach of warranty case the point may be put in this way: it does not matter if the defect is latent. It may be unknown, even unknowable... The court has to assume, though it be contrary to the fact, that the parties had in mind the breach that has occurred. Thus, whenever a question of remoteness of damage arises in a contract case, its solution involves the court in making a hypothesis, which may, or may not, correspond with fact. The court's task, therefore, is to decide what loss to the plaintiffs it is reasonable to suppose would have been in the contemplation of the parties as a serious possibility had they had in mind the breach when they made their contract.[77]

[75] '*The Achilleas*: Custom and Practice or Foreseeability?' (2010) 14 *Edinburgh LR* 47, 60; also in *Transfield Shipping Inc v Mercator Shipping Inc* (*The Achilleas*) [2008] UKHL 48, [2009] 1 AC 61, [11] he says: 'Professor Robertson considers this approach somewhat artificial, since there is seldom any helpful evidence about the extent of the risks the particular parties would have thought they were accepting. I agree that cases of departure from the ordinary foreseeability rule based on individual circumstances will be unusual, but limitations on the extent of liability in particular types of contract arising out of general expectations in certain markets, such as banking and shipping, are likely to be more common'.

[76] As Robertson puts it, '[t]he test is not just objective, focusing on a reasonable person rather than the defendant, but is also counterfactual, in the sense that it assumes that the reasonable person has engaged in a process of contemplation in which the defendant himself or herself is unlikely to have engaged': A Robertson, 'The Basis of the Remoteness Rule in Contract' (2008) 28 *LS* 172, 176.

[77] [1978] QB 791, 807; also Asquith LJ in *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 KB 528, 540: 'In order to make the contract-breaker liable under either rule it is not necessary that he should actually have asked himself what loss is liable to result from a breach. As has often been pointed out, parties at the time of

The courts make no false presumptions about the parties' intentions in doing so. They do not need to: the justification for the remoteness rule does not derive from the parties' intentions under the orthodox approach. But, it is not clear how an intention-based theory of remoteness can provide a justification for limiting the defendant's liability on the basis of such a counterfactual, objective hypothesis or any other non-factual basis. After all, any such justification, under the latter approach, derives from the intentions of parties, which has to be factual rather than hypothetical.

(b) Factual Lacuna

Finally, Robertson has made an additional criticism of the 'assumption of responsibility' approach: even supposing that we can accurately presume that the parties' intention does not run out in most cases, there is no reliable proxy for that intention. There is no reliable evidence showing what allocation of risk they have intended. [78] Interpretation is typically the interpretation of language or behaviour of the parties to a contract. However, in remoteness cases, typically the parties are totally silent about the allocation of risk. What the advocates of an intention-based approach suggest in these circumstances is that the courts should ascertain the parties' intention by considering the nature and factual matrix of the contract. However, as Robertson suggests, this is a 'highly unreliable enterprise'— because 'there is so much background factual material to interpret' — which also seems to be the reason why the courts adopt the strict test of the 'officious bystander' when engaging in the task of implication.[79] As Wee puts it, '[w]here an intention or agreement as to the allocation of a particular risk simply cannot be discerned, as seems not unlikely in the remoteness context, such an approach will

contracting contemplate not the breach of the contract, but its performance. It suffices that, if he had considered the question, he would as a reasonable man have concluded that the loss in question was liable to result…'

[78] A Robertson, 'The Basis of the Remoteness Rule in Contract' (2008) 28 *LS* 172, 179.

[79] ibid.

not only be fictional, but will also involve the courts in rewriting the parties' bargain'.[80] In *Hadley,* for instance, the problem of the factual lacuna is present. As Wee has explained, there is no factual evidence enabling the courts to determine to whom the parties had allocated the risk of the loss in question: 'on the available evidence, it seems that a reasonable person would understand the parties' agreement to have allocated the risk in question to anybody'.[81] Kramer may indeed contend that where the loss is not reasonably foreseeable, the parties can reasonably be said to have intended to allocate the risk to the claimant. However, such a loose inference of a tacit intention from that seems to be fictional, highly unreliable and also not in accord with the courts' conception of the state of the law on contractual interpretation and implication.[82]

E. The *SAAMCO* Principle

Shoulder to shoulder with the 'assumption of responsibility' test, the so-called *SAAMCO* principle has been referred to by the courts in *The Achilleas* and some subsequent modern cases to justify the award/denial of damages based on the remoteness rule in contract. The aim of this section is to clarify the relation between the two principles. As the 'assumption of responsibility' principle was shown to be predicated on a defective basis, the *SAAMCO* principle will be flawed as well if it is understood to connote the same principle as that of the assumption of responsibility. The judicial view in *The Achilleas* and subsequent cases dominantly reflects the latter understanding. On the other hand, if the two principles are not identical, it will be necessary to clarify what the *SAAMCO* principle stands for and whether it can offer assistance in constructing a viable theory of remoteness in contract. This section suggests that the key

[80] 'Contractual Interpretation and Remoteness' [2010] *LMCLQ* 150, 168.

[81] ibid 170.

[82] Also see M Stiggelbout, 'Contractual Remoteness, "Scope of duty" and intention' [2012] *LMCLQ* 97, 120 and PCK Wee, 'Contractual Interpretation and Remoteness' [2010] *LMCLQ* 150, 170–75 for detailed criticism of some other major remoteness cases based of the problem of the factual lacuna.

point of principle in *SAAMCO* was that damages should be limited based on the *purpose of the defendant's duty* and that this cannot, in most contract cases, support an assumption of responsibility approach to remoteness. This paves the way for the next section in which a theory of remoteness is drawn, utilising a non-intention-based conception of the 'purpose of duty' principle.

1. Facts of SAAMCO

South Australia Asset Management Corp v York Montague Ltd (SAAMCO)[83] involved three cases in which the claimants (respondents) were considering making loan contracts. The defendant surveyors (appellants) were required to value the properties offered by the mortgagees as securities for the loans. The defendants overvalued the properties. Money was advanced on the basis of the wrong valuations. The mortgagees defaulted in the repayment of the loans. The claimants sold the properties for an amount much lower than that which they had loaned to the defendants. Loss suffered in each case was partly a result of the defendants' negligent overvaluation of the property and partly a result of the substantial fall, subsequent to the formation of the contract, in the property market. The question was whether the defendants in each case were liable for the whole loss suffered as a result of the breach of their duty, which was concurrently a breach of their contractual and tortious duty of care. In the first case, *South Australia Asset Management Corporation v. York Montague Ltd*, the claimants had advanced £11m on a property whose actual value at the time was £5m. The defendants had negligently valued the property at £15m. Subsequent to the mortgagees' default, the claimants sold the property for only £2,477,000. This was lower than the actual price of the property at the time of evaluation, since the market had fallen sharply. The Court of Appeal had awarded compensation for the whole loss. The defendants' (appellants') appeal for reduction of damages

[83] [1997] AC 191.

was dismissed by the House of Lords. As the facts of the latter two cases are similar to each other, as will be clarified soon, I only mention the facts of one of them. In the second case, *United Bank of Kuwait Plc v Prudential Property Services Ltd*, the claimants had advanced £1.75m on the security of a property whose actual value at the time was between £1.8m and £1.85m. The property had negligently been valued by the defendants at £2.5m. As a result of the fall in the property market, the property was sold for an amount much lower even than its correct price at the valuation time, i.e. for £950,000. The Court of Appeal, in this case and the third case, awarded compensation for the whole loss suffered by the claimants. The House allowed the defendants' appeal for a reduction of damages in both of the second and third cases.

2. The House's Reasoning

The House's formulation of the principle underlying all of the three cases and its reasoning, based upon that formulation, for dismissing the appeal in the first case but allowing the appeals in the second and third cases was as follows.

Lord Hoffmann, giving the judgment of the House, commenced by drawing attention to the notion that holding the defendant responsible for all of the losses which his wrongful act causes is plausible in principle, but it should in practice apply only to exceptional cases, since it would involve punishing the defendant for his wrongdoing. In normal cases, he suggests, the principle for determining the scope of recoverable losses is the *purpose of the defendant's primary duty*. In order to clarify this principle, he employs Hart and Honoré's excellent example of the unlicensed driver whose negligent act causes injury.[84] Is the driver liable for all consequences of his negligent act? The incident would not happen but for the driver's breach of duty, i.e. driving without licence: had he not driven, the incident would not happen. But it

[84] HLA Hart and T Honoré, *Causation in the Law* (2nd edn, Clarendon Press 1985) 120.

would involve punishing him to hold him liable also for injuries not attributable to his driving *without a licence* (say in a case in which he drove with care on a motorway, but someone suddenly appeared in his way and was injured when carelessly trying to cross the motorway).[85] The principle underlying the latter proposition is, as Lord Hoffmann expounds, that even though the latter kind of loss is caused by the driver's negligent act of driving without a licence, the scope of his liability (in normal cases where the law is not seeking to punish or deter the wrongdoing) is defined by the purpose of his duty of care, which requires holding him liable only for losses attributable to what made the act wrongful, i.e. to his not having a licence.[86] One other example offered by Lord Hoffmann is that of the mountaineer who seeks the doctor's advice on the fitness of his knee.[87] If he goes on an adventure, relying on the doctor's negligent opinion that his knee is fit, and suffers injury as a consequence of some incident unrelated to the unfitness of his knee, the doctor is not liable for that injury. It is so even if the mountaineer would not have gone on the adventure but for the doctor's advice. This is because the purpose of the doctor's duty of care is to ensure that he does not suffer from incidents resulting from his knee not being fit. In both examples, it is irrelevant whether or not the defendant could reasonably foresee the occurrence of losses against which the claimant is not intended to be protected by the former's duty of care (or which are not within the scope of his duty, in Lord Hoffmann's preferred terms).

Such were the situations in the second and third *SAAMCO* cases. According to Lord Hoffmann, the application of the above principles requires that 'a person under a duty to take reasonable care to provide information on which someone else will decide upon a course of

[85] An actual case whose facts and conclusion are quite analogous is the decision of the Court of Appeal in *Western Steamship Co Ltd v NV Koninklijke Rotterdamsche Lloyd (The Empire Jamaica)* [1955] 3 All ER 60.

[86] *South Australia Asset Management Corp v York Montague Ltd (SAAMCO)* [1997] AC 191, 212.

[87] ibid 213.

action is, if negligent, not generally regarded as responsible for all the consequences of that course of action. *He is responsible only for the consequences of the information being wrong*'.[88] He attempted to clarify by distinguishing between a duty simply to provide information and a duty to advise as to what course of action the advisee should take:

> The principle thus stated distinguishes between a duty to provide information for the purpose of enabling someone else to decide upon a course of action and a duty to advise someone as to what course of action he should take. If the duty is to advise whether or not a course of action should be taken, the adviser must take reasonable care to consider all the potential consequences of that course of action. If he is negligent, he will therefore be responsible for all the foreseeable loss which is a consequence of that course of action having been taken. If his duty is only to supply information, he must take reasonable care to ensure that the information is correct and, if he is negligent, will be responsible for all the foreseeable consequences of the information being wrong.[89]

He then moved to applying those principles to the facts of the case. In *United Bank of Kuwait Plc v Prudential Property Services Ltd*, the claimants' loss had been measured by Gage J at £1,309,876 46. As it was said above, also the market fall had contributed to this. The damages, according to Lord Hoffmann, 'should have been limited to the consequence of information being wrong, which was that the lenders had £700,000 or £650,000 less security than they thought.'[90] The appeal was therefore allowed and damages were reduced to one or the other of the latter amounts, to be determined by the trial judge in case that the parties cannot agree on the correct value of the property at the valuation date. The appeal in the third case was also allowed on similar grounds. As for the first case, the appeal was dismissed on the basis of the same principles: the defendants were not entitled to a reduction in the measure of damages, since the amount of loss suffered did not surpass the scope of their duty, i.e. the amount for which the claimants had less security than they thought.

[88] ibid 214 (emphasis added).

[89] ibid.

[90] ibid 222.

3. Clarifying the House's Reasoning

Writing in the context of claims in the tort of negligence, Professor Stapleton has emphasised the importance of distinguishing between the following elements: the form of actionable damages, breach, duty, cause-in-fact, and remoteness.[91] The significance of distinguishing between the latter three elements is equally (or perhaps even more clearly) observable in contract. *SAAMCO* is an example of how, in dealing with a claim for damages for the breach of a contractual[92] duty of care, the House's failure to clearly make that distinction obscured the precise basis of its reasoning. It is submitted that the true basis of the judgment becomes clear by drawing a line between three streams of reasoning, relating respectively to the problems of scope of duty, causation, and remoteness, employed by Lord Hoffmann. This paves the way to the conclusion that the results of the case may be explained most clearly on the ground of the latter issue, understood as being solvable by reference to the *purpose of the defendant's duty*.

(a) The 'Scope of Duty' Approach

The substantial part of Lord Hoffmann's reasoning starts by suggesting that the problems in the case can be solved by determining the scope of the defendants' duty of care. He stated:

> A duty of care such as the valuer owes does not however exist in the abstract. A plaintiff who sues for breach of a duty imposed by the law (whether in contract or tort or under statute) must do more than to prove that the defendant has failed to comply. He must show that the duty was owed to him and that *it was a duty in respect of the kind of loss which he has suffered*.[93]

[91] 'Cause in Fact and the Scope of Liability for Consequences' (2003) 119 *LQR* 388, 389.

[92] The defendant also had a concurrent duty in tort (on concurrent liability in contract and torts, see *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145). But it is important for the purposes of the discussion in the present chapter that Hoffmann's reasoning in *South Australia Asset Management Corp v York Montague Ltd (SAAMCO)* ([1997] AC 191, 212) is based on regarding it as an implied term of contract; also see L Hoffmann, '*The Achilleas*: Custom and Practice or Foreseeability?' (2010) 14 *Edinburgh LR* 47.

[93] *South Australia Asset Management Corp v York Montague Ltd (SAAMCO)* [1997] AC 191, 211 (emphasis added).

By making the above statements and statements to the same effect in *Nykredit v Edward Erdman Ltd (No 2),*[94] Lord Hoffmann in fact offered a solution based on the so-called 'scope of risk' approach (or 'risk principle'), most famously supported by scholars such as G Williams[95] and judgments such as Lord Bridge's in *Caparo Industries Plc v Dickman*[96] in which he said: 'It is never sufficient to ask simply whether A owes B a duty of care. It is always necessary to *determine the scope of the duty by reference to the kind of damages from which A must take care to save B harmless.*'[97] Mainly developed in the context of the law of damages for the tort of negligence, the theory suggests that the defendant's liability for consequences of the breach of a duty of care is to be determined by clarifying the scope of the duty, not least because the correct definition of a duty of care is not a duty simply to take care, but a duty to protect the claimant against certain risks.[98] Lord Hoffmann's distinction between 'a duty to provide information' and 'a duty to advise on the action to be taken' is to be seen as an attempt to determine the scope of the defendants' liability for the consequences of the breach of their duty of care by clarifying their precise duty and then determining its scope in relation to the risks against which that duty required them to protect the claimants.

[94] [1997] 1 WLR 1627, 1638: 'Your Lordships identified *the duty as being in respect of any loss which the lender might suffer* by reason of the security which had been valued being worth less than the sum which the valuer had advised' (emphasis added).

[95] 'The Risk Principle' (1961) 77 *LQR* 179. Some other early scholarly defences of the approach include: AL Goodhart, 'The Unforeseeable Consequences of a Negligent Act' (1930) 39 *Yale LJ* 449; 'The Imaginary Necktie and the Rule in *Re Polemis*' (1952) 68 *LQR* 514; RE Keeton, *Legal Cause in the Law of Torts* (Ohio State UP 1963). For a modern defence of the theory, see M Stauch, 'Risk and Remoteness of Damages in Negligence' (2001) 64 *MLR* 191.

[96] [1990] 2 AC 605. The approach is generally believed to have its roots in Cardozo J's judgment (supported by the majority) in the US case of *Palsgraf v Long Island RR*, 248 NY 339, 162 NE 99 (1928).

[97] *Caparo Industries Plc v Dickman* [1990] 2 AC 605, 627.

[98] J Steele, 'Breach of Duty, Causing Harm? Recent Encounters between Negligence and Risk' (2007) 60 *CLP* 296, 307.

But, the problem with that approach is that it conflates questions of 'the defendant's primary duty of care' and 'liability for consequences of breach of that duty/remoteness' which are best to be kept separate. As Stapleton argues in the context of the tort of negligence, where a duty of care is owed, 'the "scope of the duty" is simply to act reasonably in the circumstances';[99] taking a 'scope of duty' approach to the question of remoteness 'at best conflates inquiries that it is clearer to keep separate and at worst encourages circular reasoning'.[100]

Even supposing that the 'scope of risk' approach may explain the limits of the defendant's liability for consequences of breach in a typical tortious situation such as where D negligently damages C's property, seeing D's primary duty as a duty to take reasonable care not to damage C's property, it seems difficult to accept that approach in relation to a case such as *SAAMCO*: it seems artificial to define the defendants' duty as one of taking reasonable care to guard the claimants against the risk of suffering losses in the form of losing all or part of the money advanced as a loan, rather than a duty simply to take reasonable care in valuing the properties. Even more importantly for the purposes of the present chapter, a 'scope of duty' approach would seem equally, if not more, artificial when taken to solve the problem of remoteness in most purely contractual contexts.[101] Where, for instance, D is under an obligation to deliver sugar at a specific port at a specific time (*The Heron II*), or to properly install a pig hopper's ventilator (*Parsons*), it seems even less natural to define D's primary duty as one respectively to guard C against receiving less profits from selling sugar in a fallen market or losing pigs infected as a result of a rare disease. Rather, it is quite natural, as it will soon be

[99] J Stapleton, 'Cause in Fact and the Scope of Liability for Consequences' (2003) 119 *LQR* 388, 391.

[100] ibid 992–96. Also see J Stapleton, 'Legal Cause: Cause-in-Fact and the Scope of Liability for Consequences' (2001) 54 *Vanderbilt LR* 941.

explained, to say that 'the scope of D's primary duty' in each case respectively involves taking reasonable care in valuation of property, delivering sugar according to the specified contractual terms, or properly installing the hopper, but its 'purpose' is to protect C against the risk of the occurrence of those consequences.

Lord Hoffmann, writing extra-judicially, has accepted Stapleton's criticism, conceding that '[t]he scope of the duty of care is to take reasonable care to get the valuation right' and that '[i]t has nothing to do with the extent of the consequences for which the valuer is liable.'[102] The major point of principle in *SAAMCO*, according to Lord Hoffmann who gave the leading judgment in that case, was *not* therefore the 'scope of duty' principle as such.[103]

Finally, it is very important to keep in mind the latter conclusion, as ignoring it would result in false beliefs about the utility of *SAAMCO* particularly in relation to the law of remoteness in contract, which is the subject of the present chapter. Edwin Peel, for example, assuming that the *SAAMCO* principle was about the scope of the defendant's duty, rejects the idea that it is of any utility in relation to the problem in *The Achilleas*, simply because the defendants' duty was perfectly clear in the latter case: they were obliged to redeliver the vessel at a particular date.[104] He is right in believing that the clarification of the defendants' duty would be of trivial utility, if any at all, in solving the problem: this was the case also in other major cases of remoteness in contract, both before and after *The Achilleas*, such as *Parsons*, *The Heron II, Victoria Laundry*, and *Supershield*. It is however wrong to assume that *SAAMCO*

[102] L Hoffmann, 'Causation' (2005) 121 *LQR* 592, 596.

[103] Stapleton regards the language of 'scope of duty' as 'discredited ('Occam's Razor Reveals an Orthodox Basis for *Chester v Afshar*' (2006) 122 *LQR* 426, 426–448. For a decision of the House, made shortly before the publication of the aforementioned article, in which the language has been used in the context of negligence, see *Chester v Afshar* [2004] UKHL 41, [2005] 1 AC 134 (Lord Walker and Lord Hope using the 'scope of the risk' language).

[104] E Peel, ed, *Treitel: The Law of Contract* (14th edn, Sweet & Maxwell 2015) 20–10.

is of no utility in solving those cases because the *SAAMCO* principle is about the clarification of the scope of the defendant's duty as such. As it will be clarified below, it *is* of utility in that relation, and this is because it is *not* about the defendant's scope of duty.

(b) Causation

There are multiple references in Lord Hoffmann's reasoning to the proposition that the defendant is responsible only for the *consequences of the information being wrong*. However, it has to be said that the application of that formula does not seem to have been able to explain the results of all three appeals. Indeed, a consequence of the information being wrong was that the claimants had less security than they thought. But another consequence was that it caused the claimants to enter the loan contract and, as a result, suffer losses which also included the losses resulting from the fall in the property market. So, the question is why precisely the losses resulting from the market fall were not included in the damages in the second and third appeals.

The answer may be thought to lie in part of Lord Hoffmann's reasoning which he put forward immediately after the paragraphs in which his Lordship introduced the 'scope of duty' approach as the principle capable of providing the solution for the case and asked: '[w]hat therefore should be the extent of the valuer's liability [based on the 'scope of duty' approach]?'[105] Immediately following that, his Lordship drew attention to Hart and Honoré's work and the examples of the driver without licence and the mountaineer. Arguing the issue in this order seems odd, as the latter part of his reasoning relates to the separate question of 'causation'[106] and therefore cannot provide an answer to the question he had just asked about

[105] *South Australia Asset Management Corp v York Montague Ltd (SAAMCO)* [1997] AC 191, 212.

[106] This order of his Lordship's argument, together with his statements in *Nykredit v Edward Erdman Ltd (No 2)* ([1997] 1 WLR 1627, 1638) and other judicial statements such as Rix LJ's in *Haugesund Kommune v Depfa ACS Bank (No 2)* ([2011] EWCA Civ 33, [2012] Bus LR 230, 249, 254) indicating that the *SAAMCO* principle was about 'scope of duty' rather than 'causation', might lead one to the conclusion that Lord Hoffmann's reasoning in *SAAMCO* had nothing to do with the question of causation. But those statements should be seen as simply suggesting that it did not relate to the orthodox, 'but for' test of causation. It did relate to a different standard of

the scope of the defendants' duty. In any event, the 'causation' part of his Lordship's reasoning is to be seen in the following way. Writing extra-judicially on causation, he suggests that although there was a 'but for' causal connection between the defendants' wrongful action and all losses suffered by the claimants in *SAAMCO*,[107] a different test of causation limited the defendants' liability.[108] This is in line with his view of causation expounded in that article and such cases of tortious breach of duty of care as *Chester v Afshar*[109] and *Fairchild v Glenhaven Funeral Services Ltd*,[110] according to which the questions of 'liability for consequences of breach' and 'causation' are not separate[111] and that while 'the causal connection most commonly prescribed', i.e. the 'but for' connection, is to be applied in most cases, there are exceptional cases in which the 'but for' test is not appropriate. In those cases, he explains, liability should be limited if 'a different kind of causal connection' is not there between the breach of duty and the damage; in order to determine whether or not such causal connection exists, the courts need to consider the *purpose* of the rules imposing the defendant's duty.[112]

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causation, which may be described as the 'attribution' test. This is clear from his extra-judicial discussion of the case in 'Causation' (2005) 121 *LQR* 592 (discussed immediately below). Also, in *SAAMCO*, 214, where he discussed the mountaineer example, he clearly said that imposing liability on the doctor would offend common sense, since 'it makes the doctor responsible for consequences which, though in general terms foreseeable, do not appear to have a sufficient *causal* connection with the subject matter of the duty' (emphasis added).

[107] The losses resulting from the market fall would not have been suffered but for the wrongful overvaluation of the properties. Applying a 'but for' test, damages should have therefore included these losses in all appeals. We know that they did not.

[108] 'Causation' (2005) 121 *LQR* 592; '*The Achilleas*: Custom and Practice or Foreseeability?' (2010) 14 *Edinburgh LR* 47, 58.

[109] *Chester v Afshar* [2004] UKHL 41, [2005] 1 AC 134.

[110] [2003] 1 AC 32.

[111] Also see *Environment Agency (formerly National Rivers Authority) v Empress Car Co (Abertillery) Ltd* [1999] 2 AC 22, 29 (Lord Hoffmann); *Kuwait Airways Corpn v Iraqi Airways Co (Nos 4 and 5)* [2002] 2 AC 883, 1106 (Lord Hoffmann).

[112] *Environment Agency (formerly National Rivers Authority) v Empress Car Co (Abertillery) Ltd* [1999] 2 AC 22, 29; *Kuwait Airways Corpn v Iraqi Airways Co (Nos 4 and 5)* [2002] 2 AC 883, 1106; *Chester v Afshar* [2004] UKHL 41, [2005] 1 AC 134, [28] (Hoffmann Dissenting).

Just as in the mountaineer case, for example, liability should be limited since the mountaineer's injury cannot be attributed, in that limited sense of causation, to the doctor's negligent advice, so also in *SAAMCO*, where the defendant's duty was — unlike a duty to advise on whether the client should lend — limited to the provision of information on the value of the property, it may indeed be correct that the losses resulting from the market fall could not be attributed to the breach of duty.

This may indeed explain the results of the second and third appeals in which those losses were *not* included in the awards. But then another difficulty would emerge: applying this kind of causation test, it is not clear why the losses resulting from the market fall in the first appeal *were* included in the damages awarded. Lord Hoffmann, analysing *SAAMCO* more clearly in causation terms in his article, suggests that the solution of the problems in all three appeals lies in taking into account the *purpose* of the defendant's duty. As said above, the purpose of the defendant's duty may be considered, in appropriate cases, in order to explain why damages are not attributable to the wrongful act. It is contended below that the 'purpose of duty' principle explains the results of all of the three appeals. But the question remains why the losses resulting from the market fall in the first appeal were included in damages while they were not 'attributable' to the breach of duty. It seems awkward to suggest that there was that 'different kind of causal connection' between the losses resulting from the market fall and the breach of duty in the first appeal but not between the same losses and breach in the second and third. Distinguishing between the questions of 'causation' and 'remoteness' enables us to appreciate the fact that the 'purpose of duty' principle may clarify the reasoning of the courts in a range of situations, including those in *SAAMCO*, without assuming that where that principle is employed to solve a problem, the reasoning has to relate in all situations exclusively to the question of causation. Lord Hoffmann is right in the aforementioned article to the extent that he suggests that the principle may be relied upon, where appropriate, to provide answers

for questions of causation, etc. But it appears to be inevitable to accept that it may also be employed to solve the different question of 'remoteness'. The question in *SAAMCO* was of the latter nature.

Moreover, it is preferable to regard the question in *SAAMCO* as one of remoteness particularly when seeking the underpinning principles of remoteness in *contract*. This is not least because Lord Hoffmann in the leading case in that area, i.e. *The Achilleas,* and others in some relevant major cases subsequent to it, have relied upon *SAAMCO* while acknowledging that the problem before the courts in those cases is whether or not the losses were too remote a consequence of the breach. One might argue that Lord Hoffmann could have done so while considering the question of remoteness only as a sub-category of causation. But this view of his conception of the relation between remoteness and causation would not seem to be persuasive for two reasons. *First*, it would seem not to be clearly supported by Lord Hoffmann's statements elsewhere, and indeed to stand in contrast with his statements in *Kuwait Airways Corpn v Iraqi Airways Co (Nos 4 and 5),*[113] where he stated that the conclusion which he reached in that case, while depending upon the principle of the purpose of the defendant's duty, was not a practice in remoteness, but in causation.[114] This shows that he regards the two questions as distinct. *Second*, considering that, it is reasonable not to attribute such conception to Lord Hoffmann, as it would involve a radical departure from our normal conceptions of the law of remoteness in contract. As for other judicial views, there is no suggestion by other judges, in cases of remoteness in contract in which *SAAMCO* has been relied upon, that consideration of the law of remoteness is in fact a consideration of causation.

(c) The gist of SAAMCO: 'purpose of duty' as a test of remoteness in contract

[113] [2002] UKHL 19, [2002] 2 AC 883.

[114] ibid 1126.

In ‘Causation’, Lord Hoffmann, while conceding that the defendant’s scope of duty ‘has nothing to do with the extent of the consequences for which the valuer is liable’, insisted that ‘[t]here is a close link between the nature of the duty and the extent of liability for breach of that duty’.[115] By this, what he meant was that the *scope of liability for consequences* is to be determined by reference to the *purpose of the defendant’s duty*, rather than the *scope of his duty*. Yet, by insisting that the scope of liability for consequences depends on the nature of the duty, he in fact argues that the purpose of the duty is part of its nature, but not part of its scope. The latter argument, while plausible, seems to be of trivial significance. What is important is (a) the suggestion that the question of the scope of the valuers’ liability for the consequences of their breach of contractual duty of care was determined by reference to the purpose of that duty, and (b) that the questions of ‘scope of duty’ and ‘scope of liability for consequences’/remoteness are distinct.

Indeed many courts continue to use the language of ‘scope of duty’, adhering to the former belief but rejecting the latter.[116] Some academics have also preferred to do so. They defend the language of ‘scope of duty’, considering a ‘scope of duty’ approach to remoteness based on the ‘purpose of duty’ principle as a revised version of the ‘risk principle’.[117] However, it was explained above that it is preferable, for the purposes of clarity of argument and avoidance of artificiality, to keep the questions of remoteness and ‘scope of duty’ separate. The

[115] L Hoffmann, ‘Causation’ (2005) 121 *LQR* 592, 596

[116] See eg *Aneco Reinsurance Underwriting Ltd v Johnson & Higgins Ltd* [2001] UKHL 51, [2002] CLC 181, in which, in contrast with *SAAMCO*, the so-called ‘scope of duty’ principle extended the defendant’s liability, since the risk fell within the scope of his duty.

[117] J Steele, writing in the context of negligence, thinks that a ‘scope of risk’ analysis based on the ‘purpose of duty’ principle is not ‘circular or nonsensical’ and can illuminate some important, though not all, issues and problems relating to the question of liability for consequences: ‘Breach of Duty, Causing Harm? Recent Encounters Between Negligence and Risk’ (2007) 60 *CLP* 296, 306. M Stauch regards the ‘scope of duty’ approach as a revised version of the ‘risk theory’ which replaces the ‘reasonable foreseeability’ test (*The Wagon Mound*) by the ‘purpose of duty’ principle. But he does not believe that that approach can provide a solution in all areas of the law of remoteness: ‘Risk and Remoteness of Damages in Negligence’ (2001) 64 *MLR* 191, 197–99.

preferable way of defining the relation between the notions of 'scope of duty' and remoteness is accordingly as follows. 'Scope of duty' does not relate to the question of remoteness: knowing clearly the scope of the defendant's primary duty is just the starting point for the task of determining what losses are too remote by constructing the purpose of the duty. But, whether one prefers to adopt this approach or to tie the question of remoteness to that of 'scope of duty', what matters for the purposes of the present chapter is that the gist of *SAAMCO* — what may be called 'the *SAAMCO* principle' if one decides to regard it as applicable broadly in the area of remoteness in contract — is the principle that the solution to the question of remoteness in contract lies in constructing the purpose of the defendant's relevant primary duty.

So far, it has been explained that (a) an 'assumption of responsibility' approach to remoteness in contract is not acceptable and that (b) the gist of the House's reasoning in *SAAMCO* was to apply the 'purpose of duty' test in order to answer the question of remoteness of damages. Now, considering that *SAAMCO* has been relied upon by the leading case of *The Achilleas* and other cases of remoteness in contract decided after *The Achilleas* either directly or indirectly by way of their reliance on the decision of the House in *The Achilleas*, the quest for a plausible principle of remoteness in contract leads us to the question of whether and how *SAAMCO* can provide us with such a principle, independent from the 'assumption of responsibility' approach. The rest of the present chapter will focus on these questions: what is the relation between the principle of 'purpose of duty' and 'the assumption of responsibility' approach? Can 'the purpose of duty' principle provide a satisfactory explanation for the law of remoteness in contract? How?

F. Relation between the *SAAMCO* Principle and the 'Assumption of Responsibility' Approach

Several significant judgments taking the 'assumption of responsibility' approach have referred to *SAAMCO* to justify the decisions reached. This includes, and started with, Lord Hoffmann's decision in *The Achilleas*. One might suggest that his Lordship's reference to *SAAMCO* in that case should not be taken seriously for the purpose of finding an answer for the question of remoteness in contract, and that it should merely be regarded as a response to the defendants' contention that the purpose of damages in contract is to put the claimant in the position where he would have been had the contract been performed. Stiggelbout takes this view, believing that Lord Hoffmann's reference to his statements in *SAAMCO* were only intended to reiterate that for the purpose of determining the quantum of damages, it is a wrong place to start. This seems, however, to be far from reflecting the weight Lord Hoffmann gave to *SAAMCO* in solving the question of remoteness in contract. This can be understood not only from his Lordship's statements in *The Achilleas,*[118] but also by the attitude of the courts in subsequent cases, in which they both referred to *SAAMCO* and employed the language of the scope and purpose of the defendants duty in their attempts to solve the cases before them. The claim that the modern courts' conception of the 'assumption of responsibility' approach has no analytical connection with the *SAAMCO* principle would require losing sight of the sophisticated way in which liability for consequences and the purpose of the defendant's duty are related, whether in tort or in contract, in Lord Hoffmann's intellectual legacy, reflected by his judicial and extra-judicial works in this area of the law. It is true that, while *SAAMCO* was a case of remoteness in contract, the principle employed to solve the problem was not regarded as having a broader

[118] *Transfield Shipping Inc v Mercator Shipping Inc* (*The Achilleas*) [2008] UKHL 48, [2009] 1 AC 6, [69], [70]; Baroness Hale also believes that the adoption of Lord Hoffmann's view would require 'introducing into the law of contract the concept of the scope of duty which has perforce had to be developed in the law of negligence.' (ibid [93]).

application in relation to remoteness in contract prior to *The Achilleas*. However, one can clearly see in Lord Hoffmann's judgment, supported by all other members of the House, the basis for the development of such a broadly applicable principle.

So perhaps the most seminal part of his Lordship's judgment relates to the statement that the 'purpose of duty' principle can solve the question of liability for consequences of breach in cases of breach of contract in the same way as in breach of statutory duties and torts. Referring to the old case of *Gorris v Scott*[119], he said: 'In the case of a statutory duty, the question is answered by deducing the purpose of the duty from the language and context of the statute'.[120] Then he referred to *Caparo*[121], suggesting that the purpose of duty principle applies similarly in solving the question of remoteness in torts.[122] This was all but an introduction to his major point, which related to contract: 'In the case of an implied contractual duty, the nature and extent of the liability is defined by the term which the law implies.'[123] In *SAAMCO*, however, there was no question of implication of a term, separate from the implied duty of care, defining the 'extent of the liability'. The latter was simply determined, as discussed just above, by constructing the purpose of the valuers' duty.

The Achilleas should therefore be seen as a step towards actually implying a contractual term, separate from the defendants' duty to redeliver the vessel at the specified time, relating to the extent of the liability that the defendants were taken to have assumed. Seen in the light

[119] (1873–74) LR 9 Ex 125.

[120] *South Australia Asset Management Corp v York Montague Ltd (SAAMCO)* [1997] AC 191, 212. A modern example is *Environment Agency (Formerly National Rivers Authority) v Empress Car Co (Abertillery) Ltd* [1999] 2 AC 22, 31–32 (Lord Hoffmann).

[121] *Caparo Industries Plc v Dickman* [1990] 2 AC 605.

[122] *South Australia Asset Management Corp v York Montague Ltd (SAAMCO)* [1997] AC 191, 212.

[123] ibid.

of that background, the modern 'assumption of responsibility' approach may be seen as an attempt to deduce the purpose of the defendant's duty by making reference to an implied term relating to the extent of the defendant's liability for the consequences of breach. In other words, a plausible account of the bigger picture — considering the clear relation between Lord Hoffmann's statements in *SAAMCO*, his decision in *The Achilleas*, and cases subsequent to it — has to suggest that the 'assumption of responsibility' approach is an attempt to construct the purpose of the defendant's duty (i.e. guarding him against specific losses) by making reference to the intention of the parties.

But any such attempt, whether as an attempt in its own right to determine the losses that are too remote or one to construct the purpose of duty, has to fail. This follows from the reasons put forward above regarding the flaws of an agreement-centred approach.

Therefore, *SAAMCO* provided the basis for advancing a satisfactory theory of remoteness in contract through highlighting the 'purpose of duty' principle, but the approach taken in *The Achilleas* and the major cases following it was a wrong step towards advancing such a theory by suggesting that the purpose of the defendant's duty is to be defined by making reference to the contracting parties' intention. The account of remoteness in contract proposed in what remains from this chapter may be seen as an attempt to correct *The Achilleas*' deviation.

CHAPTER SEVEN: DAMAGES FOR CONSEQUENTIAL LOSSES 2

It was shown that the correct conception of the *SAAMCO* principle is that it is about determining the scope of the defendant's secondary liability for consequential losses resulting from the breach by reference to the purpose of his primary duty. It was further clarified that neither the House's reasoning in *SAAMCO* nor sound reasoning require that that purpose should be determined by reference to the parties' intention. These facts, plus the fact that the claim in *SAAMCO* was brought in contract and that the case has been relied upon in some significant cases of remoteness in contract, suggest a new possibility. Could the 'purpose of duty' principle provide a plausible conception of the remoteness rule in contract that is both supported by authority and which does not rely on the fiction of the parties' intention delimiting the scope of the defendant's secondary liability? This chapter examines that possibility. I will first show that the 'purpose of duty' principle is simply a manifestation of the 'loss of benefit' theory in the area of compensation for consequential losses from breach of contract. Then I will examine the theory in context, showing how the 'purpose of duty' principle, viewed in the light of the 'loss of benefit' theory, may explain the results in most of the major past cases.

There is, however, a caveat to the scope of my claim in this chapter. I could potentially make the ambitious claim that my proposed account provides *the* most plausible analysis of this area of the law. However, the claim actually put forward here is the less ambitious one that the 'loss of benefit' theory provides *a* plausible account of remoteness in contract. Two reasons, when seen together, justify this approach. *First*, providing support for the more ambitious claim would ideally require dealing with all other major accounts of remoteness and proving them to be less convincing than the account proposed here. The modern courts' most favoured analysis, i.e. the 'assumption of responsibility' approach, was indeed shown above to be unsatisfactory.

But, there are also two other major modern analyses that would require close analysis: Professor Robertson's 'fairness account'[1] on the one hand, and Professor Stevens' recent take on the issue[2] on the other hand. However, it is not possible to deal with these analyses with due precision here, due to the limited space available in the present chapter. *Second*, for the purposes of the present thesis, it is unnecessary to make the more ambitious claim. My ultimate purpose is simply to show that the theory is not one invented solely to provide a solution for the difficult question of the nature of negotiation damages, but one that can provide, at least, an alternative explanation for some difficult questions in other areas of the law of civil remedies.

I. THE 'LOSS OF BENEFIT' THEORY OF CONTRACTUAL REMOTENESS

A. The Theory

In *Robinson v Harman*, Parke B famously said:

> what damages is the plaintiff entitled to recover? The rule of the common law is, that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed.[3]

This view of compensation, which has received its most powerful theoretical justification in Daniel Friedmann's rights-based thesis,[4] leads naturally to a specific conception of remoteness in contract. Where the scope of recovery is conceived, in principle, to include damages putting the claimant in as good a situation 'as if the contract had been performed', it is quite natural to view any rule limiting that scope as based on policy rather than principle. The alternative rights-based theory of compensation proposed herein shows, however, that the

[1] A Robertson, 'The Basis of the Remoteness Rule in Contract' (2008) 28 *LS* 172.

[2] R Stevens, 'Rights Restricting Remedies' in *Divergences in Private Law* (A Robertson et al eds, Hart Publishing 2016) 167.

[3] (1848) 1 Exch 850, 855, 154 ER 363, 365.

[4] Daniel Friedmann, 'The Performance Interest in Contract Damages' (1995) 111 *LQR* 628.

restriction placed on the scope of recovery in contract by the remoteness rule is based on principle. The same principle as that justifying the award of damages, justifies their restriction, as will now be explained.

C's having a contractual right means that D has a correlative duty to perform. The reason underlying C's right and therefore D's duty is to ensure that certain benefits accrue to C or are protected by D's performance. Where D breaches his contractual duty of performance and some or all of those benefits are lost as a result, the reason underlying his duty, i.e. the protection/furtherance of C's well-being by protecting/providing those benefits, justifies D's liability to pay damages. *This entails the 'purpose of duty' principle.* Since the purpose of a right is to protect/further *certain* benefits of the claimant right-holder, not all losses of benefit resulting from the breach/misperformance justify compensation. Now, in order to determine for what losses damages should be available, one has simply to answer the question of whether it was the *purpose* of C's primary right, or its correlative, D's primary duty, to protect/further the benefits lost consequent to breach.[5] If it was, then damages should be awarded to put C, so far as money can, at the level of well-being he would be had he not suffered the loss. If it was not, then the right does not justify the award of damages.

This is most clearly observable in the area of the basic measure of recovery, discussed in the previous chapter, in which it is *always* the purpose of the duty (or its corresponding right) to protect/further the benefits in question. These damages are therefore always available if a loss can be shown. The 'purpose of duty' principle also justifies the availability of damages for *consequential* losses of benefit. It plays a more active role in that regard compared to its role

[5] This is equally true if one believes that primary duties are not necessarily 'correlatives' of legal rights, but are simply 'grounded' by them (eg J Raz, 'On the Nature of Rights' (1984) 93 *Mind* 194, 199–200). There seems to be no reason to believe that the purpose of a right is not the same as that of the duty which it grounds. They aim at protecting/furthering the same benefits.

in relation to the justification of expectation damages. Since not all indefinite benefits consequent on the performance are to be protected by the defendant's duty, the scope of recoverable consequential losses depends on the purpose of the defendant's primary duty to perform. This constitutes the principle of remoteness in contract: *in cases of breach, if a loss relates to a (consequential) benefit which was to be protected/furthered by the defendant's primary duty, then it is not too remote and recoverable; if it does not, then it is too remote and unrecoverable*.[6]

B. Construction of the Purpose of Duty: Construction as a Question of Law – Thesis Distinguished from the Intention-Based Approach

An important question is, however, how to identify in each case whether the purpose of the defendant's primary duty was to protect/further the consequential benefits lost as a result of the breach. The short answer is that this is a matter of construction and most appropriate in the context of contract, where a relationship has already been formed by the parties and there is therefore a context on the basis of which to construe the purpose of the duty.

According to the positivist theory of rights (which is accepted by the present thesis[7]), rights are granted by the law. It is therefore quite justifiable for the law not only (a) to give force to the mutual intention of the parties to a contract, recognizing their primary and secondary rights and duties by referring to such intention where it exists, but also (b) to construe the contract and parties' rights and duties in the absence of such intention. So, where the parties' intentions can accurately be associated with specific rights and duties, the law often recognises these as their legal rights and duties. This is, for example, the case in relation to the scope of

[6] For other analyses of the remoteness rule, see, in addition to the sources cited below, eg E Peel, 'Remoteness Re-Visited' (2009) 125 *LQR* 6; J O'Sullivan, 'Damages for Lost Profits for Late Redelivery: How Remote Is Too Remote?' (2009) 68 *CLJ* 34; B Coote, 'Contract as Assumption and Remoteness of Damage' (2010) 26 *JCL* 211.

[7] Ch 3.

the defendant's secondary duty to pay damages where the parties intend the exclusion of certain liabilities. This may occur either in the form of express exclusion or limitation clauses in the contract, where the parties think of potential consequences of breach and address them in their contract, or where a term limiting the defendant's liability is able to be implied from the contract. Cases of remoteness often fall into the second category where the intention of the parties run out. In these situations, the law is justified in determining the scope of the defendant's liability to pay damages by constructing the purpose of his primary duty, *employing elements external to the parties' intention*. This is what distinguishes the 'purpose of duty' thesis from the intention-based approach. While the latter proposes to determine the scope of the defendant's secondary liability by making reference to the tacit intention of the parties, the former does not require making such reference. The purpose of the defendant's duty, and accordingly the scope of his liability can be determined, the thesis suggests, by employing the ordinary principles of construction.[8] In doing this, the courts are not only permitted, but often required to take account of the contract and the context of the parties' relationship without making reference to their intention. They are permitted to do so, since, in a final analysis, the content and purpose of a right does not derive from the parties' intention, but from the law, which grants the right in the first place. They are often required to do so, since making reference to the intention of the parties to determine whether a term relating to the scope of the defendant's liability for consequence of breach may be implied would both involve fictional reasoning in most cases of remoteness and fail to explain the results in a line of major past decisions.

[8] R Stevens, 'Rights Restricting Remedies' in *Divergences in Private Law* (A Robertson et al eds, Hart Publishing 2016) 167.

II. THEORY IN PLAY

This section is devoted to showing how the 'loss of benefit' theory of remoteness in contract, described above, explains the results of major cases decided by the courts in both the old and the modern era. There are thousands of such cases. I will, however, picked up and analyse seven key cases, showing the pattern of reasoning actually followed by the courts.

A. *Hadley v Baxendale*[9]

In *Hadley*, the claimants were mill owners who made a contract with the defendant carriers, according to which the latter were required to carry a broken crankshaft from the mill to the engineers who had made it and needed it as a pattern for a new one, and then to deliver it back to the claimants. As a result of the defendants' neglect, the delivery to the engineers was delayed, and consequently the delivery of the new shaft to the claimants was also delayed for several days. This constituted a breach of contract. The claimants had no other shaft and therefore the mill was shut down. They sought damages for the loss of the profits that they would have made had the delivery been made in a timely manner. The defendants argued that the loss was too remote and therefore unrecoverable. The court decided in their favour. The reason for this was that the carriers were not aware of the fact that the mill owners had no other shafts to replace the broken one and that the mill would stop as a result of late delivery. In the absence of the knowledge of those special circumstances, the loss in question was regarded not to be reasonably foreseeable. In the light of the 'loss of benefit' theory of remoteness, it can quite plausibly be said that in the absence of such knowledge, it was not the purpose of the defendants' primary duty of timely delivery to further the benefits (or profits) resulting from having a 'working mill'. In the 'loss of benefit' language, since it was not a reason underlying

[9] (1854) 9 Exch 341, 156 ER 145.

(or a purpose of) the claimants' primary contractual right (and therefore the defendant's duty to perform) to further those benefits, there was no justification for awarding damages for their loss.

B. *Koufos v C Czarnikow Ltd (The Heron II)*[10]

In *The Heron II*, the defendant was a ship owner who breached a charter-party by consigning sugar at Basrah with nine days' delay. The claimant charterers were sugar merchants who intended to sell the sugar upon its arrival. The market price of the sugar had fallen shortly before the date when the cargo was actually delivered. The claimants sought damages based on the difference between the price when the cargo should have been delivered and the date when it was actually delivered.[11] The defendant knew that there was a market for the cargo in Basrah, but did not know that the claimants intended to sell it immediately. He claimed that the loss was not sufficiently foreseeable and therefore it was too remote.[12] The House of Lords held unanimously that the claimants were entitled to damages based on the said difference, since the loss was reasonably foreseeable.[13]

The purpose of the defendant's duty of delivery could flatly be said to have been to enable the claimants to receive the benefits from selling the sugar. This is a very normal purpose of such contracts, and the conclusion is reinforced by the fact that although the defendant 'did not know what the charterers intended to do with the sugar, 'he knew there was

[10] [1969] 1 AC 350.

[11] See *Wilson v Lancashire and Yorkshire Railway Co* (1861) 9 CBNS 632, 142 ER 248.

[12] He only admitted that he was liable for the interest on the value of the sugar for the period of late delivery and some minor expenses.

[13] A large part of their Lordships' judgments were devoted to clarifying how likely the occurrence of the loss as a result of the breach should be from the viewpoint of a reasonable defendant.

a market in sugar at Basrah'.[14] Now, the purpose of its duty of 'timely delivery' was to provide the claimants with the benefit of being able to sell the cargo at its price at *any* time after the date when the cargo should have been delivered, which also included the benefit of selling the sugar at its price at the time of promised delivery. This is supported by the fact that, as a reasonable person, the defendant must 'have known that in any ordinary market prices are apt to fluctuate from day to day'.[15] Considering that, where his breach caused the loss of the latter benefit, it was liable to pay damages to put the claimants at the level of well-being they would be had they sold the cargo at its higher price. Would a purpose of the defendant's duty still be to enable the claimants to further the benefits from selling the sugar at the time of promised delivery if he actually knew that the claimants did not intend to sell at that time? Maybe or maybe not. But that was not an issue. Rather, the issue can be said to have been whether the defendant was responsible considering that he *did not* know whether or not they had that intention. This was immaterial, since, in order for a purpose of his duty to be to further the benefits from selling at the time of promised delivery, what mattered was only that it was 'not unlikely' as a reasonable possibility that the claimants had that intention.[16]

C. *Parsons (Livestock) Ltd v Uttley Ingham & Co Ltd* –[17] The 'Type of Loss' Fiction

One could criticise the 'type of loss' test on the ground that it is just a cover for the reality that courts actually decide on the basis of what they feel like is a fair result.[18] Lord Hoffmann seems

[14] *Koufos v C Czarnikow Ltd, The Heron II (The Heron II)* [1969] 1 AC 350, 382 (Lord Reid).

[15] ibid.

[16] ibid.

[17] (1978) QB 791.

[18] Similar thing might be said even about the very notion of 'reasonable foreseeability'. After all, the 'reasonable man' could be said to represent 'no more than the anthropomorphic conception of justice' which is 'the court itself': *Davis Contractors Ltd v Fareham UDC* [1956] AC 696, 728 (Lord Radcliffe).

to suggest that it is a cover for decisions that are in fact based on the 'assumption of responsibility' test and therefore only makes sense when it is seen in the light of that approach.[19] This was shown to be unconvincing.[20]

It is submitted that the 'type of loss' test *is* a cover. It cannot, by itself, provide a conclusive criterion for determining what losses are too remote. To use an analogy: in terms of typology, I am a man, but at the same time I belong to the species of humans, Hominidae, and bipeds. It is the purpose for which reference needs to be made to my species that determines to what type of species I belong. I am, for instance, a 'human' for the purpose of being capable of having rights. This is true of any concepts, including those of 'loss' or 'benefit'. It is accordingly pointless to say that losses actually suffered by the claimant are not too remote if they are of the same 'type' as losses which have been reasonably foreseeable. The loss of an ordinary contract can be the same type as the loss of an extremely lucrative contract, and they can both be the same type as 'lost profits'.[21] They can even all be the same type as any sort of loss. These are all 'losses' after all! What may determine the issue is the purpose for which two sorts of loss in question are to be regarded as being the same type or to be distinguished. That purpose, in the case of remoteness in contract, is to determine what losses are too remote. This, however, leads to circular reasoning: it was to identify too-remote-losses that we employed the 'type of loss' test, but now the identification of which losses are the same type depends on the question of remoteness.

The 'type of loss' concept is accordingly a placeholder and thus empty by itself. It is, however, a placeholder not for what the courts just feel like as being a fair solution, but for the

[19] [2008] UKHL 48, [2009] 1 AC 61 [22].

[20] Ch 6.

[21] Consider eg *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 KB 528 (CA), discussed immediately below.

right solution. That is the solution based on the 'purpose of duty' principle in cases in which a faithful application of the 'reasonable foreseeability' test contradicts a proper construction of that purpose. This is most significantly reflected by the decision of the Court of Appeal in *Parsons*, the leading case on the 'type of loss' test. There, the *death* of the claimant's pigs was *not* reasonably foreseeable as a serious possibility, since they were killed by a rare kind of disease. Despite that, Scarman and Orr LJJ decided that the defendants were liable for the loss, since it was the same type as their *illness*, which was a reasonably foreseeable result of the breach.[22] The result is explained by the 'purpose of duty' principle. What was the purpose of the defendants' duty of care? It was to protect the claimant's *benefit of having healthy* pigs by properly installing the hopper's ventilator. The death of the pigs was an instance of the loss of that benefit. Since the protection of that benefit was the purpose of the defendants' duty, this justified the award of damages to place the claimant at the level of well-being he would be if he still had the pigs. On the other hand, damages were not available 'for loss of profit on future sales or future opportunities of gain'.[23] The purpose of the defendants' duty of care to properly install the ventilator could plausibly be regarded as simply to protect the health of the pigs, but not to enable profits from rearing and selling additional animals.

D. Victoria Laundry (Windsor) Ltd v Newman Industries Ltd[24]

This brings us to the *Victoria Laundry* case. It is one well-known case of remoteness in contract which can be said to have been wrongly decided according to the 'purpose of duty' principle. The claimants were launderers and dyers who wished to expand their business by purchasing a large boiler from the defendants. The defendants were obliged to deliver the boiler in the

[22] Lord Denning MR reached the same result but for different reasons (*Parsons (Livestock) Ltd v Uttley Ingham & Co Ltd* [1978] QB 791, 804).

[23] ibid (Lord Denning MR). Scarman and Orr LJJ agreed.

[24] [1949] 2 KB 528.

shortest possible period of time. They breached the contract by delivering late. The claimants sought damages for the loss of business profits. The trial judge had only allowed a minor sum but refused the claim for loss of profits. The Court of Appeal reversed that decision. Asquith LJ, giving the judgment of the Court, decided that in addition to that minor sum, damages were available based on general losses of business, but not for the loss that the claimants had suffered as a result of losing particularly lucrative dyeing contracts with the Ministry of Supply. In the absence of the defendants' knowledge of the special circumstances giving rise to that loss, ie the existence of those contracts, the loss of profits from them was not reasonably foreseeable. Taking the 'type of loss' test seriously, one could criticise the decision on the basis that even though the loss of the profits from the lucrative contracts was not in fact reasonably foreseeable, it was the same 'type' as the ordinary loss of business profits: they were both 'loss of profits from the laundry business' or even simply 'loss of profits'. So one could argue that unlike the *Hadley* case, the 'type of loss' test should have allowed recovery despite the defendants' lack of awareness of the special circumstances giving rise to the loss in *Victoria Laundry*. The Court, however, did not believe that damages should be available on that basis. The truth is that, as said just above, the 'type of loss' doctrine does not provide one with a conclusive reason to take either side.

The answer is provided by the 'purpose of duty' principle. The purpose of the defendants' duty to deliver the boiler in the shortest period of time possible was clearly to protect the benefit of making profits from dyeing and laundry contracts. There is no reason to think that the purpose of that duty was only to protect the claimants' interest in making profits from ordinary contracts (if they so desired[25]) but not from lucrative ones. On this basis, it should

[25] It has been suggested that the claimants had no actual intention of entering ordinary contracts (JD McCamus, *The Law of Contracts* (Irwin Law Inc 2005) 862; A Kramer, *The Law of Contract Damages* (Hart Publishing 2014) 310), or the general loss of business was at least 'conjectural' (*Koufos v C Czarnikow Ltd, The Heron II (The Heron II)* [1969] 1 AC 350, 389 (Lord Reid)).

have not mattered whether or not the special circumstances had not been communicated to the defendants. Damages should have been awarded to place the claimants at the level of well-being they would be had they received that benefit. The case has to be said, with respect, to have been wrongly decided.

E. Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas)[26]

In *The Achilleas*, the defendant charterers were in breach of contract by redelivering the claimants' vessel later than promised. The claimants had made a follow-on charter. Knowing that the defendants would not be able to redeliver the vessel before the laycan date for the subsequent charter, they had to agree on a lower charter rate in order to convince the party to the follow-on fixture not to cancel the contract until a specific time, the anticipated time of redelivery of the ship by the defendants. The claimants sought damages based on the difference between the original and the reduced rate under the follow-on charter. The defendants contended that damages for the loss of the subsequent fixture were too remote and that the claimants' recoverable loss should be limited to the difference between the market rate and the charter rate for the period of late delivery. Their Lordships took different approaches in their reasoning, but the House decided for the defendants unanimously.

Lord Hoffmann took the 'assumption of responsibility' approach, Lord Hope fully agreeing with him.[27] This approach was shown to be flawed in the previous chapter. Those criticisms of the approach may be applied to the present case as follows. *First*, the defendants were taken not to have assumed responsibility for the loss of the follow-on charter, partly on

[26] [2008] UKHL 48, [2009] 1 AC 61.

[27] Lord Rodger agreed with Lord Hoffmann's reasons but did not think it necessary to explore the issues regarding the assumption of responsibility. Lord Walker agreed with both Lord Hoffmann and Lord Rodger. Baroness Hale was hesitant to support the conclusion reached by the other judges but said that if she was to agree with the conclusion, she would agree on the ground of the reasons provided by Lord Rodger, as she was 'not immediately attracted' to Lord Hoffmann's approach (ibid [91]). See Ch 6 for a discussion of the ratio.

the basis that such loss was completely unquantifiable[28] and unpredictable[29] at the contracting time.[30] This was shown to be in conflict with previous cases in which damages for completely unquantifiable and unpredictable losses had been awarded.[31] *Second*, they were regarded not to have undertaken responsibility since (according to Lord Hoffmann[32]) there was an understanding in the market that a defendant's loss in such circumstances is based on the more limited amount.[33] Indeed, where the scope of the defendant's liability is addressed by the parties in the form of express exclusionary clauses or where a term to that effect can be implied from the contract without resorting to fiction, the mutual intention of the parties provides the conclusive test for the question of liability for consequent losses. Thereupon, one could argue that where there is a clear understanding in the shipping market regarding liability in similar situations, it is possible to imply a term to that effect from the contract. But the existence of that understanding in the market does not necessarily mean that the parties had, at the contracting time, actually turned their minds to the question of responsibility for the loss or liability to pay damages. As a counter-argument, one may contend that in some situations a person need not turn his mind to something in order to intend it: one would book a hotel room without turning his mind to whether the room has a bed.[34] However, as Robertson has

[28] *Transfield Shipping Inc v Mercator Shipping Inc* (*The Achilleas*) [2008] UKHL 48, [2009] 1 AC 61, [23] (Lord Hoffmann).

[29] ibid (Lord Hope).

[30] The charterers had no knowledge of the terms, length or nature of the forward fixture.

[31] Ch 6.

[32] *Transfield Shipping Inc v Mercator Shipping Inc* (*The Achilleas*) [2008] UKHL 48, [2009] 1 AC 6, [23].

[33] It has been argued that in the market, there was no clear view of the scope of recoverable loss applicable to the facts of *The Achilleas* at all: A Burrows, 'Lord Hoffmann and Remoteness in Contract' in *The Jurisprudence of Lord Hoffmann* (PS Davies, et al eds, Hart Publishing 2015) 257–58; E Peel, ed, *Treitel, The Law of Contract* (14th edn, Sweet & Maxwell 2015) 20–110. Yet, I proceed with my argument supposing that there was such a view.

[34] A Kramer, 'Implication in Fact as an Instance of Contractual Interpretation' (2004) 63 *CLJ* 384, 390.

responded, the issue of the defendant's liability for consequent losses, at least in typical cases of remoteness, is not so fundamental to the contract to be capable of being treated like the latter example. The presumption that the parties intend to allocate the risk is accordingly counterfactual in those cases.[35] Such was the situation in *The Achilleas*, where it does not seem to have been foundational to the parties' agreement that the defendants' liability be (at least partly) defined by the market understanding. Would the parties, if an officious bystander had suggested a provision for that extent of liability based on the market understanding when they were making their bargain, testily suppress him 'with a common "Oh, of course!"'?[36] It does not seem so.[37]

It is submitted that, as in *Victoria Laundry*, the sound conclusion would have been reached if the court had applied the 'purpose of duty' principle (seen in the light of the 'loss of benefit' understanding of compensatory damages). What matters according to that principle is the clarification of what benefits of the claimants were to be protected by the fulfilment of the defendants' duty of on-time delivery. A purpose of that duty was to further the claimants' benefit of having control of the vessel from the date when the redelivery was due. Where that benefit was lost as a result of the breach, the defendants were therefore responsible for it. One way of assessing the damages was indeed to calculate the market value of that benefit and thus to award damages on the basis of the difference between the market rate and the charter rate

[35] A Robertson, 'The basis of the Remoteness Rule in Contract' (2008) 28 *LS* 172, 179.

[36] *Shirlaw v Southern Foundries (1926) Ltd* [1939] 2 KB 206, 227.

[37] Cf PCK Wee, 'Contractual Interpretation and Remoteness' [2010] *LMCLQ* 150, 155. With regards to Lord Hoffmann's reliance on the market understanding, it may also be said that giving effect to the defendants' reliance on the understanding of their liability when breaching the contract does not provide a proper rationale for the House's decision in situations where the market understanding is in conflict with sound law (see, for instance, *Koufos v C Czarnikow Ltd, The Heron II (The Heron II)* [1969] 1 AC 350, in which the House of Lords rejected a specific understanding in the shipping industry regarding the state of the law on the remoteness rule that derived from *The Parana* [1877] 2 PD 118; also see *Raineri v Miles* [1981] AC 1050 and *Edward Wong Finance Co Ltd v Johnson Stokes & Master* [1984] AC 296). However, this does not seem to be a correct objection, as his Lordship did not take the market understanding into account in order to give effect to the parties' expectations as such, but simply as an indicator of the scope of the defendants' assumption of responsibility.

for the period of late delivery. This is absolutely analogous to tortious cases of user damages, where the claimant loses the benefit of exclusive control of his chattels.[38] But a purpose of the defendants' duty of timely delivery was also clearly to enable the claimants to make a follow-on charter if they desire and to make profits out of it. This clearly distinguishes the present case from a case such as *Mulvenna v Royal Bank of Scotland plc*,[39] to which Lord Hoffmann referred to support his judgment.[40] There, too, the reasonably foreseeable loss of the profits in question was regarded too remote; but, unlike *The Achilleas*, it was *not* the purpose of the defendants' duty in that case to guard against the loss. The defendant bank was obliged, as part of a refinancing agreement, to refund some money to the claimant's account. The purpose of this was to enable the claimant (who was then the subject of specialised lending) to deal with the defendants as in normal banking relations.[41] He had been told by an officer of the bank that if he returned to mainstream banking, the bank would consider his application for funding two development projects under the normal banking criteria. The defendants failed for a specific period of time to refund the sums under the refinancing agreement. The claimant sought damages for lost profits from the developments on the basis that if the defendants had made the refunds, he would have been brought back to the mainstream banking, making a successful

[38] *Strand Electric and Engineering Co Ltd v Brisford Entertainments Ltd* [1952] 2 QB 246. See Ch 8 for a discussion. As it will be explained, the loss of the benefit of control and possession of the property is a factual loss on its own right that does not depend on whether the claimant actually intended to use the property. So it would be incorrect to assume (as A Kramer (*The Law of Contract Damages* (Hart Publishing 2014) 311) does) that the award of the smaller measure in *The Achilleas* was based on no actual loss and was only awarded based on a vague notion of justice or fairness where the loss relating to the larger amount was regarded too remote. The same can be said about the award of damages for 'general' loss of business in *Victoria Laundry*, where the award of this smaller amount has been regarded as representing only a 'conjectural' loss (*Koufos v C Czarnikow Ltd, The Heron II (The Heron II)* [1969] 1 AC 350, 389 (Lord Reid). A Kramer describes this as a 'non-remote (albeit not suffered) loss': *The Law of Contract Damages* (Hart Publishing 2014) 309. He does not, however, explain how a loss can exist but not be suffered! For another example in remoteness in contract, see *Cory v Thames Ironworks & Shipbuilding Co Ltd* (1868) LR 3 QB 181.

[39] [2003] EWCA Civ 1112, [2004] CP Rep 8.

[40] *Transfield Shipping Inc v Mercator Shipping Inc* (*The Achilleas*) [2008] UKHL 48, [2009] 1 AC 61, [19] – [21].

[41] *Mulvenna v Royal Bank of Scotland plc* [2003] EWCA Civ 1112, [2004] CP Rep 8, [8].

application to the bank, therefore obtaining the required funds for the developments and making profits from them.[42] One question for the Court of Appeal was whether there was the sufficient causal connection between the breach and the loss to make the defendants liable for it. The Court's answer to this was negative. A second question was whether the loss was too remote from the breach. The Court's answer to this was also negative. According to the 'purpose of duty' analysis,[43] the Court was correct in deciding that despite the reasonable foreseeability of the loss of profits, it was too remote a consequence of the breach. Let us suppose that dealing with the claimant as in normal banking relations would have led to the bank's financing of the project. Even in that case, it seems implausible to say that it was the purpose of the bank's duty of making the refund to enable the claimant to make profits from developing the property by obtaining the necessary funds that would have been provided by the bank had the parties resumed normal banking relations. The purpose of the bank's duty was simply to return the claimant to normal banking relations. This was, however, unlike the case in *The Achilleas*, in which case it was clearly a purpose of the defendants' duty of timely delivery of the vessel to provide the claimants with the benefit of entering follow-on charters. The defendants in *The Achilleas* should have therefore been considered responsible for the loss of that kind of benefit as well as the loss of the possession and control of the vessel for the period of late delivery. There was no reason for the House not to enable the claimants to choose between these two amounts, where the award of either amount was justifiable by the purpose of (or the reason underlying) the defendants' duty (or the claimants' right). Where the greater

[42] Although the bank was under no legal liability to provide the finance.

[43] Here, for the purpose of my present argument, I analyse the result of the case in terms of the 'purpose of duty', which, I believe, is the correct conception of the remoteness rule. This is not to say, however, that also the Court conceived to be applying that principle. Waller LJ (Carnwath LJ agreeing), while confirming the trial judge's reliance on *SAAMCO* (*Mulvenna v Royal Bank of Scotland plc* [2003] EWCA Civ 1112, [2004] CP Rep 8, [24]), justified his decision in terms similar to those of assumption of responsibility. He believed that even where special circumstances are brought to the attention of the defendant (the second limb of the rule in *Hadley*), this does not by itself constitute liability for consequences of the breach if he has not assumed responsibility for the loss: *Mulvenna v Royal Bank of Scotland plc* [2003] EWCA Civ 1112, [2004] CP Rep 8, [26].

amount was the claimants' choice, it should have been recoverable, irrespective of its extent and whether or not the defendants could be said to have assumed responsibility for it.

F. Supershield Ltd v Siemens Building Technologies FE Ltd[44]

Supershield, the appellant sub-contractor, was found in breach of contract and liable for the improper installation of a ball float valve which caused a flood in the basement of a building and substantial damage to the electrical equipment which it contained. Siemens, the respondent contractor, had sub-contracted with another party who had in turn subcontracted with the original contractor. Siemens, while settling the claims with the parties up the contractual chain, claimed damages for the loss which Supershield had caused. Supershield claimed, among other things, that, considering the defences that had been available to Siemens, the amount for which the settlement had been made (£2,864,080) was not reasonable. One of the allegedly available defences was in respect of the remoteness of loss. Hence, one of the issues before the Court of Appeal was whether Siemens had made an unreasonable settlement based on the recognition of their liability for a loss which was too remote. The significant point in respect of the question of remoteness in that case is that the loss was not, at the contracting time, in the reasonable contemplation of the partiers as a serious possibility. This is because additional measures other than the installation of the ball valve had been taken in order to prevent the flood, but, in a quite unlikely turn of events, they had failed simultaneously. The Court of Appeal decided for Siemens that even though the loss was not in the reasonable contemplation of the parties, it was not too remote.

The availability of damages can comfortably be explained in the 'purpose of duty' terms. The purpose of the defendants' primary duty, ie the proper installation of the ball valve, was

[44] [2010] EWCA Civ 7, [2010] 1 Lloyd's Rep 349.

clearly to protect benefits, in the form of property located in the basement, against flood. The award of damages was therefore justified to serve that purpose. It was irrelevant according to the latter analysis whether or not the loss was reasonably foreseeable and whether other measures had been taken to prevent the flood. Given the simplicity of this approach, it is no coincidence that Toulson LJ, giving the judgment of the Court, while also utilizing the dominant language of 'assumption of responsibility' in the post-*Achilleas* era, relied on the decision of House of Lords in *SAAMCO*, mentioning the latter case perhaps more often than it had been cited in any other post-*Achilleas* judgments. The best understanding of the reasoning in *Supershield* [45] is that, in Toulson LJ's words, 'the question of remoteness cannot be isolated from consideration of the *purpose* of the contract [or primary contractual duty]...'[46]

G. Wellesley Partners LLP v Withers LLP[47]

This recent Court of Appeal judgment is important mainly in two respects. First, it was clearly and unanimously decided in this case that the applicable test of remoteness in cases of concurrent liability in torts and contract ought to be the contractual test. Second, *Wellesley* presents one more instance of a case in which judges refer to the 'assumption of responsibility' approach to remoteness, but where the result of the case is more correctly and straightforwardly explicable by reference to the 'purpose of duty' principle. Here, I am concerned with the latter point.

The claimants, WP, were an executive recruitment consultancy partnership. They had instructed the defendant solicitors to draft amendments to the partnership agreement. This had

[45] See Ch 6.

[46] *Supershield Ltd v Siemens Building Technologies FE Ltd* [2010] EWCA Civ 7, [2010] 1 Lloyd's Rep 349, [40] (emphasis added).

[47] [2015] EWCA Civ 1146, [2016] 2 WLR 1351.

been necessitated due to a large contribution to the partnership capital by an investor (a bank). The new provisions should, according to the instructions, have included, among other things, an option for the bank to withdraw half its capital contribution, this being exercisable only after 42 months had expired from the execution of the agreement. The option actually included by the solicitors, however, gave the bank the ability to withdraw at any time within the first 41 months of the agreement. The bank exercised its option after 12 months. The claimants brought an action against the solicitors, seeking damages for negligence. The trial judge found that the defendants were in breach of contractual and tortious duty of care to include the option as instructed. They were found liable to pay damages, including damages for the loss of the profits that, but for their negligent conduct and the subsequent withdrawal by the bank, the claimants would have had a chance to earn by opening an office in New York. The Court of Appeal confirmed the judge's award of damages for this. The defendants' appeal to the Court was partly based on the claim that the trial judge was wrong in applying the tortious test of remoteness and that the applicable test in cases of concurrent duty in tort and contract is the contractual test, which is more restrictive. They, accordingly, contended that the damage relating to the US lost profits was too remote. The claimants argued, in contrast, that the applicable test of remoteness is the tortious test[48] which makes a wider scope of loss available. They also made the alternative argument that even applying the contractual test of remoteness, the loss was the 'type' which could reasonably have been expected, at the contracting time, from their overseas operations. It was held that while the applicable test of remoteness is the contractual test, the loss in question was not too remote. According to the Court, the applicable test remains the *Hadley* test, as developed by subsequent cases;[49] however, that is an indicator

[48] Relying on *Midland Bank Trust Co Ltd v Hett, Stubbs & Kemp* [1979] Ch 384 (Oliver J), approved by the House of Lords in *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145.

[49] *Wellesley Partners LLP v Withers LLP* [2015] EWCA Civ 1146, [2016] 2 WLR 1351, [69] (Floyd LJ), [146] (Roth J).

of the defendant's assumption of responsibility and leads to the correct result only in the majority of cases. In special circumstances, the 'assumption of responsibility' approach may require a result different from what would have been reached applying the 'reasonable foreseeability' test.[50] Applying this approach to the facts of the case, the Court decided that the loss was not too remote, because it was reasonably foreseeable and therefore the defendants could be taken to have assumed responsibility for it. Of course, as contended by the defendants, the loss for which the claimants sought recovery related to profits that were in one sense exceptional. In a situation of global financial crisis which led to the collapse of Lehman Bros in September 2008 and thereby gravely affected the claimants' business in general,[51] Nomura acquired Lehman's Middle East business, aiming at obtaining a 'global' foothold. They therefore wanted to make a rapid expansion of their business to the US. Mr Channing, a founder of WP and its 'leading light', had excellent connections with Nomura. He would have taken up their US expansion through WP. This was an exceptional opportunity that would have yielded great profits for the claimants. But, considering the solicitors' knowledge of Mr Channing's skills and excellent connections,[52] the Court regarded the 'type' of the loss as reasonably foreseeable as a serious possibility.

The salient point for my discussion of the case here is, however, that while the paramount remoteness test was regarded by the Court to be that of the assumption of responsibility, the latter approach cannot explain the result actually reached in the case. Just as in *The Achilleas*, the application of that test would have led to the exclusion of damages for lost profits. This argument was in fact made by the defendants, but both Floyd LJ and Roth J

[50] ibid [69] (Floyd LJ). The same can be inferred from various statements by Roth J: see paras [157], [171], [178]. Longmore LJ agreed with them in all respects but one minor one (which did not relate to the issue of remoteness.

[51] ibid [169].

[52] They had worked with the claimants for a long time.

believed that the analogy with *The Achilleas* was not persuasive, because the special circumstances present in that case, i.e. the market understanding about the scope of recoverable loss, were absent in *Wellesley*.[53] This means that because of the absence of special circumstances, the case is an 'ordinary' one in which the 'reasonable foreseeability' test applies without needing to dig deeper to see whether the 'assumption of responsibility' approach requires excluding damages for reasonably foreseeable losses. This kind of reasoning may be convincing from a mechanical perspective, one content with dividing the cases of remoteness between 'ordinary' and 'special' cases and then suggesting that in order for the 'assumption of responsibility' approach to operate at all to exclude damages, a case needs to fall in the minority category in which 'special circumstances' exist. But an analyst concerned with assessing the real force of the approach in explaining the result of the case has to consider the issue from a wider perspective. In *The Achilleas*, while Lord Hoffmann founded his reasoning partly on the alleged market understanding,[54] this was not a reason for Lord Hope (who took an 'assumption of responsibility' approach as well) at all. The shared reason for not taking the defendants as having assumed responsibility was, rather, the charterers' complete lack of ability at the contracting time to predict and control the terms of the follow-on charter and the scale of its loss.[55] And for one who seeks to adhere loyally to the application of the 'assumption of responsibility' approach, this is a good reason to conclude that the charterers would not have assumed responsibility.[56] For such person, *Wellesley* would be quite analogous to *The Achilleas*. While the solicitors knew at the contracting time that the claimants had a plan to expand their

[53] *Wellesley Partners LLP v Withers LLP* [2015] EWCA Civ 1146, [2016] 2 WLR 1351, [88] (Floyd LJ), [178] (Roth J).

[54] *Transfield Shipping Inc v Mercator Shipping Inc* (*The Achilleas*) [2008] UKHL 48, [2009] 1 AC 61, [23].

[55] ibid [23] (Lord Hoffmann), [34] (Lord Hope).

[56] Ch 6.

business to the US, they were completely unable to predict the loss of the Nomura profits. Accordingly, in contrast with the Court's opinion, they would not have assumed responsibility for the loss.

In his attempt to justify the decision to make the solicitors responsible based on the 'assumption of responsibility' approach, one could make, as Roth J did,[57] an analogy with the *Supershield* case. There, according to him, the Court took the defendants as having assumed responsibility because it was clearly the 'purpose' of their duty to provide protection against the loss of the electrical equipment in the basement. One could accordingly argue that in the present case also, responsibility would have been assumed for the loss because it was the purpose of the solicitors' duty to enable the claimants' overseas business. But there is a critical difference between the two cases. Viewing *Supershield* from the 'assumption of responsibility' perspective, the question in that case was one of assumption of responsibility for the specific losses at issue. While the occurrence of those specific losses was not likely as a serious possibility, their scale and nature, in the unlikely case of occurrence, was completely predictable. It therefore may make sense to suggest that the fact that the purpose of the defendants' duty was clearly to prevent the loss was a sufficient reason to take them as having assumed responsibility for it. In *Wellesley*, however, (a) a similar argument may only be made in respect of the type of the loss, and (b) in any case it is not a satisfactory argument. Firstly, the argument can be made only in respect of the type of the loss, because it is clearly absurd to say that the purpose of the solicitors' duty was to protect against the specific loss of profits in issue. The defendants did not know about the Nomura profits at the contracting time (nor even did the claimants): the collapse of Lehman Bros, its takeover by Nomura, and the development of the opportunity for the claimants to handle Nomura's business in the US happened after the

[57] *Wellesley Partners LLP v Withers LLP* [2015] EWCA Civ 1146, [2016] 2 WLR 1351, [172].

time of the contract between the claimants and the defendants. Secondly, the argument made in respect of the type of the loss is unsatisfactory. Floyd LJ said, citing Lord Hoffmann: 'The fact that the scale of the [specific] losses was unforeseeable does not make them too remote if they are losses for which the contract-breaker has otherwise assumed responsibility'.[58] But how do we know that the defendants in the present case had 'otherwise assumed responsibility'? Floyd LJ and Roth J's response was that the solicitors would have assumed responsibility for the type of the loss of profits from the claimants' US office. And how do we know that they had assumed responsibility for that type? Roth J would respond that '[t]he whole reason for [or the purpose of] including a restriction in the agreement on the investor reducing its interest in the business and withdrawing its capital was clearly to protect the resources of the business, by which its development, including any overseas expansion, would be funded.'[59] But, the fact that the very purpose of the defendants' duty was to enable overseas expansion does not seem to be a good reason why one should be convinced that they would have assumed responsibility for the type of the loss of US profits, meaning profits of any scale from any future contract made by the claimants through their US office. The fact that a purpose of the charterers' duty of timely delivery of the vessel can be said to have been clearly to protect against the loss of profits from follow-on charters did not make Lords Hoffmann and Hope in *The Achilleas* take them as having assumed responsibility for the type of the loss of follow-on charters irrespective of the possible scale of indefinite instances of that type, which they could not predict or control. Even Roth J in the present case conceded that there might be a strong case for saying that the defendants could not be taken to have assumed responsibility if the damage related to a much larger scale of loss of profits from the claimants' US business.[60] Why would it be so if the

[58] ibid [86].

[59] ibid [168].

[60] ibid [171].

solicitors could be said to have assumed responsibility for the 'type' of the loss of US profits? These problems, in addition to those discussed generally in respect of the 'assumption of responsibility' approach[61] (which also applies to the present case) make one unpersuaded by an 'assumption of responsibility' explanation of the result actually reached in the case.

Once again, the 'purpose of duty' principle, not the 'assumption of responsibility' approach, provides a straightforward and plausible explanation. *Wellesley* was indeed 'just such a case' as *Supershield*, as Roth J pointed out;[62] but it was just such a case in the aforementioned sense. It is very telling that in pointing out the analogy with the *Supershield* case, Roth J cited Toulson LJ's statement that *Supershield* should be solved on the basis of the *SAAMCO* principle,[63] a principle that, on the correct analysis, reflects the 'purpose of duty' approach.[64] This point was made in clear terms by Floyd LJ who stated that *SAAMCO* is about the purpose of the defendant's duty and, seen in that way, explains why the lost profits should be recoverable in *Wellesley*.[65] Of course, '[t]he whole reason for including a restriction in the agreement on the investor reducing its interest in the business and withdrawing its capital was clearly to protect the resources of the business, by which its development, including any overseas expansion, would be funded.'[66] But this itself (without needing to use it as a basis for artificially establishing the defendants' assumption of responsibility) justifies the award of damages. They were justified irrespective of the fact that the specific lost profits (or the chance of making them) in question was not foreseeable even as an unlikely consequence of the breach.

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[61] Ch 6.

[62] *Wellesley Partners LLP v Withers LLP* [2015] EWCA Civ 1146, [2016] 2 WLR 1351, [172].

[63] *Supershield Ltd v Siemens Building Technologies FE Ltd* [2010] EWCA Civ 7, [2010] 1 Lloyd's Rep 349, [43].

[64] See Ch 6.

[65] *Wellesley Partners LLP v Withers LLP* [2015] EWCA Civ 1146, [2016] 2 WLR 1351, [81].

[66] ibid [168] (Roth J).

It did not matter either that it made little sense to consider the solicitors responsible for the specific loss in question on the basis that they had voluntary assumed responsibility for it. Nor was it material that it was not clear that they could be taken to be responsible on the basis that they had assumed responsibility for the 'type' of the loss. They were responsible for the loss, because it was clearly the purpose of their duty (or the claimants' corresponding right) to protect the benefit of the opportunity to make profits from overseas business, using the capital invested by the bank. Where that benefit was lost as a result of their breach of contract and the bank's subsequent withdrawal, damages were awarded to place the claimants at the level of well-being they would be had that benefit not been lost.

CHAPTER EIGHT: NEGOTIATION DAMAGES

This final chapter considers the nature of negotiation damages based on the findings of this thesis so far, and discusses questions of availability and measure of these damages in the light of their nature.

Regarding the nature of negotiation damages, I have already put forward, as a hypothesis, that user damages are a kind of negotiation damages when the latter term is used in its broad sense. My task in the present chapter is to show that this hypothesis is correct. User damages and negotiation damages on a *Wrotham Park* basis both reflect the reasonable exchange value of the claimant's direct benefit lost, i.e. the sum he would reasonably have been willing to receive (at the time of the loss) in order to give up his direct benefit. This is simply a method of putting a value on the benefit lost. In cases of negotiation damages on a *Wrotham Park* basis, such value is determined by constructing the hypothetical negotiations between the parties. In cases of user damages, however, a market exists, providing a clear answer to the question of the exchange value of the claimant's direct benefit.

I. NATURE

The 'hypothetical negotiations' method is employed by the courts to put a value on the claimant's direct loss. In cases where the method is employed by the courts, the award is, accordingly, compensatory damages for a direct loss, or what is often termed as 'the basic measure of recovery'.[1] This claim will be examined in what follows in this section. There are thousands of decided cases in which the method has been used or discussed. In attempting to

[1] See Ch 5.

justify the said claim, however, I will take up and analyse some of the most significant of these cases.

Let me start with the House of Lords' decision in *Attorney General v Blake*.[2] The case is of high significance, not least because it seems, to a great extent, to have been due to the influence of this case that many academics[3] have been encouraged to prefer a gain-based analysis of negotiation damages, an analysis which was argued in Chapter Two to be unsatisfactory. There, the claimant was a former member of the intelligence services who, in breach of his contract with the Crown, published an autobiography using information that he had undertaken not to divulge. The Crown was awarded an account of the profits made by the defendant by his wrongful act. In giving this judgment, though, the House needed to pass one significant hurdle: before then, an account had never been ordered for a breach of contract. In his attempt to justify the award, Lord Nicholls, giving the leading judgment, made statements on the *Wrotham Park* case that are often believed to support a gain-based view of negotiation damages. In addition to some direct indications supporting such a view of negotiation damages,[4] Lord Nicholls relied on the *Wrotham Park* case[5] to justify an account of profits, an award which is clearly gain-based. However, there are also reasons to believe that his Lordship saw negotiation damages as compensatory: while the damages in *Wrotham Park* had been awarded in lieu of an injunction under Lord Cairns' Act,[6] his Lordship indicated that damages

[2] [2001] 1 AC 268.

[3] The general judicial trend is by no means to prefer a gain-based analysis, with most recent important decision, *One Step (Support) Ltd v Morris-Garner* [2016] EWCA Civ 180, [2017] QB 1, clearly preferring a loss-based view. Cf *Marathon Asset Management LLP v Seddon* [2017] EWHC 300 (Comm), [2017] ICR 791 (Leggatt J).

[4] *Attorney General v Blake* [2001] 1 AC 268, 283–84.

[5] Also *Jaggard v Sawyer* [1995] 2 All ER 189, discussed below text to n 23–29.

[6] Chancery Amendment Act 1858 (Lord Cairns' Act), now found in s50 of the Senior Courts Act 1981.

under the Act are based on the claimant's loss.[7] The truth is that his Lordship's statements on the *Wrotham Park* case are ambiguous, making an objective and conclusive inference as to the nature of negotiation damages an impossible task. Seeing the judgment from a holistic perspective, his Lordship's discussion of the *Wrotham Park* case and his description of it as 'a solitary beacon' is best seen simply as part of his Lordship's attempt to make his main point, which is when a need is felt to award substantial damages, the claimant is not to be 'confined to recoupment of *financial* loss',[8] where such loss does not exist. This was the case both in *Blake* and in *Wrotham Park*. What made the two cases similar, from Lord Nicholls' viewpoint, is not, therefore, that damages in both cases were gain-based (they were not in the latter[9]), but that they both showed the law's concern with filling a gap that was there due to a narrow conception of the notion of a loss. While the damages in *Blake* filled the gap with an account of profits, damages in *Wrotham Park* did a similar job by compensating the claimants for a loss that had been suffered but could not be identified using a narrow definition. While Lord Nicholls may have been unable or unwilling to think of a compensatory analysis that is not based on a 'strained and artificial' notion of a loss,[10] I will contend below that such analysis can quite plausibly be provided.

In *Wrotham Park Estate Co Ltd v Parkside Homes Ltd*,[11] the first defendants had breached the claimants' right by constructing a number of houses on land in breach of a

[7] *Attorney General v Blake* [2001] 1 AC 268, 281; see E Peel, ed, *Treitel: The Law of Contract* (14th edn, Sweet & Maxwell 2015) 20–015. Lord Hobhouse, dissenting, also supports a compensatory view, though his Lordship seems to have accepted a 'loss of bargain' analysis. See below text to n 65–67 for a brief discussion of damages in lieu of an injunction.

[8] *Attorney General v Blake* [2001] 1 AC 268, 283 (Lord Nicholls; emphasis added).

[9] Discussed immediately below, text to n 11–23.

[10] *Attorney General v Blake* [2001] 1 AC 268, 279 (Lord Nicholls).

[11] [1974] 1 WLR 798 (Ch).

restrictive covenant. They had sold the houses to the other defendants. The covenant imposed a negative duty on the defendants 'not to develop the … land for building purposes except in strict accordance with a lay-out plan to be first submitted to and approved in writing by the vendor or the surveyors, such plan to indicate thereon the roads sewers and drains to be constructed.'[12] One question before the court was whether 'the covenant was entered into for the *benefit*'[13] of the claimants.[14] This is, in the terms used by this thesis, simply a question of whether the purpose of the claimant's right was to ensure a benefit. In answering this, the next question was whether the claimants reasonably valued the thing that they had been promised. Brightman J gave a positive answer to that:

> [I]t seems to me that an estate owner living on a residential and agricultural estate sandwiched between two developing towns, is properly interested in the standard of development of those towns... a reasonable owner of the Wrotham Park Estate might well fear that the quality of the development on the periphery of his estate is deteriorating to his disadvantage.[15]

Thus, the court found as a fact that the defendants' negative act of *not developing the land except in accordance with the specified conditions* was a benefit to the claimants.[16] It was also a direct benefit, since it was an immediate purpose of the claimants' right to ensure it.

The court decided that the award of an injunction ordering the demolition of the houses was not appropriate under the circumstances of the case. The court was, however, justified in awarding damages based on the value of the direct benefit lost, even though the claimants had

[12] ibid 802.

[13] ibid 806 (emphasis added).

[14] The principle had also been asserted in *Marten v Flight Refuelling Ltd* [1962] Ch 115, on which Brightman J relied. Also see *Shelfer v City of London Electric Lighting Co* [1895] 1 Ch 287, 322.

[15] ibid 808.

[16] Note that there is no normative element in this view of the claimants' benefit. In this way, the analysis is essentially different from a right-based analysis viewing the damages awarded as a substitute for the claimants' *right* (which is a normative concept).

not suffered a consequential loss in the form of a diminution in the value of their own land.[17] In the absence of a market reflecting the reasonable value of the lost benefit, a 'hypothetical negotiations' method was famously used by the court. The next question was therefore what sum the claimants, as reasonable people, would have agreed to be paid, at the infringement date, in order to give up the benefit. It was irrelevant whether the claimants would (or could[18]) have made such a bargain in reality, because the method is merely a way of assessing the value of the lost benefit. Two quick points need to be made here. *First*, it has been suggested that the claimants suffered a non-pecuniary loss of the benefit of the view of an undeveloped green area.[19] Any damages awarded on this basis would be akin to damages for consequential mental distress. However, the measurement method used by the court shows that damages were for the claimants' direct loss. That they cared about the view of their surroundings is simply a reason why they valued ensuring that the developments would not be made against the plan and therefore why ensuring that was a benefit to them. *Second*, a 'substitutive damages' analysis, three versions of which have been discussed in this thesis,[20] does not explain the award, not least because the damages were assessed at the time of infringement. The damages could not be a substitute for the claimants' right, since the right had not been lost[21] nor was it gone[22] at that time. It is also difficult to accept that the court's denial of an injunction had a

[17] *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 1 WLR 798 (Ch), 812.

[18] The claimants were, in fact, not authorised to make the bargain: *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 1 WLR 798 (Ch), 815.

[19] J Edelman, 'The Meaning of Loss and Enrichment' in *Philosophical Foundations of the Law of Unjust Enrichment* (R Chambers, et al eds, OUP 2009) 214; J Beatson, et al eds, *Anson's Law of Contract* (30th edn, OUP 2016) 632.

[20] See Ch 4 for a discussion of Daniel Friedmann's thesis, Ch 2 (text to n 69–79) and Ch 5 for Robert Stevens' thesis, and Ch 5 (text to n 114–35) for Brian Coote's thesis.

[21] This can be said to be the case eg according to Brian Coote's analysis of 'benefits in law' in 'Contract Damages, *Ruxley* and the Performance Interest' (1997) 56 *CLJ* 537.

[22] R Stevens, 'Damages and the Right to Performance' in *Exploring Contract Law (*J Neyers, et al eds, Hart publishing 2009) 192–93.

retrospective effect, so the claimants had lost their right to enforce the covenant from the date of its infringement.

The 'hypothetical negotiations' method was also used in *Jaggard v Sawyer*.[23] The case is recognised as an important acknowledgment by the Court of Appeal of a compensatory analysis of negotiation damages, not least because two highly respected judges of the Court of Appeal, Sir Thomas Bingham MR and Millett LJ, were involved in it. The Court's conception of the damages awarded has been criticised on the basis that it echoes the 'lost bargaining opportunity' thesis.[24] However, this is not correct, in so far as it suggests that the thesis received acceptance from both judges. Sir Thomas Bingham MR did not refer to the thesis except to describe Steyn LJ's rejection of it in *Surrey County Council v Bredero Homes Ltd*,[25] and said nothing to the effect of accepting or rejecting Steyn LJ's opinion. Rather, he simply said that he could not 'accept that Brightman J's assessment of damages in the *Wrotham Park* case was based on other than compensatory principles.'[26] In *Jaggard*, the claimant had bought a house in a residential area including ten houses served by a private cul de sac. Each plot had been conveyed, together with part of the road in front of it, subject to restrictive covenants, binding also on successive owners, requiring that no part of the unbuilt land should be used other than as a private garden and that the relevant portion of the road should be kept in good repair. The defendants had bought a house in the same residential area and then purchased a plot of land adjoining their property without access to the cul de sac. Obtaining planning permission later to build a dwelling house on the plot, they constructed the house. They also constructed a

[23] [1995] 2 All ER 189; also see *Lane v O'Brien Homes Ltd* [2004] EWHC 303.

[24] See eg A Burrows, *Remedies for Torts and Breach of Contract* (3rd edn, OUP 2004) 383; *The Law of Restitution* (3rd edn, OUP 2011) 650–51.

[25] [1993] 1 WLR 1361.

[26] *Jaggard v Sawyer* [1995] 2 All ER 189, 281.

driveway over part of the garden of their property, providing access to the dwelling house from the cul de sac. The defendants had committed trespass by using the private roadway to access the newly built plot and had also breached the covenant by constructing and using the driveway over their garden. Applying the principle laid down in *Shelfer v City of London Electric Lighting Co*,[27] the trial judge had rejected the claimant's application for an injunction but awarded damages in lieu. That decision was affirmed by the Court of Appeal. It was reasonable for the claimant to claim that he valued the defendants' *not using the unbuilt land other than as a private garden*, not least because no one would reasonably want an increase in the traffic and the costs of roadway maintenance; he had also threatened to bring proceedings for an injunction to restrain that use and had finally actualised his threat.[28] The 'hypothetical negotiations' method was used to put a value on his direct benefit.[29]

The same principle of recovery is applied in the area of user damages. In what is, perhaps, the most quoted judicial statement on negotiation damages for a wrongful use of property, Lord Shaw said:

> If A, being a liveryman, keeps his horse standing idle in the stable, and B, against his wish or without his knowledge, rides or drives it out, it is no answer to A for B to say: 'against what loss do you want to be restored? I restore the horse. There is no loss. The horse is none the worse; it is the better for the exercise.[30]

[27] [1895] 1 Ch 287, 322.

[28] Cf *Surrey County Council v Bredero Homes Ltd* [1993] 1 WLR 1361 (see below text to n 41–48 for an analysis of the case).

[29] *Wrotham Park* and *Jaggard* reflect situations in which the claimant's direct benefit is lost *permanently*. However, the same analysis shows that the use of the 'hypothetical negotiations' method is also justified to measure the claimant's loss of a direct benefit for a *limited period of time* where, in contrast with the circumstances in cases of user damages, that benefit has no market value. So, in *Experience Hendrix LLC v PPX Enterprises Inc* [2003] EWCA Civ 323, [2003] 1 All ER (Comm) 830, negotiation damages were awarded where an injunction had been awarded as well. While the injunction was meant to enforce the claimant's direct benefit with respect to future, negotiation damages provided compensation for the loss of that benefit before the trial date.

[30] *Watson, Laidlaw & Co Ltd v Pott, Cassels and Williamson* (1914) 31 RPC 104, 119.

While this passage is often used to bolster the claim that user damages are gain-based, what can be inferred from this passage is simply that it is not a defence for a wrongful user of the claimant's horse (or other property) that it is 'none the worse', and that a lack of diminution in the value of the claimant's property (or any other kind of *consequential* loss) does not prevent the law from awarding damages. The possibility of a compensatory analysis on the basis of a broad definition of a factual, direct loss is not excluded by that example.

The purpose of the claimant's property right in cases of user damages is to ensure the benefit of his *exclusive control of the possession* of his property. The latter benefit includes a bundle of benefits that are not exhausted by that of the integrity of the property against interferences that (1) would *diminish its value* or (2) restrict its *use* by the claimant. So, one reasonably values the benefit of an exclusive control of property regardless of whether one wants to use it and whether or not another's wrongful possession of it causes the diminution of its value. The claimant may have (as most reasonable people do) a variety of reasons for valuing control of his property in that way. In Lord Shaw's example, for instance, it may be that the liveryman desires to keep possession of the horse for economic reasons that are not limited to the use of the horse. Maybe he considers an attack on his exclusive control of the possession of the horse as endangering the security of his other property, maybe he has good reasons to believe that it is not to his interest that other people would think he is careless about the integrity of his property, and so on. Accordingly, when the horse is wrongfully possessed by another in the situation described by Lord Shaw, he suffers a direct loss by losing what he reasonably values for a particular period of time. The so-called 'use value' of the property precisely reflects the value of that loss. Despite the apparent connotation of the term, which signals that these damages are based on the reasonable value of the *use* of property in the market, they in fact reflect the amount which a reasonable person in the market would pay for acquiring the benefit of the exclusive *possession* of the property for a limited period of time. This may be evidenced

by the fact that a party to such hypothetical bargain would not be allowed to avoid paying the hiring price by saying that he did receive the possession of your property but did not use it. Also, it is irrelevant that the claimant may take no subjective interest in having the possession of the horse at the time of infringement of his right; after all, the market shows that that benefit is reasonably valued and that, therefore, the claimant becomes worse off by losing it, just as one becomes worse off by suffering a *permanent* loss of his property regardless of whether or not, at the time when it was, say, set to fire by another, one subjectively valued having it.[31]

What was suggested above reflects the way in which user damages are in fact viewed by the courts. In the landmark case of *Strand Electric and Engineering Co Ltd v Brisford Entertainments Ltd,*[32] negotiation damages were famously awarded for detention of the claimants' chattels, and it was regarded as immaterial whether the claimants would have used their property. The defendants had wrongful possession of the claimants' switchboards in their theatre, which constituted the tort of detinue. The trial judge had measured damages by making reference to the claimants' lost profits and subtracted a certain amount from the damages which should have been paid to the defendants had the full hiring charge of the switchboards been awarded; that was to account for the possibility that if returned to the claimants, some of the switchboards might not have been used by them, or might have been accidentally destroyed. The claimants appealed to the Court of Appeal. The Court awarded negotiation damages compensating the claimants' loss of the benefit of control of the possession of all of the switchboards, measured on the basis of 'the full hiring charge for the full period of the detention',[33] and rejected the trial judge's considerations requiring a reduction of the measure

[31] See text to n 38–40.

[32] [1952] 2 QB 246, 252.

[33] ibid 255.

of damages. A similar analysis also clarifies the decision of the Privy Council in *Inverugie Investments Ltd v Hackett*,[34] a case that was shown in Chapter Two of this thesis to be inexplicable by the existing accounts of negotiation damages. The claimant, in that case, was the lessee of 30 apartments within a hotel complex. He had wrongfully been ejected by the defendants. User damages were awarded on the basis of the going rate for the use of each of the apartments for 365 days a year, even though the apartments had not been occupied 365 days a year (actually the level of occupancy had been much less than that). The purpose of the damages in that case could not, therefore, be to reverse the value received by the defendants as a result of their wrongful use of the apartments.[35] The correct analysis is that the damages were awarded to compensate the loss of the claimant's direct benefit of control of the possession of the apartments. It was therefore immaterial whether the defendants had made use of them 365 days a year or whether they had benefited from that use, whether the hotel had been running at a loss,[36] or whether the claimant could (or would have been able to) make use of the apartments 365 days a year. He valued having the possession of each and every apartment in the hotel 365 days a year, this being reflected by the market value of such possession.[37]

II. AVAILABILITY

The suggested view of negotiation damages has multiple implications for the questions of availability and measure of damages. This section enumerates some of the most significant of those implications for the question of availability of negotiation damages.

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[34] [1995] 1 WLR 713.

[35] See Ch 2 text to n 58–62.

[36] In fact, it had been running at a loss: see *Inverugie Investments Ltd v Hackett* [1995] 1 WLR 713, 715, 717.

[37] Also see *Gondal v Dillon Newsagents Ltd* [1998] N P C 127; *Costello v Chief Constable of Derbyshire Constabulary* [2001] EWCA Civ 381, [2001] 1 WLR 1437. Cf *Ministry of Defence v Ashman* (1993) 66 P & CR 195.

A. When A Market Exists

When a market exists, reflecting the value of the *temporary* loss of exclusive control of property, user damages are always justified as a form of negotiation damages. The so-called 'use value' of property in fact reflects the value of such control and simply shows the sum a reasonable person in the position of the claimant would have been willing to receive to give up that benefit. This method being a normal way of putting a value on a direct benefit, damages assessed on this basis are also normally available, in the presence of a market, where the direct loss involves a *permanent* loss of a benefit. This, for example, includes cases of the basic measure of recovery for a breach of contract, discussed in Chapter Five of this thesis. Finally, the basic measure of recovery has, sometimes, been explained on a 'cost of cure' basis, for example in situations where an award is made under the Sale of Goods Act 1979, s 51(3) for a non-delivery, by a defendant seller, of goods wanted for resale.[38] However, such analysis does not seem to be without difficulty, not least because, in awarding the basic measure, the courts do not take account of the transaction costs for buying substitute goods in the market, nor do they normally take into account the market rise that may have occurred after the date of breach.

B. When A Market Does Not Exist

When there is no market for the direct benefit lost as a result of the breach, the situation is different with respect to the availability of negotiation damages. In these situations, if the court decides to determine the value of such a benefit using a 'hypothetical negotiations' method, it will need to *construct* a hypothetical bargain between reasonable people in the position of the claimant and the defendant. This reflects the situations where damages may be available on a

[38] A Burrows, *Remedies for Torts and Breach of Contract* (3rd edn, OUP 2004) 212.

'*Wrotham Park*' basis. These damages may or may not be available, depending on the following conditions.

1. Damages Unavailable – The (Alleged) Benefit Not Valued 'Subjectively' and Reasonably

Where there is a market for a thing to which the claimant is entitled, the claimant's well-being will be affected by losing or not receiving it, regardless of whether or not he subjectively valued that thing when his right was infringed. So, as was suggested above, I become less wealthy by losing my car, whether or not I so disliked it at the breach date that I did not care about the defendant's setting it into fire. This is not, however, the case where a thing to which I am entitled is not objectively valued. In the latter situations, in order to show that the claimant has suffered a loss, the court will need to be convinced that he has been made worse off as a result of the breach by losing a thing that was at least subjectively valued by him. Also, since a benefit is a thing that is *reasonably* valued, the court will need to be convinced that, at least, it was not unreasonable for the claimant to value that thing. This has been shown in this thesis to be reflected in the case law, most importantly in the House of Lords' decision in *Ruxley Electronics and Construction Ltd v Forsyth*,[39] where the extra depth of the pool was a benefit to the claimant because it was reasonable for him to value it, even though the extra depth was not valued in the market.[40]

This neatly explains the decision of the Court of Appeal in *Surrey County Council v Bredero Homes Ltd*,[41] a highly controversial case that has been criticised by the advocates of a gain-based, as well as a compensatory, analysis of negotiation damages. There, the claimants were owners of the freehold of two parcels of land, who decided to offer them for development

[39] [1996] AC 344.

[40] Also see eg *Farley v Skinner* [2001] UKHL 49, [2002] 2 AC 732.

[41] [1993] 1 WLR 1361.

as a housing estate. They made a written contract to transfer the site to the defendant. The defendant covenanted with the claimants, promising that it would develop the site in accordance with terms of an agreed planning permission and a specific scheme. However, they obtained a new planning permission later that permitted them to build more houses than agreed in the scheme. They had caused no consequential loss to the claimants. The claimants sought negotiation damages on a *Wrotham Park* basis, but their claim was rejected. It is submitted that damages were not available on that basis, since the claimants had suffered no direct loss of benefit either. The claimants confessed, and Dillon LJ had no reason to doubt, that

> their sole purpose in imposing the covenants at all — to commence and pursue the development to its completion in accordance with the first planning permission — was that the defendant would have to apply for and pay for a relaxation if it wanted to build anything more.[42]

The claimants had not applied for an injunction: they had waited until the development had taken place. This was evidence that they did not value the defendant's refraining from developing contrary to the first planning permission.[43] They, of course, had an interest in waiting until the development had been completed and making money from the defendant's breach of contract. But it was not a *legitimate interest*, i.e. an interest that it was a purpose of their right to ensure.[44] The covenant indeed required the defendant to build up to 72 houses, but it did not require that they would pay any sum, or share with the claimants any part of their profits if they breached their obligation. Rose LJ agreed with Dillon LJJ (and Steyn LJ). His reasoning also focused on the question of whether it was reasonable to say that the claimants in fact valued the defendant's not developing contrary to the agreed planning permission, deciding that it was not, simply because the claimants had done nothing to ensure the

[42] ibid 1364.

[43] J Beatson, et al eds, *Anson's Law of Contract* (30th edn, OUP 2016) 636.

[44] A similar analysis of the 'legitimate interest' requirement was shown in Ch 4 also to explain an important aspect of the case law in the area of an order to pay a debt.

defendant's not developing against the planning permission. They had suffered no loss of benefit. For Rose LJ, that was, accordingly, a factor that made the difference between the present case and the *Wrotham Park* case, in which it is 'wholly unlikely that he [i.e. Brightman J] would have given the same answer if in that case the plaintiffs' response to the defendants' breach of covenant had been that of the plaintiffs in the present case'.[45]

The Court's decision was therefore correct, though it was based on partly wrong reasoning by Steyn and Dillon LJJ. The claimants had clearly sought gain-based damages aiming at stripping a proportion of the defendant's profits. They had heavily relied on the *Wrotham Park* case, believing that the damages awarded in that case were gain-based. Steyn and Dillon LJJ, by accepting the claimants' conception of the damages in the latter case,[46] succumbed to an awkward attempt to justify the conclusion that gain-based damages sought by the claimants could not be awarded, even though they had been awarded in the *Wrotham Park* case. This was unnecessary, since damages in the latter case, even though measured by reference to a proportion of the defendant's anticipated profits, had not *aimed at* profit-stripping.[47]

Finally, the Court's decision demonstrates one more example of a situation in which a 'substitutive' conception of the compensatory analysis does not explain the attitude of the law. *First*, as it has been said before, damages cannot be a substitute for the claimant's right in these situations, since the right had not been lost at the time of breach; the claimants in *Bredero* would have well been able to apply for an injunction then. *Second*, this case shows that damages cannot be substitutive for the *value* of the claimants' right. They were denied in circumstances

[45] *Bredero Surrey County Council v Bredero Homes Ltd* [1993] 1 WLR 1361, 1371.

[46] ibid 1369 (Steyn LJ), 1364 (Dillon LJ).

[47] See Ch 2 text to n 33–41.

where the right had a value; it could have been used by the claimants as a ground for negotiating with the other party over the release of it for an amount of money (of whatever scale).

Marathon Asset Management LLP v Seddon is another case where negotiation damages were denied because there was no loss of a benefit.[48] There, the defendants were employed by the claimant. The third defendant copied the claimant's confidential information. The first defendant assisted him in copying further documents belonging to the claimant. The third defendant retained the information for a limited period before he delivered it up to the claimant. The defendants were found liable for breach of contract,[49] and breach of a general duty of confidence imposed by law.[50] They then left the claimant's employ, in the hope of establishing their own competing business. The breaches did not cause any financial loss to the claimant. Yet the claimant sued for damages.

There is no doubt that substantial damages can be awarded for the wrongful use of confidential information, regardless of whether or not the claimant suffered consequential loss.[51] In *Marathon*, however, the claimant did not seek damages for the defendants' *use* of information, as no substantial use had been made. Relying on 'user damages' by analogy, the claimant argued that the defendants were liable to pay substantial damages merely for the wrongful copying and possession of the confidential information. The claimant argued that, in the absence of a market, the damages should be assessed by constructing hypothetical negotiations.

[48] [2017] EWHC 300 (Comm), [2017] ICR 791.

[49] See *Merryweather v Moore [1892] 2 Ch 518*, 524; *Robb v Green [1895] 2 QB 315*, 317, 318–319, 320.

[50] *Attorney General v Guardian Newspapers Ltd (No 2) [1990] 1 AC 109*, 281; *Campbell v MGN Ltd [2004] UKHL 22, [2004] 2 AC 457*, [14], [47] – [48], [87], [134]; *Vestergaard Frandsen A/S v Bestnet Europe Ltd* [2013] UKSC 31, [2013] 1 WLR 1556, [23].

[51] *Seager v Copydex Ltd (No 2)* [1969] 1 WLR 809; *Universal Thermosensors Ltd v Hibben* [1992] 1 WLR 840, 856; *Vercoe v Rutland Fund Management Ltd* [2010] EWHC 424, [2010] Bus LR D141.

Leggatt J, contradicting the earlier decision of the Court of Appeal in *One Step*,[52] held that negotiation damages are gain-based.[53] He favoured Burrows' analysis,[54] rejected the claim, and awarded nominal damages. However, whether or not the latter analysis fits the result in *Marathon*, this thesis has shown that Burrows is unable to explain many other negotiation damages cases.

The 'loss of benefit' analysis can explain the result in *Marathon* on the basis that the claimant lost no substantial benefit. In cases of wrongful possession of property, the claimant suffers a loss of the benefit of exclusive control, regardless of whether or not the defendant uses the property.[55] But wrongful possession of information is different.[56] In commercial contexts, the claimant often values exclusive control of confidential information simply because he does not want others to use it, as it may (for example) enable the user to target the claimant's clients. Accordingly, exclusive control of information may be of no substantial value to the claimant, provided that the claimant still retains exclusive use of the information. As such, if the defendant deprives the claimant of exclusive control of information, but does not use the information, the claimant has lost no benefit. This was the case in *Marathon*, in which the 'hypothetical negotiations' method demonstrated that exclusive control without use of the information had only a token value.[57]

[52] [2016] EWCA Civ 180, [2017] QB 1, [81].

[53] [2017] EWHC 300 (Comm), [2017] ICR 791, [199].

[54] ibid [242].

[55] Above text to n 30–37.

[56] Cf *Stoke-on-Trent City Council v W & Wass Ltd* [1988] 1 WLR 1406 (Nourse LJ), 1414.

[57] [2017] EWHC 300 (Comm), [2017] ICR 791, [255].

2. Damages Available

(a) Lack of consequential loss no precondition– the need for a more liberal approach

A question of whether a lack of identifiable, financial loss is a precondition of the availability of negotiation damages has been considered afresh by the Court of Appeal in *One Step (Support) Ltd v Morris-Garner*.[58]In that case, the claimants were in the business of providing supported living services for vulnerable individuals. The defendants were found by the trial judge to be in breach of restrictive covenants requiring them not to compete with the claimants and not to solicit their clients. The judge also found that, in contrast with many previous cases of negotiation damages, it was *possible* for the claimants in the present case to show financial loss. The loss was, however, very *difficult* to prove, not least due to the level of secrecy in the defendants' business and the inherent difficulty with measuring any loss of goodwill.[59] The judge had, accordingly, given the claimants a choice between negotiation damages and proving their consequential loss. In the Court of Appeal, the defendants argued, among other things, that the courts are not justified in awarding negotiation damages simply because they find it a just award; rather, these damages are available only when (a) there is a *lack* of identifiable, financial loss, and (b) denying these damages would amount to *manifest* injustice. The Court of Appeal upheld the trial judge's decision, awarding negotiation damages on a '*Wrotham Park*' basis, on the ground that it is not a lack of (or impossibility to prove) such loss that is a precondition of the award, but that difficulty in proving loss suffices, and that this was not inconsistent with previous authority.[60] It was also held that 'manifest injustice' is not a

[58] [2016] EWCA Civ 180, [2017] QB 1, [129].

[59] ibid [122] (Christopher Clarke LJ).

[60] Such as *Attorney General v Blake* [2001] 1 AC 268; *Experience Hendrix LLC v PPX Enterprises Inc* [2003] EWCA Civ 323, [2003] 1 All ER (Comm) 830; *WWF World Wide Fund for Nature v World Wrestling Federation Entertainment Inc* [2007] EWCA Civ 286, [2008] 1 WLR 445; *Abbar v Saudi Economic & Development Co (SEDCO) Real Estate Ltd* [2013] EWHC 1414 (Ch), [224] – [226].

precondition of the award either; where the loss is difficult to prove, negotiation damages are just and recoverable. The claimants elected negotiation damages.

The Court's decision, therefore, demonstrates a liberal approach to the availability of negotiation damages when it allows awarding these damages not only in cases of a lack of identifiable, consequential loss, but also where such loss is simply difficult to assess. However, based on the analysis of negotiation damages put forward in this thesis, there is no justification for the courts to stop there. What if the claimant has suffered consequential loss of, say, only £5, which can perfectly be identified and easily be proved? Should damages be limited to £5? When it is accepted that negotiation damages compensate the claimant for his factual, direct loss, it is not clear why, in a case where such loss exists, he should not be able to choose damages for such loss, regardless of the measure of his consequential losses. Saying otherwise would be as unreasonable as suggesting that where one's property is lost, one is limited to the consequential loss of profits from, say, hiring out the property where one has also suffered a direct loss, based on the market value of the property. While the Court in *One Step* emphasised that difficulty of proving consequential loss is a precondition of negotiation damages, the basis for a more liberal approach is provided by the same case. So, fully appreciating that the decision may provide for a more liberal approach, Longmore LJ rejected the defendants' objection that such approach would be inappropriate since negotiation damages, assessed on a *Wrotham Park* basis, may overcompensate the claimant. Rather he stated that where the need exists to use the 'hypothetical negotiations' method, it is the business of the trial judge to ensure that the hypothetical negotiations are constructed in a reasonable way, so to avoid overcompensation.[61] In addition, negotiation damages were awarded in circumstances in which the defendants objected (a claim with which the court did not disagree) that the award would 'introduce a new

[61] *One Step (Support) Ltd v Morris-Garner* [2016] EWCA Civ 180, [2017] QB 1, [148].

element into the relations between covenantor and covenantee in several contexts', thereby opening the gate for claiming negotiation damages in several other contexts, such as employment, and the sale of a business. Such a liberal approach would also affect the extent of the availability of an injunction by making damages an adequate remedy in a greater number of cases. The court did not consider any such objections as justifying the denial of negotiation damages. It is submitted that the courts will be justified (depending on policy considerations) to follow the same logic, awarding negotiation damages where (a) the claimant has suffered a direct loss, (b) there is no market for the benefit lost, and (c) it is reasonable to attempt to attribute a value to the benefit in issue by using a 'hypothetical negotiations' method.[62] Christopher Clarke LJ accepted such an approach in clear terms when he rejected the concern that the Court's decision 'would make the exception the rule',[63] asserting that the test is nothing but 'what does justice require'.[64]

(b) Seeking or possibility of an injunction irrelevant- the 'solitary beacon'

One misconception about negotiation damages would be that damages are to be available on a '*Wrotham Park*' basis only where an injunction is sought or is possible. However, clear authority supports the view that this is not the law. Most recently, in *One Step*, it was held that negotiation damages are available even where no injunction is sought or possible.[65]

[62] One typical example of where the use of the method would not be sensible is the cases of bodily injury. Another example would be the situation in the *Blake* case, in which it would not be sensible to assume, in order to put a value on the Crown's interest in the defendant's negative act, that the Crown would have been willing to negotiate with the defendant: no reasonable government would negotiate with a 'notorious' spy, thus consenting to the use of information that he obtained during his service in the intelligent services.

[63] *One Step (Support) Ltd v Morris-Garner* [2016] EWCA Civ 180, [2017] QB 1, [125].

[64] ibid [126].

[65] *One Step (Support) Ltd v Morris-Garner* [2016] EWCA Civ 180, [2017] QB 1, [133] (Christopher Clarke LJ). Also see *WWF World Wide Fund for Nature v World Wrestling Federation Entertainment Inc* [2007] EWCA Civ 286, [2008] 1 WLR 445, [54] (Chadwick LJ, agreed by the other members of the judicial board); *Pell Frischmann Engineering Ltd v Bow Valley Iran Ltd* [2009] UKPC 45, [2010] BLR 73, [48] (Lord Walker, giving the judgment

This attitude of the law is justified for the following reasons. *First*, Lord Cairns' Act, when enacted, had two major purposes. On the one hand, it came into effect to enable the courts of equity to award an injunction *and* damages for a wrong already committed before the trial, so to enable the claimant to bring both claims at the same time and in the same court. This function of the Act has become irrelevant as a result of the Judicature Acts in the nineteenth Century. However, one the other hand, Lord Cairns' Act made it possible for the courts of equity to award damages in lieu of an injunction for a wrong that has not been committed yet. This is to say that where the Act allows that, it is *a fortiori* justified for the courts to award negotiation damages in situations in which the wrong has been committed, even though an injunction has not been sought or is impossible. *Second*, the aforementioned misconception stems from the fact that when these damages were, for the first time, awarded in the *Wrotham Park* case, they were awarded in lieu of an injunction under the jurisdiction of Act. However, the importance of Brightman J's decision in the latter case is that while damages in lieu of an injunction used to be awarded for the claimant's *consequential* losses, he, for the first time, used the 'hypothetical negotiations' method to enable awarding damages for a *direct* loss in the absence of a market for claimant's direct benefit. The case was a 'solitary beacon'[66] for that reason. In that light, it is not clear why the method should not be used when similar circumstances arise but an injunction has not been sought or is not possible.

(c) Cause of action irrelevant

Where a loss of a direct benefit is suffered as a result of the infringement of the claimant's right, damages are justified to serve the purpose of his right. This analysis is indifferent to where the

of Privy Council); *Giedo van der Garde BV v Force India Formula One Team Ltd* [2010] EWHC 2373 (QB), [501].

[66] *Attorney General v Blake* [2001] 1 AC 268, 283 (Lord Nicholls).

right came from. That the cause of action is irrelevant, is reflected by the development of the case law after the *Wrotham Park* case.[67] While the latter case involved a breach of a restrictive covenant that could not be described as a breach of contract without an equitable exception to the principle of privity of contract, and the claimant's loss in most cases in which negotiation damages are awarded result from a tortious breach, this did not prevent the Court of Appeal to awarded these damages in *Experience Hendrix LLC v PPX Enterprises Inc* for an ordinary breach of a negative contractual obligation.[68] One further development occurred in *Giedo van der Garde BV v Force India Formula One Team Ltd*, in which negotiation damages on a '*Wrotham Park*' basis were an alternative ground on which a very substantial amount was awarded for the breach of a *positive* contractual obligation.[69] Examples of the award of these damages for other types of breach are also abundant.[70]

(d) Blake guidelines irrelevant

One significant misconception resulting from a conflation of the purposes of negotiation damages and an account of profits would be to think that the *Blake* guidelines, with respect to the conditions under which an account of profits may be available, also apply to the question of availability of negotiation damages. So, in *Experience Hendrix*,[71] Peter Gibson LJ, while rejecting a claim for an account of profits because the facts of the case were not exceptional, justified an award of negotiation damages by reference to the cases' satisfaction of the

[67] See *Devenish Nutrition Ltd v Sanofi-Aventis SA (France)* [2008] EWCA Civ 1086, [2009] Ch 390, [4] (Arden LJ).

[68] [2003] EWCA Civ 323, [2003] 1 All ER (comm) 830.

[69] [2010] EWHC 2373 (QB). However, unfortunately, a gain-based view of negotiation damages was briefly preferred by Stadlen J. This was despite the fact that he had already said that the same measure is justified as compensation for the claimant's loss of '*benefits in fact* in the form of the enjoyment of the *fruits of performance*' (ibid [474]; emphasis added).

[70] See Ch 1.

[71] [2003] EWCA Civ 323, [2003] 1 All ER (comm) 830; see Ch 1 text to n 8–9 for the facts.

guidelines introduced in *Blake*.[72] Firstly, he found that there had been a deliberate breach by the defendants. However, while most breaches in contract are deliberate, it is not appropriate to limit the award of negotiation damages to cases of a deliberate breach, simply because these damages are compensatory; one cannot avoid paying damages for a loss that he has caused just because his act had not been deliberate. This requirement makes sense, though, as a qualifying factor with relation to the award of an account of profits, because the purpose of the latter is, at least partly, to deter future wrongdoing: one cannot be deterred when he does not know he is committing a wrong. Secondly, the judge thought the award of damages appropriate because the claimant had a *legitimate interest* in preventing the defendant's *profit-making*.[73] However, negotiation damages do not aim at profit-stripping, as one can readily think of situations where the defendant's profits are not taken into account by the court,[74] or damages are not based on his actual profits at all.[75] When the question of a legitimate interest is considered in cases of negotiation damages, as in *Bredero Homes* (discussed above[76]), it is where the award of an injunction is in issue; there, the question is whether the claimant has an interest in seeking an order to protect, by way of an injunction or damages, the very thing that he has been promised. That he has such interest, is an alternative way of saying that that *thing* (often a negative act of the defendant) is a direct benefit to him. Where such benefit has been lost as a result of the breach, it is always legitimate for the claimant to seek its protection by way of damages, since it is always a purpose of one's right to ensure a direct benefit.

[72] ibid [58].

[73] Not least because an injunction was available in the case.

[74] See eg *Severn Trent Water Ltd v Barnes* [2004] EWCA Civ 570, [2004] 26 EG 194; also most cases of wrongful use of property, in which damages are based on the market, use-value of the property.

[75] *Pell Frischmann Engineering Ltd v Bow Valley Iran Ltd* [2009] UKPC 45, [2010] BLR 73.

[76] Text to n 41–48.

This is all to say that the award of negotiation damages is justified when a direct benefit has been lost, regardless of the *Blake* guidelines. This was acknowledged by Mance LJ, who gave the other judgment of the Court in *Experience Hendrix*,[77] and more recently by Christopher Clarke LJ, who gave the leading judgment of the Court in *One Step*.[78]

III. MEASURE

The proposed conception of negotiation damages also determines the basics of how they are to be measured. As these damages are there to provide compensation for the claimant's loss, the fundamental principle when using a 'hypothetical negotiations' method is simply to put a reasonable value on the benefit lost as a result of infringement. So, where the result of such hypothetical negotiations is best reflected by the market value of the lost benefit, this determines the question of the measure of damages in typical cases of user damages, as was discussed above. Where, however, a market does not exist, a '*Wrotham Park*' measure of the damages is used to put a reasonable value of the benefit lost. The purpose of the court, in these situations, is nothing but to make the most reasonable construction of situations in which the claimant would be willing to receive a sum of money in order to give up the benefit in issue. *Amec Developments Limited v Jury's Hotel Management (UK) Limited*[79] presents a succinct explanation of the guidelines that are to be used, when constructing the negotiations, in order to reach the most reasonable value attributable to the lost benefit. Mann QC explains that in such negotiations, the courts imagine the parties as each 'making reasonable use of their

[77] *Experience Hendrix LLC v PPX Enterprises Inc* [2003] EWCA Civ 323, [2003] 1 All ER (Comm) 830, [24]. Hooper J agreed with both of Perter Gibson and Mance LJJ.

[78] *One Step (Support) Ltd v Morris-Garner* [2016] EWCA Civ 180, [2017] QB 1, [126]. Cf ibid [147] (Longmore LJ); *WWF World Wide Fund for Nature v World Wrestling Federation Entertainment Inc* [2007] EWCA Civ 286, [2008] 1 WLR 445, [59] (Chadwick LJ).

[79] [2002] TCLR 13.

respective bargaining positions without holding out for unreasonable amounts',[80] *assuming* that the claimants were willing to release the benefit *at a proper price* and not for a large ransom, that the defendants were similarly willing to make the bargain, and that 'the parties would proceed on common ground, put forward their best points, and take into account the other side's best points'.[81] Important implications derive from this conception of the purpose of constructing the hypothetical negotiations, as follows.

1. The Instrumental Nature of Taking Profits into Account

The compensatory nature of negotiation damages has significant implications for the questions of when the defendant's profits are to be taken into account and (when they are), to what extent they should be counted.

(a) The 'sensible and practical' test

The purpose of construction being to put a value on the lost benefit, the courts are not bound to measure negotiation damages by reference to the defendant's profits. They may only be taken into account when this would be sensible and practical. This can be best illuminated by the decision of the Court of Appeal in *Severn Trent Water Ltd v Barnes*.[82] There, the trial judge had awarded £2,170 in response to the defendants' trespass on the claimant's land by laying a water main under it. The trespass had caused no damage to the land. Of the £2170, £500 had been awarded on a *Wrotham Park* basis, £1,560 measured separately on the basis of the defendants' profit-making, and £110 as additional compensatory damages that were not in dispute. The Court of Appeal held that the damages had been assessed on a wrong basis. The

[80] ibid [12].

[81] ibid [35]

[82] [2004] EWCA Civ 570, [2004] 26 EG 194.

claimant had no right, independent of an entitlement to damages on a 'hypothetical negotiations' basis, to a proportion of the defendants' profit-making just because the defendants had made profits by wrongful use of his property. More importantly for present purposes, it was also held that negotiation damages could not be measured by reference to the defendants' anticipated profits where 'there was no practical or sensible way of assessing the profits accruing to the Severn Trent company [the defendants] from its use of no more than 20 metres of a water main which ran for 28 kilometres'.[83] Potter LJ, with whom the other members of the judicial board agreed, approved the £500 measure of damages reflecting the sum that the claimant would have received from the defendants as 'the likely reasonable outcome of any negotiations which would have taken place'.[84]

(b) What proportion of profits?

It follows that determining what proportion of the actual or anticipated profits should be taken into account depends solely on the reasonable construction of the hypothetical negotiations. So it is, in essence, wrong to consider whether a given proportion adequately deters future wrongdoing, whether it will be an adequate punishment for the defendant's act, or whether it prevents a windfall to the defendant.

2. Date of Negotiations– Past and Post-Negotiation Events

The traditional answer to the question of the assessment date of the basic measure of damages is that they are to be assessed at the date of breach.[85] However, the law's developments in past decades shows that the courts are not bound to adhere to the so-called 'breach date' rule under

[83] ibid [42].

[84] ibid [35].

[85] See eg *Dodd Properties (Kent) v Canterbury City Council* [1980] AC 174.

all circumstances. While the law's departure from the general rule may be seen as anomalous, it is suggested that such a criticism would stem from a failure to see the principle underpinning the 'breach date' rule itself. The foundational principle is that a loss is to be assessed at the time when it occurs. So it is unequivocally correct that the courts are not bound to assess the claimant's consequential losses at the breach date; they are assessed at the date of trial. This is simply because these losses do not often occur at the date of breach. The same foundational principle applies in assessing direct losses when they are normally measured at the time of breach of the claimant's right. So, for example, in a typical case of breach of contract where the claimant suffers a direct loss which is purely contractual,[86] he suffers the loss when he is supposed to receive the direct benefit in issue but does not receive it, this being the breach date; where, for instance, the terms of a sale contract that I have with you requires that you deliver a car on 30 December 2018, my receipt of the car is a benefit which is lost on that date in the case of non-delivery. In rare circumstances, however, the same foundational principle may justify a different assessment date. This was, for instance, the case in the House of Lords' decision in *Golden Strait Corporation v Nippon Yusen Kubishika Kaisha (The Golden Victory)*.[87] The claimant shipowners had concluded a time charter with the defendants that was to last for several years, but gave the defendants an option to terminate the contract in the case of outbreak of a war in Iraq. A war in fact happened before the expiry of the charter. The defendants, however, had repudiated the contract before the outbreak of the war. The claimants had accepted the repudiation and claimed damages. The House held that, in assessing the claimants' loss, it was not bound to ignore the fact that the defendants would have been able to terminate the contract once the war broke out. Expectation damages were, therefore, awarded

[86] See Ch 5 text to n 7–9 for the definition of a purely contractual loss in this thesis.

[87] [2007] UKHL 12, [2007] 2 AC 353; acknowledged in *Hooper v Oates* [2013] EWCA Civ 91, [2014] Ch 287 and *Bunge SA v Nidera BV* [2015] UKSC 43, [2015] 3 All ER 1082. See also *Johnson v Agnew* [1980] AC 367.

based on the benefit that the claimants were to obtain from the charter up until the outbreak of war rather than the agreed expiry date of the charter. This is to say that, in assessing the claimants' direct loss, the House considered an event that had happened after the breach date. It is suggested that this was simply because, in contrast with one-off transactions, the claimants would have received the promised benefits gradually and when they would have become due under the contract.[88] No loss would have occurred after the outbreak of the war. Thus, though the 'breach date' rule reflects the rule of assessment in normal situations, it can be ignored if necessary according to the foundational principle of (if you like) the 'loss date'.

The assessment date is also a critical question in measuring negotiation damages, not least because in determining what points the parties would have emphasised and what events the court should consider as irrelevant, one important question is whether the court is allowed to take into account events which actually happened after the date of breach. The above analysis of the assessment date shows that negotiation damages, as a species of damages for a direct loss, are also normally to be assessed at the date of breach; the courts are, therefore, required normally to imagine the hypothetical negotiations at that time, ignoring any post-breach events.

Inconsistent with this view is Mann QC's opinion in the *Amec* case.[89] There, Mann QC held that the 'hypothetical negotiations' method is not to be 'pursued rigorously to its logical end',[90] and that he does 'not have to imagine a negotiation in which the parties have to guess

[88] For the alternative view that the 'breach date' rule is simply an application of the rule of mitigation, see A Dyson and A Kramer, 'There Is No "Breach Date Rule": Mitigation, Difference in Value and Date of Assessment' (2014) 130 *LQR* 259. Cf R Stevens, 'Damages and the Right to Performance' in *Exploring Contract Law (*J Neyers, et al eds, Hart Publishing 2009) 195–97, for a view that *The Golden Victory* was correctly decided but the reasoning of majority was unsatisfactory when they emphasised that damages in contract are awarded for factual loss suffered by the claimant.

[89] *Amec Developments Ltd v Jury's Hotel Management (UK) Ltd* [2002] TCLR 13.

[90] ibid [13].

at something which events have in fact made certain'.[91] He suggested that this is the approach adopted by Brightman J in the *Wrotham Park* case when, in imagining a negotiation, he considered the *actual* profits received by the defendants consequent on their wrongdoing. However, it is suggested that in the latter case, Brightman J only took the actual profits into account simply as the best available clue about what, *at the breach date*, reasonable persons in the position of the claimants would have received in order to give up their benefit. In other words, the actual benefits were taken into account by Brightman J precisely because he thought this would be the most reasonable way of following the 'hypothetical negotiations' method rigorously to its logical end.

In any event, the 'breach date' rule has been confirmed later in *Lane v O'Brien Homes Ltd*[92] and by the Court of Appeal in *Lunn Poly Ltd v Liverpool and Lancashire Properties Ltd*.[93] In *Lane*, the defendants had purchased a land from the claimant and built four new houses on it in breach of a collateral contract between the parties that prohibited construction of more than three new houses. The negotiation damages awarded by the trial judge had been based on the assumption that the time of negotiations should be considered as the time of formation of the contract from which the defendants' negative obligation derived. David Clarke J, rejecting the judge's decision, said that the correct date to be assumed as the starting point of negotiations is the breach date.[94] Later in the same judgment, he made a statement which one might see as reflecting his hesitation as to the 'breach date' rule. He said:

> The court has to consider hypothetical negotiations conducted in a particular factual situation: namely, the desire of the purchaser to be rid of a contractual obstacle and the desire of the seller to exact

[91] ibid.

[92] [2004] EWHC 303 (QB).

[93] [2006] EWCA Civ 430, [2006] 2 EGLR 29.

[94] *Lane v O'Brien Homes Ltd* [2004] EWHC 303, [24].

> the best price. The existence of that obstacle is the starting point from which the negotiations begin.[95]

However, this is not to say that the correct assumption as to the starting time of the negotiations should be the contracting time because that is the time when the 'contractual obstacle',[96] namely the defendant's contractual obligation, comes into existence. Rather, David Clarke J's statement should be seen in the light of the context in which he made it. Counsel for the defendants has argued that an important element in the negotiations would have been uncertainty as to whether the prohibition of building more than three houses was a contractual term at all, and that the trial judge should have discounted heavily for the uncertainty as to the existence of such an obstacle against the defendants' wish to build. It was to reject this contention that David Clarke J said that 'the existence of that obstacle is the starting point from which the negotiations begin'.[97] By this, he was not referring to the appropriate *time* of the hypothetical negotiations, but simply to the point that the existence of such an obstacle is a prerequisite condition for imagining any negotiations at all. He made this clear by continuing that 'in my judgment, the hypothetical negotiations must be considered on the basis that there was indeed a contractual prohibition in place, rather than merely the risk of one'.[98] In *Lunn Poly*, Neuberger LJ declared that in assessing negotiation damages, 'principle and consistency indicate that post-valuation events are normally irrelevant'.[99] Despite that, he continues, for assessing damages awarded in lieu of an injunction under Lord Cairns' Act, 'the judge may, where there are good reasons, direct a departure from the norm either by selecting a different

[95] ibid [26].

[96] ibid.

[97] ibid.

[98] ibid.

[99] *Lunn Poly Ltd v Liverpool and Lancashire Properties Ltd* [2006] EWCA Civ 430, [2006] 2 EGLR 29, [29].

valuation date or by directing that a specific post-valuation date event be taken into account.'[100] This flexibility on the judge's part is acceptable, he states, deriving from 'the quasi-equitable nature of such damages'.[101] However, two points need to be made regarding Neuberger LJ's suggested departure from the rule. *First*, the term 'quasi-equitable' is a vague, if not wrong, term that fails to explain the true nature of damages under Lord Cairns' Act. *Second,* as was explained above, history shows that the Act provided a ground for awarding a monetary response in lieu of an injunction, which has been used to award two different forms of compensatory damages. Neuberger LJ's opinion is correct when seen as explaining the assessment date of damages in lieu of an injunction for the claimant's consequential losses. When assessed on a *Wrotham Park* basis, though, these damages are negotiation damages providing compensation for a direct loss, and therefore follow the 'breach date' rule.

Finally, it was suggested above[102] that in cases of user damages, the courts award damages based on the value of the claimant's lost benefit of exclusive control of his property for a *limited period*. Similarly, where, following the breach of his right, the claimant is deprived of a subjective direct benefit for a limited period, the courts rightly award negotiation damages asking what sum of money the claimant would have accepted to give up the benefit for that limited period.[103] This may be viewed as a departure from the 'breach date' rule, since, at the date of breach, the parties (or reasonable people in their positions) often have no knowledge of future events, including whether the breach will be permanent or temporary. This is not correct, though. The 'breach date' rule concerns the *measure* of a loss, whereas the courts consider the extent and duration of breach to *identify* the loss. These are separate issues. When the subject

[100] ibid.

[101] ibid.

[102] Above text to n 30–37.

[103] See *Experience Hendrix LLC v PPX Enterprises Inc* [2003] EWCA Civ 323, [2003] 1 All ER (Comm) 830.

matter of hypothetical negotiations is correctly identified as a loss of a benefit for a limited period, then the next question is what elements should or should not be considered in putting a value on the lost benefit. It is only then that the 'breach date' rule comes to play, requiring that post-breach events should not be considered. This was acknowledged by the Court of Appeal in *Eaton Mansions (Westminster) Ltd v Stinger Compania de Inversion SA*.[104] The claimants were the underlessors of a block of flats. The defendants rented two flats in the building. They installed air-conditioning units on the roof of the block for a number of years. By doing so, they committed the tort of trespass. Among other things, the claimants sought damages based on hypothetical negotiations for the permanent release of their right. The Court of Appeal held that they were only entitled to damages for the breach of their right for the limited number of years during which their right was actually breached. The defendants argued that the limited duration of the breach is a post-valuation event. However, Patten LJ (giving the Court's judgment) rejected this argument, explaining that the 'issue in this case is not whether a post-valuation event should be taken into account… It is the much more fundamental question of what is to be taken to be the subject matter of those negotiations'.[105]

[104] [2013] EWCA Civ 1308, [2014] CP Rep 12.
[105] ibid [20].

CONCLUSION

Over a century ago, a member of the House of Lords put a problem forward, for which he had a straightforward solution. However, perhaps he did not realise that the explanation of why that obvious solution is correct would become one of the most puzzling problems in the English law of obligations, giving rise to serious divergences over what is the purpose of damages at all. His Lordship formulated the problem and his answer as follows:

> If A, being a liveryman, keeps his horse standing idle in the stable, and B, against his wish or without his knowledge, rides or drives it out, it is no answer to A for B to say: against what loss do you want to be restored? I restore the horse. There is no loss. The horse is none the worse; it is the better for the exercise.[1]

The purpose of damages is traditionally believed to be to compensate the claimant for his loss. Why would one be entitled to damages simply by showing that his property has been wrongfully possessed? An even more puzzling question began to arise several decades later, under the influence of the acclaimed decision of Brightman J in the *Wrotham Park* case. The question is: on what basis can one explain the award of substantial damages in a case where the claimant's right, deriving from a restrictive covenant, has been breached without the value of his land having been diminished even by one farthing and without his being able to show other forms of financial loss? Examples of a similar nature are abundant in various contexts, encouraging curious jurists and academics to continue wondering: is it possible to discover one single principle underpinning the award of damages in all of these cases? My thesis has been an attempt to answer that question.

I started with the hypothesis that negotiation damages on a *Wrotham Park* basis are of the same nature as user damages. It was demonstrated that all of the major, existing analyses

[1] *Watson, Laidlaw & Co Ltd v Pott, Cassels and Williamson* (1914) 31 RPC 104, 119 (Lord Shaw).

of these damages, whether restitutionary or compensatory, suffer from several difficulties. Then I put forward a thesis that aims at offering an analysis based on the notion of a *factual* loss, a notion that, as I have defined it, is broader than the orthodox conception of a loss, but is not 'strained and artificial'.[2] The analysis was set out by offering a brief outline of a theory of compensation that was described as the 'loss of benefit' theory. Assistance was sought and obtained from the jurisprudential literature on the nature of rights. The main tenet of the benefit/interest theory of rights is that one's having a right simply means that one's well-being is to be enhanced/protected by means of ensuring certain beneficial interests. Based on this simple tenet, *two* key notions can be defined and employed to explain a vast expanse of the law's response to the infringement of rights. *First*, a definition of a factual *loss* can be offered: one's well-being is affected when he loses or does not receive a *benefit* to which he is entitled, a benefit defined as *anything* that one reasonably values. *Second*, the identification of a loss on that basis is not the end of the story; once a loss is identified, the next question is whether its recovery is normatively justified. The benefit/interest theory (at least from Raz's point of view) tells us that a right's imperative call to ensure certain benefits of the right-holder also justifies a remedy, in a case of infringement, serving the purpose of the right by placing the claimant right-holder in the same position of well-being as if his right had not been infringed. This is to say that if the loss relates to a benefit whose protection/furtherance was the purpose of the claimant's right, a remedy serving that purpose is normatively justified. These two concepts, together, constitute the 'loss of benefit' theory.

The remainder of my thesis has simply been an examination of this remedial theory in the context of the existing case law. In order to employ the theory to explain negotiation

[2] *Attorney General v Blake* [2001] 1 AC 268, 279 (Lord Nicholls).

damages on a firm basis, I ventured into an examination of the truth of the theory in one major area of the law, i.e. the law of contract remedies. I reached the following conclusions.

Friedmann's acclaimed 'performance interest' thesis, while keeping the law on the right track by placing emphasis on the importance of performance, would explain much more when revised in the light of a right's normative implication for the available remedy. Contract remedies do not protect every valuable performance. Rather, they aim at ensuring the claimant's well-being by way of ensuring those benefits, expected to be received as a result of performance, that it is the *purpose* of the claimant's right to ensure. Specific performance protects the claimant's well-being by means of ensuring the exact same benefit promised. This was shown to have an analytical advantage over Friedmann's view of specific performance. An order to pay an agreed sum has the same function. If the defendant repudiates the contract before the claimant has substantially performed his obligations, the claimant has an option to affirm the contract, perform, and claim the agreed sum. However, the claimant cannot keep the contract open and claim the agreed sum if damages can put him in the same state of well-being as that which is to be ensured by the purpose of his contractual right. This is difficult to explain based on Friedmann's approach. The same consequentialist theory of remedies also works in explaining expectation damages. With respect to the basic measure of recovery, it clarifies that damages are always to be available for a direct loss of benefit because it is always a purpose of the claimant's right to ensure a direct benefit. Most controversies in this area, therefore, revolve around whether, in a given case, a loss has been suffered at all. It was demonstrated that in the cases in which the basic measure has been awarded without any consequential loss having been suffered, the award compensates the claimant for his direct loss, when a loss is conceived as the loss or non-receipt of a reasonably valuable thing to which the claimant is entitled. On that basis, cases such as *Ruxley* and *White Arrow* were explained, *Panatown* was criticised, and the law's attitude in the area of sub-sale contracts was justified. Stevens' and

Coote's versions of the 'performance interest' thesis were shown to encounter difficulties in explaining the awards in many such cases. Moreover, while Friedmann's thesis refrains from explaining damages for consequential losses, leaving the question of remoteness of damages to policy considerations, the 'loss of benefit' theory offers a principled basis governing the award of such damages. The law's attitude in the area of damages for consequential mental distress is, so to speak, a manifestation of the 'loss of benefit' theory of compensation, by making damages available only in circumstances where it is the purpose of the claimant's contractual right to provide pleasure. The doctrine of remoteness is, also, best seen in that light. While the courts have tended to explain the award of not-too-remote damages based on Lord Hoffmann's 'assumption of responsibility' analysis, this analysis suffers from serious difficulties. It is suggested that his Lordship's judgment in *SAAMCO* is to be used at the heart of a correct analysis of the doctrine of remoteness, as it puts emphasis on the purpose of the claimant's right without unnecessarily connecting the question of remoteness to that of the assumption of responsibility.

Negotiation damages are best understood in the light shed by this conception of compensatory damages. They are damages for the claimant's direct loss. The difficulty of identifying such loss by the courts and the academics stems from a failure to use a notion of the claimant's becoming worse off that is broad *and* factual at the same time. One reasonably values the exclusive possession of one's property, regardless of whether a wrongdoer's possession of it amounts to a diminution of value or a loss of one's use of it. One may reasonably value another's developing his neighbouring land in conformity with a specific restrictive covenant, regardless of whether the wrongful development diminishes the value of his own land by one farthing (or more or less). In both occasions, what is reasonably valued by the claimant is a direct benefit to him. It is by no means clear why he would not become worse off by losing what he values. This is something that cannot be explained either by the orthodox

understandings of a loss or by gain-based theses. Nor can it be expounded by a right-based thesis which fails to make an analytical distinction between the notions of a right (as a normative concept) and a benefit (as a factual one), thus facing the correct objection that damages cannot be *substitutive* for a right that is not lost in many cases of negotiating damages but is simply infringed. The 'loss of benefit' theory avoids this objection easily by highlighting the said distinction. The Court of Appeal's denial of negotiation damages in *Bredero Homes*, the irrelevance of the cause of action and the possibility of an injunction, and the doctrine of the 'breach date' rule, are all but implications of a 'loss of benefit' understanding of negotiation damages.

Finally, the same view of negotiation damages offers two significant suggestions for the future evolution of the law. *First* — as it can be seen from Brightman J's judgment in *Wrotham Park* and has expressly been declared by several courts — the courts' consideration (in many but not all cases) of a proportion of the defendant's profits is simply to enable a reasonable construction of imaginary negotiations between the parties. The purpose of this is simply to put a value on the claimant's direct benefit; the courts' occasional use of the *Blake* guidelines in determining the availability of negotiation damages should, therefore, not be followed in the future. *Second*, a more liberal approach to the availability of negotiation damages is completely justified based on principle. As stated recently by Christopher Clarke LJ in *One Step*, the question is not whether this 'would make the exception the rule';[3] it is, rather, 'what does justice require'.[4]

[3] *One Step (Support) Ltd v Morris-Garner* [2016] EWCA Civ 180, [2017] QB 1, [125].

[4] ibid [126].