A PERFORMANCE-ORIENTED ACCOUNT OF MONEY AWARDS FOR BREACH OF CONTRACT

Thesis submitted towards the degree of Doctor of Philosophy in Law

by

David Winterton
Magdalen College

Trinity Term 2011

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ABSTRACT

It is generally accepted that the award of contract damages in English law is governed by the expectation principle. This principle provides that following an actual or anticipated breach of contract the innocent party is entitled to be put into the position that he or she would have occupied had the contract been performed. There is significant ambiguity over what 'position' means in this context. The conventional understanding of the expectation principle is that it stipulates the appropriate measure of loss for an award of compensation. This thesis challenges this understanding and proposes a new performance-oriented account of awards given in accordance with the expectation principle.

The thesis is in two parts. Part I outlines and challenges the orthodox understanding of awards given in accordance with the expectation principle. Chapter One outlines the orthodox account, and explains the traditional interpretation of loss in this context. Chapter Two mounts a doctrinal challenge to the orthodox account, demonstrating the existence of many awards for breach of contract that do not reflect the actual loss suffered by the innocent party. Chapter Three highlights the conceptual difficulty of the orthodox account and outlines the problems with conventional terminology, proposing stable definitions for important legal concepts.

Part II advances an alternative account of contract damages that draws a distinction between two different kinds of money awards. The first is an award substituting for performance. The second is an award compensating for loss. Chapter Four outlines the account's foundations by defending the existence of the right to performance and the existence of the proposed distinction. Chapter Five explains the quantification and restriction of money awards substituting for performance. Chapter Six explains the nature of money awards compensating for loss. Finally, Chapter Seven defends English law's preference for awarding monetary substitutes for performance rather than ordering specific performance.

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INTRODUCTION

I. OVERVIEW

In English law the orthodox understanding of a damages award for breach of contract is that it compensates the innocent party for loss. In this context compensation is measured by reference to the position the innocent party would have occupied had the contract been performed.[1] Traditionally, loss has also been understood almost exclusively in financial terms. Only in limited cases has recovery for non-pecuniary loss been allowed. The correct application of this orthodox understanding has caused significant judicial disagreement in at least six recent House of Lords' decisions, spanning a variety of different contractual contexts.[2] The substantial divergence of opinion in these cases demonstrates the existence of some confusion regarding the purpose of awarding damages following a breach of contract. A significant cause of the confusion is that two different principles are invariably conflated when courts make awards. This thesis decouples these two different principles and proposes an account that resolves much of the present uncertainty.

The thesis examines all the six cases referred to above in detail. It also considers many other authorities. However, the substantial volume of decisions on contract damages makes it impossible to cover all the authorities comprehensively, particularly given the broadly theoretical approach adopted. The aim of this thesis is not to provide

[1] The classic formulation is Parke B's in *Robinson v Harman* (1848) 1 Exch 850, 855.

[2] *Ruxley Electronics & Construction Ltd v Forsyth* [1996] AC 344 (HL); *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 AC 518 (HL); *Attorney-General v Blake* [2001] 1 AC 268 (HL); *Farley v Skinner* [2001] UKHL 49; [2002] 2 AC 732; *Golden Strait Corporation v Nippon Yusen Kubishika Kaisha (The Golden Victory)* [2007] UKHL 12; [2007] 2 AC 353; *Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas)* [2008] UKHL 48; [2009] 1 AC 61.

an encyclopaedic digest of the case law but to use key examples to show that the authorities often pull in different directions because of a basic misconception. The overall goal is to expose this misconception and outline a coherent framework within which to resolve various problems that arise in quantifying contract damages. This framework is outlined in Part II of the thesis. The argument advanced is that, in contrast to the orthodox understanding outlined above, there are two distinct kinds of money awards that seek to put the innocent party into the position as if the contract had been performed. The first is a money award substituting for performance. The basis for such awards is the right to performance arising upon contract formation. The money award is a substitute for this performance. The second is a money award compensating for loss. The basis for such an award is the secondary right of repair that arises upon breach. The law upholds this right through an award of compensation for actual loss suffered.

The alternative understanding of contract damages this thesis proposes has two significant implications. First, compensating for loss should no longer be viewed as the dominant purpose of awarding damages for breach of contract. Rather, it is only some money awards for breach that aim to compensate for loss. Other awards substitute for performance. Moreover, even when compensation is awarded, the compensatory objective of such awards is merely a manifestation of the more fundamental purpose underpinning all legal responses to contractual breach, which is to achieve the next-best thing to performance having occurred. This is attained by providing the victim of breach, to the extent that she remains entitled to some aspect of the contractual performance, with both an appropriate substitute for this performance, (either via a coercive order or an appropriate money award) and compensation for any additional loss suffered in consequence of non-performance.

Secondly, the proposed account casts doubt on the traditional, clear division between money awards and coercive orders by recognising that substitutive money awards and coercive orders simply represent different points along a remedial continuum, and all responses on this continuum are concerned with the common goal of providing an appropriate substitute for performance. There are numerous different ways, on this continuum, in which the common law could permit a response that substitutes for performance. At one extreme is a coercive order that requires a party to perform on the date performance is due. This is essentially an order for actual performance accompanied by the threat of additional sanctions for non-performance. Because of these additional sanctions, this order is a substitute for performance. Next, there is a coercive order that requires the breaching party to perform after the due date for performance has passed. Again, there will be additional sanctions for non-performance. Since the time for performance differs, as does the consequences of non-performance, this is a clearer form of substitute performance.

Money awards can substitute for performance as well. The common law could have made such awards conditional upon requiring the sum to be used to obtain performance. It did not to do so. This thesis identifies two different monetary substitutes for performance that the common law has recognised. The closest money substitute for performance is an award of the cost of equivalent performance. This award provides an innocent party with the sum required to obtain a near equivalent to a contractually agreed performance from another source. When this measure is unreasonable or unquantifiable, another money award is provided to substitute for performance. This award is an approximation of the price a reasonable person in the innocent party's position would have accepted to release the breaching party from performance. One of these different monetary substitutes for performance, or one of the various coercive orders, can be

combined with an award of compensation for any further loss suffered in consequence of breach that has not been compensated indirectly by the substitutive award, subject to the various restrictions that limit the recovery of compensation for loss. The fundamental point, however, is that the latter kind of award for loss is distinct from money awards that substitute for performance.

A possible objection that might be raised against maintaining the distinction this thesis proposes is that ultimately both substitutive and compensatory awards are grounded in the common underlying objective of attempting to put the innocent party into a position that approximates the position he would have occupied had the contract been performed. Although the two awards share this common theoretical basis, it is necessary to maintain the proposed distinction for three reasons. First, other than at the highest level of theory, the motivation for each award is different. Money awards substituting for performance aim to ensure the innocent party obtains an equivalent to performance. Money awards compensating for loss aim to ensure the claimant is left no worse off as a result of breach. Secondly, although ultimately both kinds of response are grounded in the existence of the primary right, the significance of breach is fundamentally different for each award. While breach creates the secondary right to repair to which compensatory awards give effect, breach does not affect the primary right to performance underpinning substitutive awards. Rather, a sufficiently serious actual or anticipatory breach enables the innocent party to terminate the contract and seek substitute performance. Thirdly, the distinction has important practical significance for both the availability and quantification of substitutionary awards. This is most obviously seen in relation to the different restrictions that apply to the different awards. Compensatory awards are subject to restriction on the grounds of remoteness and mitigation, and the limits imposed on the recovery of non-pecuniary loss. Substitutive

awards are not subject to these restrictions, since they are not concerned with loss. However, they are subject to different restrictions concerned with performance. The limitations on the availability of specific performance are an example in relation to a coercive substitutive remedy. Similarly, an award of the cost of equivalent performance is unavailable when circumstances make it unreasonable for the innocent party to insist upon this equivalent or when this measure is unquantifiable because equivalent performance has become impossible. In such cases, a reasonable approximation of the price of release should be awarded.

A final important introductory observation is that the thesis advanced here must be distinguished from other rights-based theories of contract damages. In particular, it is important to make clear that the proposed account differs from the account recently championed by Professor Stevens.[3] More will be said about these differences in Chapter Six but the principal point of distinction between the two approaches is in the way in which money awards substituting for performance are measured. While, for Stevens, the appropriate measure of performance is always the difference in value between the performance contracted for and that provided, this thesis argues that there is a more general principle underpinning English law's response to breach, which is to provide the innocent party with the most appropriate substitute for performance in the circumstances. When a coercive order is inappropriate or not sought, this is *prima facie* the cost of obtaining equivalent performance from elsewhere. In some cases this will coincide with Stevens's difference in value measure. In other cases it will not.[4] In this regard, the proposed account is closer to accounts advanced by Coote,[5] Smith,[6] and

[3] R Stevens, 'Damages and the Right to Performance: A *Golden Victory* or Not?' in Neyers, Bronaugh and Pitel (eds), *Exploring Contract Law* (Hart 2009) 171; R Stevens, *Torts and Rights* (OUP 2007) 70.

[4] See 291 below.

[5] B Coote, 'Contract Damages, *Ruxley*, and the Performance Interest' (1997) 56 CLJ 537; B Coote, 'The Performance Interest, Panatown and the Problem of Loss' (2001) 117 LQR 81.

Webb.[7] Nevertheless, it is also distinct from these accounts. This is most fundamentally because it recognises the possibility of an alternative monetary substitute for performance when the cost of equivalent performance is unquantifiable or unreasonable. More subtle distinctions between the proposed account and these various alternatives also exist.

II. STRUCTURE

A. PART I

This thesis is divided into two Parts. Part I outlines and challenges the orthodox understanding of contract damages in English law. Chapter One outlines the orthodox account, according to which the purpose of awarding contract damages is to compensate for loss. Two further questions arise in outlining this account. The first concerns the appropriate measure of loss. The second is the legitimate scope of recovery. As regards the former, the conventional view is that loss is measured by reference to the difference between the party's actual position and the hypothetical position the party would have occupied had the contract been performed. With regard to the second question, traditionally loss has been interpreted narrowly, focussing upon deterioration in a party's *financial* position. The chapter concludes by observing that recently English law has moved towards the adoption of a broader understanding of loss, which takes account of a wider variety of non-pecuniary interests than was previously the case.

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[6] S Smith, *Contract Theory* (OUP 2004) 420; S Smith, 'Substitutionary Damages' in C Rickett (ed) *Justifying Private Law Remedies* (Hart 2008) 93.

[7] C Webb, 'Performance and Compensation: An Analysis of Contract Damages and Contractual Obligation' (2006) 26 OJLS 41; C Webb, 'Justifying Damages' in Neyers, Bronaugh and Pitel (eds), *Exploring Contract Law* (Hart 2009) 139.

The remainder of Part I challenges the orthodox account. The challenge outlined in Chapter Two is doctrinal. This chapter demonstrates that there is a significant discrepancy between the orthodox account and the decided case law by outlining numerous instances where the amount awarded following a successful action for breach does not accurately reflect the innocent party's actual loss. In some of these cases the sum awarded does not even purport to compensate the innocent party for loss. In others the law claims to adopt a compensatory approach but the amount awarded does not correspond with the actual loss suffered. On the basis of these cases it is argued that the orthodox account is descriptively inadequate.

The challenge to the orthodox account continues in Chapter Three. The focus here is on demonstrating the conceptual incoherence of this account and the shortcomings in conventional terminology. Conceptual incoherence stems from understanding the expectation principle as a measure of *loss*. In fact the expectation principle is better understood as a hybrid of two distinct principles: one concerned with substituting for performance, the other with compensating for loss. This misconception has led to an excessive focus on identifying a loss in interpreting the expectation principle. As regards conventional terminology, it is argued that the ambiguous meaning of important concepts like 'loss', 'damages', 'compensation', and 'remedy' has hindered clear understanding and allowed the prevailing orthodoxy to persist despite its doctrinal inaccuracy. In addition to suggesting clear and stable definitions for these concepts, this section proposes new terminology for money awards substituting for performance.

B. PART II

Part II proposes an alternative account of contract damages in English law, according to which there are two distinct kinds of money award available in a claim for

breach of contract. The first is an award substituting for performance. The basis for this award is the right to performance that arises upon contract formation. The award is a substitute for this performance. The second is an award compensating for loss. The basis for this award is the secondary right to repair that arises upon breach. An award of compensation for loss gives effect to this right. Chapter Four outlines the foundations of this account. The remaining chapters in Part II focus on explaining the nature and content of the two different kinds of awards (Chapters Five and Six), and on defending the legitimacy of English law's preference for awarding money over compelling performance (Chapter Seven).

Chapter Four has two aims. The first aim is to defend the claim that the formation of a valid contract creates a legal right to performance in the promisee. This claim is defended on both doctrinal and theoretical grounds. The doctrinal defence exposes the fallacy of the claim that English law's preference for money awards over specific performance is inconsistent with the existence of a legal right to performance. The theoretical defence rests upon demonstrating the instrumental and intrinsic contributions that contract law makes towards the realisation of valuable personal autonomy. The second aim is to defend the proposed distinction between substitutionary and compensatory money awards. Again, this defence has both a doctrinal and a theoretical aspect. The doctrinal defence rests principally on outlining some unequivocal examples of awards that substitute for performance rather than compensate for loss. The theoretical defence rests upon a particular account of the effect of breach on the primary right. According to this account, the reasons justifying the original primary right to performance persist following breach and press for next-best conformity. This requires both that an appropriate substitute for performance be provided and that harm caused by breach be repaired.

Chapter Five explains the quantification and restriction of money awards substituting for performance. The purpose of such awards is to provide the innocent party with an appropriate substitute for performance. When it remains possible for the innocent party to obtain an equivalent to the performance contracted for, the closest monetary substitute for performance is the cost of obtaining this equivalent. However, such awards are subject to a restriction that is best understood as an inquiry into whether it is reasonable for the innocent party to insist upon equivalent performance in the circumstances. Historically, English law's preoccupation with loss led courts to overemphasise the innocent party's intention to repair in deciding this question. Recent authority suggests that intention is not decisive. This is the preferable approach. Section II defends the availability of an alternative measure of performance when the balance of reasons is against awarding either specific performance or the cost of equivalent performance. The appropriate measure for this award is the amount a reasonable person in the innocent party's position would have accepted as the price of releasing the other party from performance. Traditionally, English law has limited the availability of this measure, though there are signs that such awards are becoming more readily available. The traditionally restrictive approach is explicable principally by reference to the dominance of the orthodox understanding of contract damages.

With an understanding of money awards substituting for performance in place, Chapter Six explains the nature and content of money awards compensating for loss. Such awards uphold a secondary right to repair that arises upon breach. This chapter first defends the claim that the breach of a primary legal duty generates a secondary duty of repair. The distinctiveness of awards upholding the secondary right from awards substituting for performance in the particular context of a breach of contract is then defended by arguing in support of the orthodox understanding of the various restrictions

that limit the recovery of compensation for loss. In particular, it is argued that rather than being based in the parties' underlying agreement, the limits imposed on compensatory awards are best explained as external rules of law upholding various policy considerations that English law seeks to promote in the particular contractual context.

Chapter Seven defends English law's position on the availability of specific performance. In essence, it argues that although coercive orders, such as specific performance or injunctions, may provide closer substitutes for performance than substitutionary money awards, their availability should be confined because an appropriate money award is usually a preferable substitute for performance taking all relevant considerations into account. The argument advanced relies upon the understanding of contractual obligation supported in Chapter Four. Section I makes two principal claims. The first is that contract law's instrumental value, allowing parties to co-ordinate for mutual future benefit, requires a performance-oriented response to breach. The second is that contract law's intrinsic value, enabling parties to realise this instrumental value in the absence of interpersonal trust, generally renders a coercive order and the cost of equivalent performance roughly interchangeable substitutes for performance. Section II defends English law's preference for monetary substitutes for performance over coercive orders on the basis that this approach is usually favoured by the balance of relevant considerations.

III. METHODOLOGY

As should be clear from the structure just outlined, this thesis employs a methodology that is concerned with both a descriptive account of the law of contract damages and an exploration of the theory underlying this account. There has been much written about the theoretical justification for contractual rights and the appropriate

response to breach.[8] Detailed doctrinal treatment of contract damages also abound.[9] That these distinct fields often fail to engage meaningfully with each other is understandable given the scope of their respective enterprises. Nevertheless, one of the aims of this project is to bring these two bodies of scholarship closer together. This thesis utilises the theoretical literature to shed light on highly important practical questions about the quantification of contract damages and the choices between different responses to breach.

A. AN INTERPRETATIVE APPROACH

In his book on contract theory, Professor Stephen Smith distinguishes four different types of legal theory: historical, prescriptive, descriptive and interpretative.[10] In accordance with the kind of theories Smith focuses upon there, this thesis seeks to provide an interpretative account of English law. The aim of such an account is to make sense of the law by revealing the existence of an intelligible order. It is important to appreciate that the adoption of an interpretative approach is not intended to diminish the value of any other theoretical approach. These other approaches simply constitute different projects. Importantly, however, as Smith explains, they are projects that 'are clearly relevant to, and sometimes overlap with, the interpretative project', which is why 'nearly all interpretative theories include historical, prescriptive and descriptive elements'.[11] The account presented here is no different. In attempting to reveal the

[8] For an overview see Smith, *Contract Theory* (n 6).

[9] For example, E Peel (ed), *Treitel's Law of Contract* (12th edn, Sweet & Maxwell 2007); H Beale (ed), *Chitty on Contract* (30th edn, Sweet & Maxwell 2010); H McGregor, *McGregor on Damages* (18th edn Street & Maxwell 2010); A Burrows, *Remedies for Torts and Breach of Contract* (3rd edn OUP 2005).

[10] Smith, *Contract Theory* (n 6) 5. For a different division see M Eisenberg, 'The Theory of Contracts' in P Benson (ed) *The Theory of Contract Law* (CUP 2001) 206, 208.

[11] Smith, *Contract Theory* (n 6), page ref???.

intelligibility of the English law on contract damages, this thesis considers various historical, prescriptive and descriptive claims.

The attempt to present an interpretive theory of contract damages raises the question of how such a theory should be evaluated. Smith proposes four criteria of particular relevance in assessing interpretive theories of contract law: fit, coherence, morality and transparency.[12] In the context of this work, the first criterion is the most important. Essentially, it is concerned with the extent to which the theory advanced is consistent with the law as it presently exists. This thesis attempts to demonstrate that the proposed account of contract damages better fits the present English law than the orthodox understanding of contract damages.

This emphasis on fit requires two important qualifications. The first is that this emphasis does not diminish the importance of the other criteria relevant to evaluating an interpretative account. In particular, this thesis places significant weight upon the 'morality' criterion. Smith distinguishes three different versions of this criterion. The strongest version claims that an interpretative theory must be evaluated partly by reference to the extent to which it presents the law as morally justified. The genesis of interpretative theories of law is usually attributed to Professor Dworkin,[13] who explains that '[a] successful interpretation must not only fit but also *justify* the practice it interprets'.[14] Such claims are the basis for significant jurisprudential debates beyond the scope of the present work. However, the thesis does seek an account that both substantially fits the decided case law and is independently justifiable. The second

[12] ibid 7.

[13] See generally R Dworkin, *Law's Empire* (Hart 1998). Smith explains that taking an interpretative approach 'does not commit one to endorsing Dworkin's particular understanding of interpretation', Smith, *Contract Theory* (n 6) 5.

[14] Dworkin, *Law's Empire* (n 13) 285.

qualification is that this criterion cannot be neatly separated from the other three.[15] In particular, the extent to which the criteria of 'fit' and 'justification' are separable is open to debate. On one possible view, a doctrinal explanation that does not provide good *reasons* for the legal position adopted fails even as a purely doctrinal explanation.

As the thesis outline hopefully makes clear, the justificatory aspects of this thesis cannot be neatly separated from its doctrinal claims. The inextricable link between fit and justification in this work is demonstrated most clearly by the combination of doctrinal and theoretical arguments advanced in favour of the right to performance and the distinction between substitutionary and compensatory awards in Chapter Four. A concern with justification also informs the arguments made in Part II more generally, which attempts to demonstrate how the new performance-oriented account can explain the cases in a theoretically coherent way. The most theoretical argument advanced in this thesis occurs in Chapter Seven. Though perhaps not strictly speaking necessary to establish the thesis's central claim that English law does and should recognise a distinction between substitutionary and compensatory money awards, this argument provides the new account with greater force by refuting its strongest objection. It is also necessary to establish the thesis's broader purpose of outlining a coherent performance-oriented account of English contract law.

The reference to 'coherence' here raises the relevance of the other two criteria Smith proposes in evaluating interpretive legal theories. Although this thesis gives less emphasis to 'coherence' and 'transparency' than to 'fit' and 'justification' in advancing the proposed account, these additional two criteria are certainly not irrelevant. 'Coherence' is not prioritised simply because it does not add much to the requirements of 'fit' and 'justification'. As Smith explains, the most appealing version of 'coherence' understands

[15] Smith, *Contract Theory* (n 6) 11.

it as advocating nothing more than consistency, and 'consistency in the sense of non-contradictoriness is a basic requirement of intelligibility'.[16]

The 'transparency' criterion has greater independent value. It is concerned with evaluating how well a theory accounts for the 'internal' explanation of a particular area of law.[17] Smith explains that 'law is transparent to the extent that the reasons legal actors give for doing what they are doing are their real reasons'.[18] Again, Smith distinguishes weak, moderate and strong versions of this criterion but it is unnecessary to discuss these here. For present purposes, it is important to appreciate simply that an interpretative theory of contract damages will be better the more closely it corresponds with actual judicial explanations for legal decisions.

On this basis, this criterion might appear to present a problem for this thesis given that its aim is to demonstrate that the prevailing orthodoxy on contract damages is misconceived. This problem is less significant than it may appear because English law also places considerable weight on the sanctity of contract. Indeed, there may be greater respect for contractual rights in English law than in certain other common law jurisdictions given the special position that English courts occupy as the neutral arbiters of large-scale commercial disputes between sophisticated contracting parties. In essence, this thesis argues that the tension between the principle that *pacta sunt servanda* and the compensatory principle dissolves once it is appreciated that the latter is not the fundamental principle governing the availability of money awards following breach. Compensatory awards, like other responses to breach, are made with the aim of achieving next-best conformity with actual performance of the contract.

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[16] ibid.

[17] See E Weinrib, *The Idea of Private Law* (Harvard UP 1995) Chapter One.

[18] Smith, *Contract Theory* (n 6) 24.

B. RESPONDING TO AN OBJECTION

It might be objected that the methodological approach adopted in this thesis, which is concerned with both a descriptive account of the law *and* an exploration of the underlying theory, is illegitimate either because such a combination is invalid generally or because the thesis attempts to cover too much ground. Although it is accepted that this thesis cannot comprehensively cover either all the cases or all the relevant theoretical literature on the substantial topic of contract damages, it is contended that it is both possible, and necessary, to employ the methodology adopted in relation to the present topic for two main reasons.

First, is clear that English law has reached a crossroads in this area. There are important authorities that are irreconcilable with the orthodox account. In particular, the recent decisions in *Ruxley*, *Panatown* and *The Golden Victory* demonstrate deep division at the highest level concerning the nature and quantification of contract damages. In consequence, an exhaustive examination of the last two hundred years of English case law will not provide a clear road forward. This does not mean that the older authorities are ignored completely. However, the purpose of examining them is principally to demonstrate how the present juncture was reached and to help identify the law's current topology. By contrast, important recent decisions are examined in significant detail. This is both to identify particular problem areas and to demonstrate the explanatory value of the distinction proposed in relation to current doctrinal debates. This examination is sufficient to show that the traditional conception of contract damages is descriptively inadequate and that the proposed alternative is superior.

Secondly, this methodological approach is necessary because, with the divergences in judicial reasoning in the cases, the theoretical foundations of contract law must be re-examined. The law's present uncertainty makes it necessary for this thesis to

be theoretically justified as well as doctrinally accurate. It is contended that this justifies the substantial theoretical arguments advanced. The overriding aim of this work is to propose an account that not only substantially explains the current law and provides a coherent framework for deciding future cases, but does so in a theoretically satisfactory manner.

PART I: A CRITIQUE OF THE CONVENTIONAL APPROACH TO CONTRACT DAMAGES

This Part of the thesis outlines and challenges the orthodox understanding of damages awards for breach of contract in English law. Chapter One outlines the orthodox account, according to which the purpose of awarding contract damages is to compensate the innocent party for loss suffered in consequence of breach. In the process, this chapter explains how loss traditionally has been understood in this context. Chapter Two challenges the orthodox account on doctrinal grounds, demonstrating that there are many damages awards for breach of contract that do not reflect the actual loss suffered by the innocent party. Chapter Three continues the challenge to the orthodox account by highlighting the conceptual inadequacy of this account and the problems with conventional terminology. In place of this inadequate terminology, stable definitions for important concepts that arise in this area of the law are proposed.

CHAPTER ONE – THE ORTHODOX UNDERSTANDING OF CONTRACT DAMAGES IN ENGLISH LAW

INTRODUCTION

This chapter explains this conventional understanding of contract damages in English law. Section I outlines the orthodox interpretation of the expectation principle, upon which such awards are said to be based. Section I.A observes that Parke B's famous formulation of the expectation principle in *Robinson v Harman* contains two distinct sources of indeterminacy. The first concerns the purpose of awarding contract damages. The second concerns the principle's scope. The orthodox understanding of contract damages overlooks the first indeterminacy by understanding the principle as merely advocating a particular measure of loss. In outlining the orthodox account, this chapter therefore focuses on the second indeterminacy. Section I.B explains that traditionally loss has been defined quite narrowly to include only the financial consequences of breach, though some exceptions to this narrow definition of loss have been recognised.

Section II outlines the more expansive interpretation of loss that English law now adopts in the contractual context. As suggested by the methodological approach outlined above, this is done by highlighting important doctrinal landmarks rather than through a comprehensive survey of all the cases. In relation to the recovery of damages for non-pecuniary loss, the significant point is that the recent trend has been towards relaxing the historically restrictive approach. In particular, the availability of damages for

'mental distress' consequent upon a breach of contract has increased significantly, though this is not the only development. Determining precisely where the boundaries of loss-based recovery should lie is not a concern of the current thesis.

I. THE ORTHODOX INTERPRETATION OF THE EXPECTATION PRINCIPLE

The authority most commonly invoked for the conventional understanding of contract damages is *Robinson v Harman*.[19] In response to the question of what damages are available in an action for breach of contract, Parke B famously stated that:

> 'The rule of the common law is that where a party sustains 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'.[20]

A. THE INDETERMINACY IN THE ROBINSON V HARMAN FORMULATION

The conventional understanding of Parke B's formulation is that it stipulates the appropriate measure of *financial* loss, compensation for which the victim of a breach of contract is entitled to upon any claim for damages.[21] On occasion judges refer to this as contract law's 'compensatory principle'.[22] In the academic literature it is typically described as the 'expectation measure' of loss, with a sum of money awarded in

[19] *Robinson v Harman* (n 1).

[20] ibid 855.

[21] *The Golden Victory* (n 2) [9] (Lord Bingham); *British Westinghouse Electric & Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd* [1912] AC 673 (HL) 689 (Lord Haldane).

[22] For example, *The Golden Victory* (n 2) [9] (Lord Bingham), [38] (Lord Scott).

accordance with this principle typically labelled 'expectation damages'.[23] According to the conventional understanding of contract damages, any award inconsistent with this principle must be understood as a justifiable, or unjustifiable, exception to it. In reality, however, the expectation principle contains significant indeterminacy.

1. Indeterminacy as to Purpose

Parke B's famous formulation is conventionally understood as stipulating the appropriate measure of financial loss in an action for damages for breach of contract but it actually contains two distinct sources of indeterminacy. The first and most fundamental concerns the underlying purpose of awarding damages in accordance with this principle. On the basis of Parke B's words alone, it is not clear whether the object of awarding damages is limited to compensating the innocent party for loss or extends to providing a substitute for performance. As Chapter Two demonstrates, even on a definition of loss that takes account of harm to certain non-pecuniary interests, these two different bases for quantification do not always correlate.

Support for the orthodox understanding might be derived from the reference to 'loss' at the beginning of Parke B's formulation. However, this does not resolve the indeterminacy because 'loss' itself is open to various interpretations. In particular, if one focuses on the latter half of the statement, it is possible to interpret 'loss' very broadly to include the loss of performance that breach itself entails. On this interpretation, the principle can be understood as advocating an approach that is centrally concerned with putting the innocent party in the actual, rather than financial, position that performance would have secured. In other words, absence of the performance is corrected as well as

[23] L Fuller and W Perdue, 'The Reliance Interest in Contract Damages' (1936) 46 YLJ 52. But see D Friedmann, 'The Performance Interest in Contract Damages' (1995) 111 LQR 628 and Webb, 'Performance and Compensation' (n 7).

presence of consequential losses. The characteristic elucidation of the expectation principle in terms of 'loss' has meant that this fundamental indeterminacy has been overlooked, since 'loss' is a term conventionally associated with the deterioration in a party's actual physical or financial position.[24]

2. Indeterminacy as to Scope

Even if one ignores this fundamental indeterminacy with regard to purpose and assumes an interpretation that concentrates only on the extent to which the innocent party is factually worse off as a result of breach, the expectation principle contains a further indeterminacy regarding the precise scope of its application. That is, on the basis of Parke B's words it is not clear exactly which kinds of losses are included within the principle's compensatory ambit. In particular, it is not clear the extent to which the reference to 'loss' includes damage to various non-pecuniary interests that may be affected by breach. Since the purpose of this chapter is simply to outline the orthodox account of contract damages, it focuses only on this second source of indeterminacy. The more fundamental indeterminacy just identified underpins the arguments developed in Chapters Two and Three.

The expectation principle's indeterminacy with regard to scope is at least partly caused by the words 'so far as money can do it'. This phrase could suggest that only financial damage should be compensated. However, rather than suggesting that damages should never be awarded for non-pecuniary harm, the more natural interpretation of this phrase is that it is simply recognition that such harm is not, or not accurately, measurable in money terms. With this basic conceptual overview of the expectation principle in

[24] Ambiguity surrounding meaning of loss is discussed below at 120.

place, the focus of the discussion now shifts to explaining the way that courts have generally interpreted the meaning of loss in the contractual context.

B. THE MEANING OF 'LOSS' IN THE ORTHODOX ACCOUNT

It was noted above that the traditional focus on loss in interpreting Parke B's formulation in *Robinson v Harman* has led to it being labelled 'the compensatory principle' in contract law; compensation being a term normally associated with repairing or rectifying *loss*. Although alternative interpretations of 'compensation' exist, normally they are presented as challenges to this orthodox conception.[25] The purpose here is to explain more precisely what saying that contract damages are awarded to compensate for loss means in practice. As already observed, the conventional formulation of the expectation principle is indeterminate. It is not sufficient to observe that the purpose of awarding such damages is 'to put the claimant in the same position as he would have been in had the contract been performed' because this merely begs the question of what precisely is relevant in attempting to reconstitute the claimant's 'position'.

1. A Focus on the Financial Consequences of Breach

In the contractual context, 'loss' has traditionally been understood almost exclusively in financial terms. An example of the traditional approach is Pennycuick J's judgment in *Ford v White & Co.*[26] The claimant bought property intending to develop it. In breach of contract, his solicitor failed to inform the claimant about a covenant against development. Evidence showed that the property would have been worth an additional £1,250 had it not been for this covenant. However, the claimant had paid no more than

[25] Some of these are discussed below in Chapter Three, at 135.

[26] *Ford v White & Co* [1964] 1 WLR 885 (CA).

the property's actual value. The claimant brought an action for breach against the solicitor claiming £1,250.

It was held that the claimant could not recover this sum as damages since this would have put him in a better financial position than if the contract had been performed. If the solicitor had not breached, the claimant would have been informed of the restrictive covenant and would not have proceeded with the purchase. However, the property was worth exactly what the claimant had paid for it, so beach did not affect his financial position. In reaching this conclusion, Pennycuick J cited with approval Lord Haldane's statement in *British Westinghouse* that the 'fundamental basis [for awarding damages for breach of contract] is... compensation for pecuniary loss naturally flowing from the breach'.[27] In *Ruxley* Lord Lloyd also referred to this dictum with approval, stating that:

> 'Lord Haldane does not say that the plaintiff is always to be placed in the same situation *physically* as if the contract had been performed, but in as good a situation financially, so far as money can do it. This necessarily involves measuring the pecuniary loss which the plaintiff has in fact sustained'.[28]

The decision in *White Arrow Express Ltd v Lamey's Distribution Ltd* provides an important qualification to this understanding.[29] The claimant contracted with the defendant for the provision of an enhanced mail delivery service to its customers. Instead of providing this enhanced service the defendants provided only the standard service. The difficulty for the claimants was that although they could demonstrate that

[27] ibid 887. See *British Westinghouse* (n 21) 689.

[28] *Ruxley* (n 2) 366 (emphasis added).

[29] *White Arrow Express Ltd v Lamey's Distribution Ltd* [1995] CLC 1251 (CA).

the defendants had not provided the service contracted for, they could not prove that this had resulted in any deterioration in their financial position, since they suffered no consequential financial loss as a result and there were not even any complaints about the service provided.

The Court of Appeal dismissed the claim, holding that a mere breach of contract without proof of loss only entitled the innocent party to nominal damages. Significantly, however, in the leading speech Sir Thomas Bingham MR clarified that a party who contracted for goods or services of a certain quality but received something inferior did suffer a *prima facie* financial 'loss' even though its balance sheet may be unaffected by the breach. The measure of this loss was 'the difference between the price paid (or, if it is lower, the market value of what was contracted for) and the market value of what was obtained'.[30] However, in order to recover this 'difference in value', the complaining party must plead and prove it.

Unfortunately for the claimants in *White Arrow* this 'loss' was not pleaded and proved in that case. Instead, the claim was pleaded as one to recover a partial failure of consideration. On the basis that a failure of consideration must be total before any payment can be recovered, this claim was rejected.[31] However, the claimants could and should have recovered damages assessed by reference to the difference in market values of the services contracted for and those received. Lord Bingham MR explained this as a measure of the claimant's financial loss.[32] However, this thesis argues that to construe a

[30] ibid 1255.

[31] ibid 1256.

[32] This is also the view put forward in E McKendrick, 'Breach of Contract and the Meaning of Loss' [1999] CLP 37, 69. The argument there shares much with the argument of this thesis but McKendrick contends that English law requires 'a more expansive notion of loss' (38) to solve the problems he identifies. This thesis argues that many of the cases he discusses are best understood as occasions where the law provides a monetary substitute for performance rather than compensation for loss.

financial loss in these circumstances is artificial. It is preferable to acknowledge that such an award is an attempt to provide the claimant with a substitute for performance.

This fundamental distinction between substituting for performance and compensating for the consequences of non-performance underpins the core argument made in this thesis. Although Lord Bingham MR correctly identified the deficiency in the law that would exist were a substantive remedy not available on the facts in *White Arrow*, his Lordship nevertheless reiterated the conventional, narrow interpretation of the expectation principle in terms of financial loss. His Lordship stated that the *Robinson v Harman* formulation aims to put the claimant:

> 'in the same financial position as he would have enjoyed if the contract had been performed... [this] formulation assumes that the breach has injured his *financial* position: if he cannot show that it has, he will recover nominal damages only'.[33]

2. Limited Recognition for Non-Pecuniary Damage

Although loss in English contract law traditionally focused on the financial consequences of breach, it is clearly established that contract damages may be awarded for damage to certain non-pecuniary interests. For example, it is long established that contract damages can be recovered for substantial physical inconvenience,[34] and such damages now also appear to extend to any mental suffering 'directly related to that inconvenience'.[35] Similarly, it is well established that damages are recoverable for

[33] *White Arrow* (n 29) 1254 (emphasis added).

[34] *Hobbs v London & South Western Railway Co* (1875) LR 10 QB 111.

[35] *Watts v Morrow* [1991] 1 WLR 1421 (CA), 1445, discussed below. Also see *Perry v Sidney Phillips & Son* [1982] 1 WLR 1287 (CA).

physical injury consequent upon breach provided such injury is not too remote.[36] In addition, damages for breach of contract may sometimes be recovered for loss of reputation.[37] Nevertheless, until recently, the recovery of damages for non-pecuniary loss for breach of contract appeared to be restricted to these three discrete pockets of liability. On this basis it remained possible to argue that generally damages were only recoverable for proven financial damage, as the statements outlined above suggest.

In particular, since *Addis v Gramophone Co Ltd*,[38] it has been thought that contract damages for any kind of 'mental distress' or 'injury to feelings' are unavailable. A company wrongfully dismissed its manager in a way that was 'harsh and humiliating'.[39] Although he was held to be entitled to damages for loss of his salary and commission, his claim for compensation for injury to his feelings caused by the manner of his dismissal was denied. As recently as *Ruxley*, Lord Lloyd stated that *Addis* 'established the general rule that in claims for breach of contract, the plaintiff cannot recover for his injured feelings'.[40] It has been convincingly argued that the case does not actually stand for this proposition.[41] Nevertheless, until recently this general exclusion was considered a well-established principle of English law.

Addis now appears to have been effectively overruled. In *Johnson v Unisys Ltd*,[42] Lord Steyn, Lord Hoffmann and Lord Millett found it necessary to re-examine its status

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[36] *Grant v Australian Knitting Mills Ltd* [1936] AC 85 (PC).

[37] *Withers v General Theatre Corp Ltd* [1933] 2 KB 536 (CA); *Malik v BCCI* [1998] AC 20 (HL).

[38] *Addis v Gramophone Co Ltd* [1909] AC 488 (HL).

[39] ibid 493.

[40] *Ruxley* (n 2) 374.

[41] N Enonchong, 'Breach of Contract and Damages for Mental Distress' (1996) 16 OJLS 617, 621.

[42] *Johnson v Unisys Ltd* [2001] UKHL 13; [2003] 1 AC 518.

even though the claim before them was not one for anxiety or mental distress resulting from the manner of dismissal but one 'solely for the recovery of special damages for financial loss'.[43] Their Lordships found that although *Addis* still applies to prevent the recovery of damages for mental distress in a claim for wrongful dismissal, it does not stand in the way of a different claim by an employee.[44] In consequence, it appears that *Addis* now stands only for the proposition that 'an employee cannot recover damages for injured feelings, mental distress or damage to his reputation, arising out of the *manner* of his dismissal'.[45] This reformulation is indicative of the development of the more expansive definition of loss in English contract law outlined in the next section.

II. EXPANDING RECOVERY FOR NON-PECUNIARY LOSS

This section charts the development of the current, broader definition of loss in English contract law. In accordance with the methodology outlined above, the discussion provides an overall summary with a particular focus on the major authorities rather than comprehensively analysing the extensive case law on contract damages for non-pecuniary loss. In particular, the discussion focuses on the House of Lords' decisions in *Ruxley Electronics v Forsyth*, and *Farley v Skinner*. There are two reasons for this focus. First, these authorities demonstrate that English contract law has now moved well beyond an exclusively financial conception of loss. Secondly, the awards provided in *Ruxley* and *Farley* illustrate the fundamental indeterminacy at the heart of the expectation principle that this thesis seeks to resolve.

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[43] ibid 529 (Lord Steyn).

[44] ibid 541 (Lord Hoffmann).

[45] ibid (emphasis added).

A. DAMAGES FOR 'MENTAL DISTRESS' AND 'PHYSICAL INCONVENIENCE'

This section is divided into three parts. The first discusses the development of the two exceptions to the general prohibition on the recovery of contract damages for 'mental distress', as outlined by Bingham LJ in *Watts v Morrow*.[46] The second explains the decision in *Farley v Skinner* as concerns the availability of damages for mental distress.[47] Although there was substantial disagreement there regarding the precise basis for the damages awarded, the decision is important in explicitly extending the scope of at least one, and perhaps both, of the exceptions outlined in *Watts*. Finally, more recent developments are outlined.

1. Two Exceptions to the General Bar on Recovery for 'Mental Distress'

The traditional bar on damages for 'mental distress' began to look less tenable after the Court of Appeal's decision in *Jarvis v Swans Tours Ltd*.[48] There, damages were awarded to an aggrieved holiday-maker for the consequential 'disappointment and distress' he suffered as a result of the holiday-provider's failure to provide the contractually agreed standard of service provision. Since then, damages for 'mental distress' have been awarded for a fairly wide variety of contractual breaches involving the provision of services. For example, in addition to awarding damages to disappointed holiday-makers, English courts have awarded damages against a solicitor who failed to

[46] *Watts* (n 35).

[47] *Farley* (n 2).

[48] *Jarvis v Swans Tours Ltd* [1973] QB 233 (CA). Also note the earlier Scottish decision in *Diesen v Samson* 1971 SLT 49 where damages were awarded against a photographer for breach of a contract to take wedding photos.

take necessary steps in non-molestation proceedings,[49] or who failed negligently to obtain custody of the client's children,[50] as well as the breach of a contract to transfer the remains of the claimant's father to a new burial plot thereafter frequented by the claimant and his family on the assumption that the remains had been transferred.[51]

Despite this, until fairly recently, it remained possible to assert the dominance of the purely financial conception of loss by characterising such cases as isolated exceptions to the general rule. This understanding was supported by the fact that it was not realistically feasible to argue that the general prohibition imposed on the recovery of damages for certain forms of non-pecuniary loss was merely an application of some other generally accepted basis for restricting loss-based recovery such as, for instance, the contractual remoteness principle.[52] In support of this view, Professor Burrows stated in 1984 that: 'mere application of a remoteness test does not dictate whether mental distress damages are in principle recoverable; rather, a more restrictive test is being applied by the courts'.[53]

The important judgment of Bingham LJ in *Watts v Morrow* supports this understanding of the restriction on the recovery of compensation for non-pecuniary loss for breach of contract. There, in the context of the breach of a survey contract, his Lordship affirmed the validity of the general exclusion on the recovery of damages for 'mental distress' and made clear that this rule is not based on the remoteness principle,

[49] *Heywood v Wellers* [1976] 1 QB 446 (CA).

[50] *Hamilton Jones v David & Snape* [2004] 1 WLR 924.

[51] *Raw v Croydon LBC* [2002] CLY 941.

[52] For discussion of this principle see 267 below.

[53] A Burrows, 'Mental distress damages in contract - a decade of change' [1984] LMCLQ 119, 134.

but on 'considerations of policy'.[54] Significantly, however, *Watts* held that 'mental distress' damages could be recovered in two situations. The first was where 'the very object of a contract was to provide pleasure, relaxation, peace of mind or freedom from molestation',[55] which takes account of the holiday and other service cases mentioned above. The second was when the claim was based on 'physical inconvenience and discomfort caused by the breach and mental suffering directly related to that inconvenience and discomfort'.[56]

It might be thought that recognition of these two exceptions undermined the traditionally restrictive definition of loss in purely financial terms. In reality, however, *Watts* simply formalised the various exceptions to the general rule that had begun to develop without substantively challenging the status of the general exclusionary rule. This interpretation of *Watts* is supported by the fact that Bingham LJ prefaced his discussion of the two exceptions by reiterating the general rule that '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 the innocent party'.[57]

2. The Decision in *Farley v Skinner*

The relevant contract in *Farley* was between a property surveyor and a potential purchaser. Despite being explicitly asked by the purchaser, Farley, to investigate the possibility of aircraft noise, the surveyor failed to point out the high levels of noise experienced at the residential property the former later purchased. Although Farley was

[54] *Watts* (n 35) 1445.

[55] ibid.

[56] ibid.

[57] ibid.

unaware of the aircraft noise when he purchased the house, the price he paid took the noise into account. As a result, he had not incurred any financial loss as a result of the surveyor's actions. Farley brought an action alleging that the defendant had failed to carry out his survey with reasonable care and skill in breach of contract. The trial judge found that the defendant had indeed been negligent but held that Farley was not entitled to any damages on a diminution in value basis since the property, like that in *Ford v White*, was actually worth what had been paid for it. Nevertheless, he awarded the claimant £10,000 in damages for the distress and inconvenience caused by the aircraft noise.

An appeal was upheld on the basis that the contract between the parties was not to provide enjoyment or relief from stress and therefore did not fall within the first exception outlined in *Watts*. However, a further appeal to the House of Lords was unanimously upheld. The Court reasoned that although damages were not generally available for mere disappointment and annoyance suffered as a result of a defendant's breach of contract, the present case fell within both of the exceptions to this general rule laid down by Bingham LJ in *Watts*. In so finding the Court effectively broadened the ambit of these two exceptions.[58]

As regards the first exception, the defendant's submission that damages for distress and inconvenience could only be awarded where the provision of 'peace of mind' was 'the very object of the contract' was rejected by the House of Lords. It was held that for such damages to be available it was sufficient that the term broken was known by both parties to be *an* important one in the context of the contract overall. It should also be noted that the basis for distinguishing *Farley* from *Watts* itself, which also involved the breach of a survey contract, was that in *Farley* there was a 'breach of a specific

[58] This interpretation of the case is supported in E McKendrick and M Graham, 'The Sky's the Limit: Contractual Damages for Non-pecuniary Loss' [2002] LMCLQ 161, 162 and J Hartshorne, 'Damages for Mental Distress after Farley v Skinner' (2006) 22 JCL 118.

undertaking to investigate a matter important for the buyer's peace of mind',[59] while in *Watts*, breach was merely in respect of an 'ordinary surveyor's contract'.[60]

The second of Bingham LJ's exceptions in *Watts* allows damages for 'physical inconvenience and discomfort caused by the breach and mental suffering directly related to that inconvenience and discomfort.' Lord Clyde upheld the appeal in *Farley* on this basis. In addition, this approach received subsidiary support from the rest of the Court, though they primarily upheld the claim under the first exception in *Watts*. Nevertheless, on the basis of the judgments in the case, it is very difficult to state definitively the present scope of this exception. For instance, while Lord Steyn and Lord Hutton continued to use the language of 'physical inconvenience', Lord Scott rejected the notion that the inconvenience must be 'physical',[61] and Lord Clyde found it unnecessary to provide any 'detailed analysis or definition' of inconvenience.[62]

A further important issue in the case was the question of how an award for inconvenience and discomfort should be quantified. As with all forms of non-pecuniary loss, this kind of harm is notoriously difficult to measure accurately. One question that arises is how much weight should be given to the particular sensibilities of the claimant.[63] Given that the evidence suggested that most residents in the area were not troubled by the level of noise, the test for measuring discomfort appears to be at least partly subjective. However, any suggestion that such an approach is liable to open the floodgates of liability is rightly played down by McKendrick and Graham, who correctly

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[59] *Farley* (n 2) 746 (Lord Steyn).

[60] ibid 756 (Lord Clyde).

[61] ibid 768.

[62] ibid 753.

[63] This issue is discussed in J Edelman, 'The Meaning of Loss and Enrichment' in Chambers, Mitchell and Penner (eds), *Philosophical Foundation of the Law of Unjust Enrichment* (OUP 2009) 211, 221.

observe that the availability of such damages can be constrained by the rules of remoteness.[64] This suggestion is consistent with the actual decision since the surveyor's liability for non-pecuniary loss there was dependent upon the claimant having specifically drawn the defendant's attention to the issue of aircraft noise. Nevertheless, this is not to suggest that the restrictive approach to the recovery of damages for non-pecuniary loss can be explained simply as an application of the contractual remoteness principle.[65]

3. Recent Developments

a. Stress in the Workplace

Following *Farley*, the Court of Appeal considered four claims brought by employees against their employers for psychiatric illness caused by stress at work in *Hatton v Sutherland*.[66] Each of the claimants based their claim on an allegation that the employers had breached their contractual duty to take reasonable care for the safety of their employees. Three of the claims failed on the basis that the relevant psychiatric injury was not a reasonable foreseeable consequence of the pressure placed on the employee. The fourth claim succeeded on the basis that the psychiatric illness was reasonably foreseeable and the employers had breached their contractual duty of care. The critical difference in this case was that the relevant employee had previously been off work suffering from depression and anxiety.

[64] McKendrick and Graham, 'Contractual Damages for Non-pecuniary Loss' (n 58) 165.

[65] For a defence of this claim see 287 below.

[66] *Hatton v Sutherland* [2002] EWCA Civ 76.

Although the case is sometimes treated as if it were part of the law of torts, the claims were clearly contractual,[67] and are in accordance with the general trend towards wider recovery for non-pecuniary loss. In particular, the decision confirms the view expressed in *Johnson v Unisys Ltd* that employment contracts cannot be treated like ordinary commercial contracts because an employee's interest in the relevant contract is not purely financial.[68] Nevertheless, the significance of *Hatton* should not be overstated, for three reasons. First, the decision makes clear that stress alone is insufficient to ground recovery. It was critical in the case that the stress led to an identifiable psychiatric illness. Secondly, the vast majority of the sum awarded to Hatton was for the earnings she lost as a result of her illness rather than for the physical harm it caused. Thirdly, the threshold requirements the Court laid down for recovery are not easy to satisfy. This is demonstrated by the fact that employees in subsequent cases have struggled to prove that their employer could have reasonably foreseen their psychiatric illness.[69]

b. Damages for a Ruined Holiday

In *Milner v Carnival Plc*,[70] Ward LJ recently provided an explanation of the various different heads of recovery in the context of a ruined holiday. His Lordship differentiated four different potential heads of 'loss' following breach of a contract of this nature. The first he labelled 'pecuniary loss' or 'the diminution in value', which was

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[67] ibid Hale LJ [21]. This is also the view taken in E McKendrick and K Worthington, 'Damages for non-pecuniary loss' in N Cohen and E McKendrick (eds), *Comparative Remedies for Breach of Contract* (Hart 2005) 276.

[68] *Unisys* (n 42) [70].

[69] McKendrick and Worthington, 'Damages for non-pecuniary loss' (n 67); see *Pratley v Surrey County Council* [2003] EWCA Civ 1067; *Barlow v Broxbourne Borough Council* [2003] EWCA 50 (QB); [2003] All ER (D) 208 (Jan).

[70] *Milner v Carnival Plc* [2010] EWCA Civ 389, [2010] PIQR Q3.

'the monetary difference between what was bought and what was supplied'.[71] According to Ward LJ, in the context of a ruined holiday, 'the task is to assess the amount by which the advertised holiday turned out to be less in money terms than the customer had paid for it'.[72] Despite such terminology, this thesis will argue that this is really a claim for substitute performance rather than a compensatory claim for loss. The second was 'consequential pecuniary loss', which 'would cover out-of-pocket expenses such as the cost of alternative accommodation, the cost of alternative travel arrangements and so forth'.[73] On the facts, he awarded the claimants £3,500 and £2,000 respectively under these two heads.

Ward LJ distinguished these awards from those given in response to two further forms of consequential loss that might arise in this context, both of which are non-pecuniary in nature. The first was 'physical inconvenience and discomfort'. Ward LJ noted that the recovery of such damages was long established where the physical inconvenience is 'sufficiently serious'.[74] The second was 'mental distress', which is 'measured by the extent of the failure to meet reasonable expectations... which is a question of fact and degree in each case'.[75] In combination, he awarded Milner £4,000 and his wife £4,500 under these two heads. This decision is useful in distinguishing the various different kinds of awards available in the context of a claim for breach of contract and further demonstrates the more liberal approach to the recovery of damages for 'mental distress' and 'physical inconvenience' recently developed.

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[71] ibid [29].

[72] ibid.

[73] ibid.

[74] ibid; *Hobbs* (n 34) 117 (Cockburn CJ).

[75] ibid [35].

B. DAMAGES FOR 'LOSS OF AMENITY'

The previous section demonstrated the recent expansion in the availability of damages for 'mental distress' for breach of contract. Despite these developments, uncertainty remains. A principal source of this uncertainty is the 'loss of amenity' award in *Ruxley*. This section explains the significance of this decision for the present thesis. The discussion is in two parts. First, the different judicial views expressed in the Court of Appeal and the House of Lords, both in relation to the availability of a 'cost of reinstatement' award and the basis for the 'loss of amenity' award, are explained. The second part considers subsequent judicial analysis of *Ruxley*. The views expressed emphasise the difficulty in explaining *Ruxley* in conventional terms and therefore cast doubt on the adequacy of the orthodox understanding of contract damages.

1. *Ruxley Electronics v Forsyth*

The *Ruxley* decision demonstrates well the fundamental tension at the heart of the expectation principle. There, a swimming pool was built to a depth of six feet, nine inches, rather than seven feet, six inches, as specified. The home owner, Forsyth, refused to pay the contractor, Ruxley, the balance due under the contract and the latter claimed for this amount. At first instance Ruxley succeeded. A counter-claim by Forsyth for the cost of demolishing and rebuilding the pool in accordance with the contractual specifications was dismissed on the ground of 'unreasonableness'. Amongst other findings, such as that the pool as built was safe for diving if no diving board was installed, the trial judge also held that the shallower depth did not affect the market value of the pool and therefore had not caused the claimant any financial loss. Nevertheless, he did accept that the claimant had suffered a 'loss of amenity' and awarded Forsyth £2,500 in recognition thereof.

a. Judicial Approval for Awarding the Cost of Performance

On appeal,[76] Forsyth gave an undertaking to use any damages awarded on a 'cost of reinstatement' basis to actually rebuild the swimming pool in accordance with the original contract. The Court of Appeal accepted the trial judge's finding that as built the pool added the same financial value to the house as the deeper pool would have. Nevertheless, a majority awarded Forsyth the cost of demolishing and rebuilding the pool in accordance with the contract specifications, accepting the trial judge's finding that this was necessary in order for Forsyth to build the pool to the required depth.

In finding in favour of Forsyth, Mann LJ emphasised the *pacta sunt servanda* principle,[77] but acknowledged that there may be cases where awarding the 'cost of rectification' is 'unreasonable'. This was not one of them because the only way to satisfy Forsyth's bargained for 'personal preference' was to rebuild the pool as specified.[78] In the leading speech in the Court of Appeal, Staughton LJ also upheld the appeal but for his Lordship the 'reasonableness' test was simply an application of the doctrine of mitigation.[79] This meant that because Forsyth could mitigate his loss only by rebuilding the pool, he was entitled to damages assessed by reference to the reinstatement measure.[80]

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[76] *Ruxley Electronics & Construction Ltd v Forsyth* [1994] 1 WLR 650 (CA).

[77] ibid 661.

[78] ibid.

[79] *Ruxley* (CA) (n 76), noted by Lord Lloyd in the House of Lords *Ruxley* (n 2) 365.

[80] ibid; 'if there is no alternative course which will provide what he requires, or none which will cost less, he is entitled to the cost of repair or reinstatement even if that is very expensive'.

b. Judicial Disapproval for the Cost of Performance Measure

In contrast to Staughton LJ, Dillon LJ rejected the view that the reasonableness constraint here was simply an aspect of mitigation, stating that while it is true that 'reasonableness lies at the heart of the doctrine of mitigation... [this] is not... the only impact of the concept of reasonableness on the law of damages'.[81] Although his Lordship accepted that the diminution in value measure in these circumstances was nil, he concluded that the appeal should be dismissed because a 'cost of reinstatement' award was 'wholly unreasonable'. Dillon LJ's conclusion that the 'reasonableness' restriction on a 'cost of reinstatement' award is not simply an aspect of the doctrine of mitigation is supported here. To date, however, there has been some confusion in this regard because of the failure to distinguish substitutionary and compensatory awards. Given the undertaking Forsyth provided to use an award of the cost of performance to rebuild, his claim is best understood as of the former, rather than the latter, kind.

Following a further appeal, the House of Lords reinstated the trial judge's award.[82] Again, the central question was not the basis for the £2,500 awarded but whether the claimant was entitled to the cost of rebuilding the pool. It was unanimously held that he was not. Despite the different result, again the House of Lords' reasoning was expressed in terms of 'reasonableness'. After reviewing the relevant authorities, Lord Jauncey affirmed the existence of a reasonable restriction on the cost of obtaining equivalent performance and upheld the trial judge's finding that it was unreasonable to incur the cost of demolishing the existing pool and build a new and deeper one.[83]

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[81] ibid 662. This was expressly supported by Lord Lloyd in the House of Lords *Ruxley* (n 2) 369.

[82] ibid.

[83] ibid 359.

Lord Lloyd expressed a similar view, holding that in cases involving defective construction a 'cost of reinstatement' award should be denied when 'unreasonable'. His Lordship further concluded that this was the case here principally because 'the judge found as a fact that Mr. Forsyth's stated intention of rebuilding the pool would not persist for long after the litigation had been concluded'.[84] According to Lord Lloyd, when denial on this basis was justified, the difference in value between the performance agreed and that provided constituted the appropriate measure for any award, subject to the possibility of an additional award for consequential loss.[85] Since the pool built added the same financial value to the house as the pool contracted for, his Lordship accepted the trial judge's finding that the difference in value measure here was nil.

c. The Basis for the £2,500 Awarded to Forsyth

The sole issue for determination in both the Court of Appeal and the House of Lords was whether the cost of reinstatement was available. However, given the conclusion reached by the House of Lords on this question, the effect of the decision was to reinstate the trial judge's award. Although an explanation of the basis for the £2,500 awarded was not strictly necessary to determine the dispute,[86] both Lord Mustill and Lord Lloyd thought it appropriate to provide some, admittedly obiter, comments concerning its basis.

Lord Mustill stated that contract law 'must cater to those occasions where the value of the promise to the promisee exceeds the financial enhancement of his position which full performance will secure'.[87] In accordance with the relevant economic

[84] ibid 372.

[85] ibid 365-372.

[86] ibid 354 (Lord Bridge).

[87] ibid 360.

literature, his Lordship described this phenomenon as a loss of the 'consumer surplus',[88] which has been defined as the excess in utility or subjective value obtained from a good or service over and above the utility associated with its market price.[89] His Lordship noted further that 'this excess... is usually incapable of precise valuation in terms of money, exactly because it represents a personal, subjective and non-monetary gain'.[90] Lord Mustill, therefore, appeared to view the £2,500 as an award for the subjective loss suffered by Forsyth.

After noting that the trial judge appeared to rationalise the award as one for consequential non-pecuniary loss, Lord Lloyd upheld the award on this basis. His Lordship stated that it was possible or legitimate to make such an award where the aim of the contract was to provide some form of mental satisfaction, describing it as 'a logical application or adaption... to a new situation' of 'the very object of the contract exception' explained by Bingham LJ in *Watts*.[91] Whether Lord Lloyd thought this award should be measured subjectively or objectively is unclear.[92] Consistent with the idea that this is an award for the loss actually suffered by the claimant, the basis for assessment of the loss of 'pleasure' or 'inconvenience' might be thought to be subjective, as Lord Mustill appeared to think. However, it seems more likely that Lord Lloyd took the view that this award was to be assessed objectively on the basis of his Lordship's statement that

[88] ibid 360.

[89] Harris, Ogus and Phillips, 'Contract Remedies and the Consumer Surplus' (1979) LQR 581 582.

[90] *Ruxley* (n 2) 360.

[91] ibid 374.

[92] Contra Edelman, 'The Meaning of Loss and Enrichment' (n 63) 222, who suggests that Lord Lloyd clearly thought the award should be measured objectively.

Forsyth was 'lucky to have obtained so large an award for his disappointed expectations'.[93]

Lord Lloyd also noted that there may be cases where skimped performance does not produce any difference in value *and* does not cause the innocent party any subjective loss of amenity. Significantly, his Lordship stated that in such cases he could see no reason why the law should not award some 'modest sum... to compensate the buyer for his disappointed expectations'.[94] Such an award is not compensatory in the conventional sense since the claimant is not arguing that breach has caused a loss. Rather, at least in some sense, it appears to be a substitute for the performance not provided. His Lordship provided no further view as to how such an award might be measured. This is understandable given that the point did not require determination. One possibility might have been the difference in market price between the pool contracted for and the pool provided. This assumes that the market price of a shallower pool is less than a deeper one. Although this seems logical since presumably a shallower pool is cheaper to build than a deeper one, it will not necessarily be true. A pool builder might price a range of slightly different pools at the same price in order to facilitate consumer choice. In any event, the more fundamental problem with this suggestion is that it can only give rise to a substantive award if the pool is too shallow rather than too deep.

All this demonstrates both the judicial impulse towards substituting for performance and the need for a coherent explanation of the award in *Ruxley*. The account proposed here seeks to provide this explanation in a way that recognises this impulse. In particular, the availability of the kind of objective award alluded to by Lord Lloyd is supported on the basis that it constitutes the best substitute for performance

[93] *Ruxley* (n 2) 374.

[94] ibid.

when an award of the cost of obtaining equivalent performance is unreasonable. Chapter Five argues that the appropriate basis for quantifying such an award is an approximation of the reasonable price of release. Although this measure is objective, the reasonable person test it adopts is flexible enough to take account of certain personal attributes of the claimant, proven on the balance of probabilities.

2. Subsequent Judicial Analysis of *Ruxley*

The principal significance of the *Farley* decision was explained above in the discussion of the availability of damages for mental distress. However, another highly significant aspect of the case was the attempt by various judges to rationalise the award in *Ruxley*. Although a variety of different explanations were offered, the comments of both Lord Mustill and Lord Lloyd received endorsement from all the Law Lords who sat in the later case. Lord Steyn, for instance, stated that he was 'satisfied that the principles enunciated in *Ruxley's* case in support of the award of £2,500 for a breach in respect of the provision of a pleasurable amenity have been authoritatively established'.[95]

Three different explanations for the *Ruxley* award were offered in *Farley*. First, Lord Steyn and Lord Hutton classified the contract in *Ruxley* as one for the provision of a 'pleasurable amenity' so that the damages awarded reflected Forsyth's 'disappointment' at the loss of this amenity. Their Lordships appeared to suggest that the *Ruxley* principle enabled a court to award a sum where there had been a failure to deliver a contractual specification of value to the claimant that would otherwise go uncompensated and that such awards were not restricted to building contracts.[96] Lord Steyn also appeared to express support for Lord Mustill's reasoning based on his reference to the 'consumer

[95] *Farley* (n 2) 749.

[96] See, in particular, ibid 760 (Lord Hutton).

surplus'. However, his Lordship also recognised that 'labels sometimes obscure rather than illuminate',[97] and referred to the £2,500 as a 'moderate sum', which might suggest some sympathy for the approach advocated by Lord Lloyd. Both Lord Steyn and Lord Hutton also endorsed Lord Lloyd's reasoning in *Ruxley*, so it is not entirely clear which of the two distinct approaches they favoured. Secondly, Lord Clyde appeared to suggest that the award of damages in *Ruxley* was for 'inconvenience'.[98] However, as McKendrick and Graham note, this surely cannot be correct since Lord Lloyd actually noted in his judgment that the trial judge in the case awarded Forsyth the sum of £750 for 'general inconvenience and disturbance'.[99] Thirdly, the most radical analysis in *Farley* of the award in *Ruxley* was that offered by Lord Scott, who stated that *Ruxley* establishes:

> 'that if a party's contractual performance has failed to provide to the other contracting party something to which that other was, under the contract, entitled, and which, if provided, would have been of value to that party, then, if there is no other way of compensating the injured party, the injured party should be compensated in damages to the extent of that value'.[100]

His Lordship thus appeared to draw a distinction between the failure to obtain a valuable contractual benefit and the consequential loss, in the form of inconvenience or distress, which may result. While the former should be assessed by reference to the approach in *Ruxley*, the latter should be assessed in accordance with *Watts*. Lord Scott also expressed the view that damages could be awarded to the claimant on *either* basis in

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[97] ibid 748.

[98] ibid 753-756.

[99] McKendrick and Graham, 'Contractual Damages for Non-pecuniary Loss' (n 58) 166 (citing Lord Lloyd in *Ruxley* [1996] AC 344, 363).

[100] *Farley* (n 2) 766.

Farley. As McKendrick has observed,[101] a similar analysis was offered by Lord Millett in *Panatown*.[102] There, his Lordship stated that, viewed objectively, there was no 'loss of amenity' in *Ruxley* and the 'loss' could more accurately be described as a 'defeated expectation'.[103] This explanation of *Ruxley* is significant in the context of the present thesis because it can be understood as recognising the distinction proposed here between substitutive and compensatory awards.

Given views Lord Scott has expressed extra-judicially,[104] it seems unlikely his Lordship would support the existence of the distinction this thesis proposes. On the basis of these writings, in combination with the comments in *Farley*, his Lordship appears to understand the *Ruxley* award as compensation for loss of the subjective value the innocent party attributes to exact performance. However, this thesis argues that the award provided in *Ruxley* is better understood as a substitute for performance when it is unreasonable to award the innocent party the cost of equivalent performance. This was essentially the understanding proposed by Lord Hobhouse in *Blake*, where he explained that the *Ruxley* award was best seen as a 'substitute for performance'.[105] To call this a 'loss' is artificial and liable to confuse. It is preferable to distinguish a failure to obtain contractual performance from the negative consequences that may follow. In *Panatown*, Lord Millett appeared to recognise the existence of this distinction, though his entire discussion occurred within the paradigm of 'loss', confirming the need for the new terminology proposed in Chapter Three of this thesis.

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[101] E McKendrick, 'The Common Law at Work: The Saga of *Alfred McAlpine Construction Ltd v Panatown Ltd*' (2003) 3 OUCLJ 145, 170.

[102] *Panatown* (n 2), discussed at 63.

[103] ibid 588.

[104] Lord Scott, 'Damages' [2007] LMCLQ 465.

[105] *Blake* (n 2) 298.

CONCLUSION

This chapter commenced by observing the internal tension within the expectation principle, which gives rise to two competing interpretations of the purpose of awarding contract damages. The first is an interpretation focussing on compensating for loss. The second recognises the possibility of awards substituting for performance as well. The prevailing orthodoxy is that the former interpretation is correct and the purpose of this chapter was to outline this conventional understanding in sufficient detail for the challenge that follows in the remainder of the thesis. Given that the traditional focus in awarding contract damages has been on compensating for loss, it explained how English law traditionally interprets loss in the contractual context. Although certain exceptions have been recognised, generally loss has been interpreted narrowly, so that damages are available only for proven financial damage, but these exceptions have now so expanded that this narrow interpretation cannot be maintained.

It is worth stressing that the broader definition of loss developed in certain recent cases does not necessarily challenge the status of the orthodox understanding of contract damages. Most, but not all,[106] of the cases discussed in this chapter can be accommodated within the orthodox account if the meaning of loss is extended to include certain forms of non-pecuniary damage, which English contract law previously did not recognise as compensable. The next chapter demonstrates that in addition to such cases there are many awards that cannot be reconciled with the orthodox account, at least without distorting the meaning of loss beyond acceptable boundaries. On this basis, it will be argued that a new understanding of contract damages is required.

[106] For example *White Arrow* (n 29) and possibly *Ruxley* (n 2).

CHAPTER TWO – THE DOCTRINAL INACCURACY OF THE ORTHODOX ACCOUNT

INTRODUCTION

Chapter One outlined the orthodox understanding of contract damages in English law, according to which their purpose is simply to compensate for *loss*. It was explained that recently a broader conception of loss has become accepted in the contractual context but a stable definition of loss remains elusive. The present chapter demonstrates the doctrinal inaccuracy of the conventional account. Section I notes the existence of two categories of award that do not even purport to be compensatory. The first are awards of nominal damages, including awards of substantial nominal damages. The second are awards measured by reference to the gain made by the breaching party. Both of these kinds of awards are manifestly inconsistent with the orthodox account on any understanding of loss.

Section II continues the doctrinal challenge by documenting five categories of case where, despite *purporting* to compensate for loss, English law makes awards that are irreconcilable with the orthodox account. The first are awards for loss suffered by a third party. The second are awards measured by reference to a supposed hypothetical bargain between claimant and defendant. At least some of these awards cannot be classified as compensatory since there is direct evidence that no such bargain would have ever taken place. The third are awards providing an innocent party with more than his actual loss following a defendant's failure to meet a contractually agreed standard. The

fourth are awards for breach of a sale contract that place the innocent party into a better position than if no breach had occurred. Finally, there are further cases where the award is measured by reference to the claimant's initial loss even though this loss is later reduced by subsequent events. In combination, these awards fundamentally challenge the status of the orthodox account.

I. CLEAR EXAMPLES OF MONEY AWARDS NOT BASED ON THE INNOCENT PARTY'S LOSS

This section documents two clear examples of a damages award for breach of contract that is not measured by reference to the loss suffered by the innocent party. The discussion commences with nominal damages awards. It then considers the possibility of gain-based awards. In both kind of case, the court explicitly recognises that it is making a non-compensatory award. Although both awards might be explained as justifiable exceptions to the general rule, the possibility of such awards demonstrates that in responding to a breach of contract the law is not always concerned to provide compensation for loss.

A. NOMINAL DAMAGES FOR BREACH OF CONTRACT

According to Lord Scott, the purpose of nominal damages is vindicatory. Writing extra-judicially, he states that the aim is of such awards is 'to mark the existence of the right in question and to mark the fact of its violation by the wrongdoer'.[107] This section makes two arguments. The first is that the mere existence of the category of 'nominal damages' casts doubt upon the correctness of any understanding of contract damages

[107] Lord Scott, 'Damages' (n 104) 469.

that fails to recognise the significance of the right to performance. The second is that the possibility of *substantial* 'nominal damages' represents a significant challenge to the orthodox understanding of contract damages by illustrating that substantial awards are not invariably concerned with compensating for loss.

1. Conventional Nominal Damages

Awards of nominal damages are generally very small in amount and are given when the claimant demonstrates the existence of a breach but cannot prove any quantifiable loss in consequence. It therefore might be said that 'nominal damages' actually demonstrate the truth of the orthodox account on the basis that substantial awards are only available when the innocent party can prove an identifiable loss. This characterisation of nominal damages is rejected here. In reality, the availability of nominal damages awards for the breach of certain legal duties, including a breach of the duty to perform a contract, is evidence in support of Birks's supposition that 'the notion of a wrong is detachable in principle from the compensable harm suffered'.[108]

The possibility of an award of nominal damages for breach of contract demonstrates that the law places some significance on the infringement of contractual rights since the sole purpose of such an award must be to recognise the breaching party's violation of the other's primary right. As Lord Scott has observed, the only possible purpose of an award of nominal damages is to vindicate the right infringed.[109] The possibility of a nominal damages award demonstrates that English law recognises the distinction between the infringement of a right and its consequences. Nevertheless, the fact that nominal damages are generally insubstantial in amount might be thought to

[108] P Birks, 'The Concept of a Civil Wrong' in D Owen (ed) *The Philosophical Foundations of Tort Law* (OUP 1995) 29, 31 and 36.

[109] Lord Scott, 'Damages' (n 104).

support the orthodox account of contract damages on the basis that such awards do not demonstrate the failure of the orthodox account *of substantive damages* awards for breach of contract. The existence of substantial awards of 'nominal damages' undermines this view.

2. Substantial 'Nominal' Damages

In *Greer v Alstons Engineering Services and Sales Ltd*,[110] Greer had bought a JCB backhoe from Alstons in 1978. Greer took it back to Alstons to be repaired in 1982. After it was returned to him, Greer alleged that it continued to be defective and returned it for further repairs in 1983. When Greer went to collect the machine in 1984, a stalemate developed because he refused to accept it unless he was allowed to test drive it and Alstons refused to allow him to test drive it unless he paid the sum of US $20,342.27, which was the amount outstanding for the repairs carried out in 1982. The Court of Appeal of Trinidad and Tobago ordered Alstons to pay Greer the assessed value of the backhoe less the sum of US $20,342.27 for the 1982 repairs and that Greer should receive the sum of US $5000 as 'nominal damages' for the infringement of its right to use the backhoe between 1982 and 1984, as well as interest from the date of judgment in 1995. Greer appealed to the Privy Council. He argued, inter alia, that he should have been awarded substantial rather than nominal damages for being deprived of the use of the backhoe during the relevant time period.

In allowing the appeal, the Privy Council noted that the 'loss' for which Greer was seeking substantive damages was unquantified. It held that while the sum of US $5000 was on the low side, it was not so low as to be wrong in principle so the award should not be disturbed. In its decision, the Privy Council emphasized that 'nominal'

[110] *Greer v Alstons Engineering Services and Sales Ltd* [2003] UKPC 46.

does not necessarily mean 'small'. Reference was made to *The Mediana*,[111] where a sum was awarded by the House of Lords for the defendant's infringement of the claimant's right to the use of a vessel damaged by the defendants' negligence. In that case, Lord Halsbury LC also stated that 'the term "nominal damages" does not mean small damages'.[112] The decision in *Greer* demonstrates that substantial 'nominal damages' are possible and that damages may be awarded in an action for breach of contract where the claimant cannot prove any loss, or at least where the loss he claims cannot be quantified.

B. GAIN-BASED AWARDS FOR BREACH OF CONTRACT

The possibility of substantial nominal damages awards demonstrates that English law does not award damages only to compensate for an established loss. Another challenge to the hegemony of compensation is the decision in *Attorney-General v Blake*,[113] where the House of Lords unequivocally recognised that in certain circumstances damages may be measured by reference to the profits obtained by the defendant through breach, irrespective of any loss suffered by the claimant in consequence. This decision and subsequent case law confirming its correctness are inconsistent with the orthodox understanding of contract damages.

1. *Attorney-General v Blake*

The facts in *Blake* are well known. Blake was a former member of the British Secret Intelligence Services originally employed in 1944. Between 1951 and 1960 he disclosed secret information to the Russian government. In 1961 he was convicted for

[111] *The Owners of the Steamship "Mediana" v The Owners, Master and Crew of the Lightship "Comet"* [1900] AC 113 (HL).

[112] ibid 116.

[113] *Blake* (n 2).

this and sentenced to forty-two years imprisonment in England. Five years later the Russians freed him and he went to live in Moscow. His contract of employment contained an undertaking not to disclose any information, in any form, about his work in the secret service. This contractual undertaking also applied after his employment ceased. In 1990 Blake published an autobiographical book entitled 'No Other Choice' and entered into an agreement with a UK publisher under which he received some advance payments and was entitled to further royalties.

The British government commenced an action seeking an account of Blake's profits. However, since the information contained in the book was no longer confidential, no action could be brought for breach of confidence and any fiduciary duty that survived the termination of his employment did not extend to keeping secret any information that was no longer confidential. In an action for breach of contract, the Crown claimed whatever amount was owing to Blake from his publisher and an injunction was granted preventing him from receiving any further payments from the publishers. Blake appealed the injunction and the Attorney-General cross appealed, claiming that all profits derived from the book owing to Blake should be paid to the Crown.

In the House of Lords, Lord Nicholls delivered the leading speech and held that in certain exceptional circumstances it may be open to order a breaching party to account for all profits either received, or entitled to be received in future, through breach. Although his Lordship refused to prescribe any 'fixed rules' as to when such a remedy would be available,[114] he held that the instant scenario was such a case, making reference to a number of special aspects of the facts in support. Possibly the most important aspect of the case was that the work of the secret service depends on the confidentiality

[114] ibid 285.

of information and, as a result of his breach of confidentiality Blake was responsible for harming the public interest. Publication of the book was a further breach of that undertaking, even though the information contained within it was no longer secret.

In addition to the case's public interest aspect, Lord Nicholls noted various other considerations that supported the availability of a gain-based response in this case. First, his Lordship observed that the disclosure of such information was a criminal offence under the Official Secrets Act 1911 and that an absolute rule against disclosure was necessary in order to ensure that members of the secret services are able to deal with each other in complete confidence. Secondly, the significant royalties Blake received were due to his ability to capitalise on his notoriety as a Soviet agent. In this context, Lord Nicholls noted the desirability of preventing a party from profiting from his wrong.[115] Thirdly, the usual contractual remedies of (compensatory) damages, specific performance and injunction were inadequate here. This aspect of the case might prompt the suggestion that the award is some kind of proxy for the Crown's unquantifiable loss. However, as Cunnington observes,[116] this rationalisation must fail because profit-stripping has been ordered in cases where no loss had been suffered,[117] and where the claimant's loss was easy to measure.[118] Fourthly, emphasis was also placed on the fact that the undertaking here was akin to a fiduciary obligation, in concluding that this was an appropriate situation in which to impose a profit-stripping remedy.[119] In combination,

[115] 'The broad proposition that a wrongdoer should not be allowed to profit from his wrong has an obvious attraction', ibid 278.

[116] R Cunnington, 'Changing conceptions of compensation' (2007) 66 CLJ 507, 509.

[117] *Boardman v Phipps* [1967] 2 AC 46 (HL).

[118] *Tang Man Sit v Capacious Investments Ltd* [1996] AC 514 (PC).

[119] *Blake* (n 2) 280.

these considerations indicated that the Crown had a 'legitimate interest' in ensuring Blake did not benefit from revealing state information in breach of contract.[120]

The *Blake* decision is highly controversial. It has been argued that it was given per incuriam because 'a supposed contract case was decided without any careful investigation of the very existence of a binding contract, or of its scope and character'.[121] For present purposes, however, its relevance is limited to the fact that the sum of money awarded was clearly measured by reference to the *gain* made by Blake in consequence of his breach. This claim is irrefutable. There is simply no way in which the damages awarded can be characterised as compensating for loss suffered by the Crown, even if one supposes that it was a proxy for an unquantifiable loss. In support of this analysis, Lord Nicholls stated that 'when awarding damages, the law does not adhere slavishly to the conception of compensation for financial measurable loss'.[122] On its face the decision appears to constitute a significant challenge to the orthodox understanding of contract damages since after *Blake* it simply cannot be said that compensation for loss is always the objective in awarding substantive damages for breach of contract.

Despite this, the significance of the challenge *Blake* poses to the orthodox account should not be overstated since it is clear that the award was not designed to put the innocent party into the position he would have been in had the contract been performed. Rather, it was viewed as a legitimate exception to the compensatory principle with Lord Nicholls acknowledging that the availability of a profit-stripping remedy should be confined to exceptional circumstances. In view of this, it might be argued that *Blake* does not seriously challenge the orthodox view but is simply an exception that

[120] ibid.

[121] AWB Simpson, 'A decision per incuriam?' (2009) 125 LQR 433, 439.

[122] *Blake* (n 2) 285.

proves the correctness of the general rule. If *Blake* were the only case to award non-compensatory damages, it would provide little reason to question the correctness of the orthodox account. However, the remainder of this chapter is dedicated to outlining numerous other examples of awards for breach of contract that are inconsistent with the orthodox account. This task commences by showing that the award in *Blake* itself has been endorsed in subsequent cases.

2. Other Gain-Based Awards

Subsequent judicial support for *Blake* can be found in the decision in *Esso Petroleum Co Ltd v Niad*.[123] Niad entered into a pricing agreement with Esso, who supplied the former with petrol for their station. This specific agreement was part of a larger scheme called 'Pricewatch' that Esso had agreed with all retailers in the area. Niad breached the pricing agreement by charging its customers a higher price than agreed under the scheme, meaning Niad paid less to Esso than it would have done if Esso had been aware of the overcharging. Sir Andrew Morritt VC held that the claimants were entitled to elect between three responses: compensatory damages, an account of profits stripping away Esso's gains, or a 'restitutionary remedy' for the amount of price support Niad obtained from Esso.

The distinction between an account of profits and the 'restitutionary remedy' is difficult to draw on these facts but the case is significant in providing a clear example of a gain-based award in a commercial context far removed from the special circumstances in *Blake*. A gain-based response was said to be justified because compensatory damages were inadequate since it was almost impossible for Esso to establish the sales that had been lost on account of Niad's breach. Esso was also said to have a legitimate interest in

[123] *Esso Petroleum Co Ltd v Niad* [2001] All ER (D) 324 (Nov).

performance because Niad's breach undermined the whole Pricewatch scheme. The decision has received some academic criticism on the basis that an account of profits is inappropriate in such a commercial context,[124] but it has subsequently been referred to by the Court of Appeal without disapproval.[125] For present purposes, the significant point is that it is inconsistent with the orthodox understanding of contract damages.

II. OTHER MONEY AWARDS INCONSISTENT WITH THE ORTHODOX ACCOUNT

The previous section demonstrated the existence of awards manifestly inconsistent with the orthodox understanding of contract damages. In no way can it be said that the sum of money awarded in these cases reflects the actual loss suffered by the innocent party in consequence of breach. However, the awards considered in the previous section did not actually purport to be compensatory. Moreover, although these awards demonstrate the possibility of non-compensatory damages, both might legitimately be classified as justifiable exceptions to the general rule that damages are awarded only to compensate for loss. In what follows, examples of contract damages awards that *do* purport to uphold the expectation principle but are nevertheless incompatible with its orthodox understanding are outlined. It is argued that one cannot reconcile these awards with the orthodox account without stretching the terminology of 'loss' beyond acceptable limits. This discrepancy demonstrates the doctrinal inaccuracy

[124] E McKendrick, 'Breach of Contract, Restitution for Wrongs, and Punishment' in Burrows and Peel (eds), *Commercial Remedies* (2003) 93.

[125] *Experience Hendrix LLC v PPS Enterprises Inc* [2003] 1 All ER (Comm) 830 (CA).

of the orthodox account. In consequence, a new understanding of contract damages is required.

A. SUBSTANTIAL MONEY AWARDS FOR LOSS SUFFERED BY A THIRD PARTY

According to the conventional understanding of contract damages, the purpose of such awards is to compensate the victim of a breach of contract for his or her *own* loss. A corollary of this principle is that a claimant should not be able to recover substantial damages for loss suffered by another. This is indeed said to be the general rule in English law.[126] Nevertheless, it is demonstrated below that the exceptions to this rule have now become so broad as to seriously threaten the existence of the general exclusion.

1. Specific Exceptions to the General Exclusionary Rule

There are some well-established exceptions to the general rule that, in an action for breach of contract, a claimant cannot recover more than the amount required to compensate him for his own loss. First, substantial damages can be recovered by a trustee even though the loss is suffered by the beneficiary and the same principle has been held to apply in the context of an agent-principal relationship where the principal is undisclosed.[127] Secondly, in *St Albans' CC v International Computers Ltd*,[128] it was held that a local authority can recover for the loss ultimately suffered by its inhabitants because,

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[126] *Beswick v Beswick* [1968] AC 58 (HL).

[127] Peel (ed), *Treitel* (n 9) 628. For example, *Allen v F O'Hearn & Co* [1937] AC 213 (HL) 218; *Siu Yin Kwan v Eastern Ins Co Ltd* [1994] 2 AC 199 (HL).

[128] *St Albans' CC v International Computers Ltd* [1996] 4 All ER 481.

although it was not strictly a trustee, it was obliged in the circumstances to act in the interests of these inhabitants by recovering damages for their benefit.

In addition, at least since the mid-nineteenth century the general rule has also been subject to a specific exception in the context of contracts for the carriage of goods.[129] In *Dunlop* the House of Lords held that a plaintiff consignor could recover substantial damages from a carrier of goods lost at sea, notwithstanding that by the time the loss occurred, the goods had become the property of the consignee. Although it has been argued that this decision 'has been misunderstood and provides no principled basis for the rule ascribed to it',[130] the decision is now clearly entrenched in English law. In this thesis it is suggested that, despite its possibly shaky foundations, the result in the case is desirable because it is independently justifiable by reference to a broader principle underpinning the law of contract damages.

The continued existence of this exception was confirmed by the House of Lords in *The Albazero*,[131] albeit subject to an important qualification. This was that the rule would not assist the consignor if the consignee had himself acquired a right to sue the ship-owner under the contract or the contracting parties had contemplated a second contract, such as a bill of lading, coming into existence between the carrier and the actual owner, which regulated the liabilities between them in relation to the goods carried.[132] This qualified version of the rule from *Dunlop v Lambert* is commonly referred to as 'the *Albazero* exception'.[133] In *The Albazero* itself, this qualification meant that the claimant

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[129] *Dunlop v Lambert* (1839) 6 Cl & F 600.

[130] B Coote, '*Dunlop v Lambert*: the Search for a Rationale' (1998) 13 JCL 91.

[131] *Owners of Cargo Laden on Board the Albacruz v Owners of the Albazero* [1977] AC 774 (HL).

[132] Coote, '*Dunlop v Lambert*' (n 130) 91.

[133] For example, Peel (ed), *Treitel* (n 9) 629.

was not entitled to recover substantial damages in respect of the loss suffered by the relevant third party. It should also be noted that *The Albazero* has now been replaced by the Carriage of Goods by Sea Act 1992. However, in relation to contracts to which this legislation applies, a special statutory exception to the general rule that a contracting party can recover damages only for its own loss is created by section 2(4) of the Act.

The rule in *Dunlop v Lambert*, even in the form qualified by *The Albazero*, clearly conflicts with the conventional understanding of contract damages. However, given its very particular application to contracts involving the carriage of goods, it might be characterised as a limited exception to the general rule, which poses no serious threat to the orthodox account. This position has become far more difficult to maintain following a line of decisions concerned with the breach of a construction contract. These cases have significantly extended the scope of the *Albazero* exception. It is worth noting, however, that there were some signs of judicial dissatisfaction with the general exclusion even before they were decided.

2. The Extension of the *Albazero* Exception

Lord Denning doubted the validity of the general exclusionary rule in a very different context in *Jackson v Horizon Holidays Ltd.*[134] The defendants contracted to provide holiday accommodation to the claimant, his wife and their two young children. The accommodation fell well short of the promised standard and at trial the claimant recovered damages, including £500 for 'mental distress'.[135] In the Court of Appeal, Lord Denning held that although this amount would have been excessive compensation if given only for the claimant's own distress, the award should be upheld on the basis that,

[134] *Jackson v Horizon Holidays Ltd* [1975] 1 WLR 1468 (CA).

[135] ibid 1472.

in addition to his own loss, the claimant was entitled to recover in respect of the loss suffered by his wife and children.[136]

Lord Denning's approach in *Jackson*, though not the actual sum awarded, was subject to disapproval in the subsequent House of Lords decision in *Woodar Investments Developments Ltd v Wimpey Construction UK Ltd*,[137] on the basis that it was inconsistent with *Beswick v Beswick*, where it was held that a testator's estate could not recover more than nominal damages for the executor's breach of contract since it had suffered no loss in consequence.[138] However, the Court noted that *Jackson* was supportable on the alternative ground that the damages awarded were for the claimant's own loss.

In *Woodar*, a contract for the sale of land required the purchaser to pay £150,000 to a third party on completion. The vendor claimed damages on the basis that the purchaser had wrongfully repudiated the contract. However, because no such repudiation was held to have occurred, the damages question did not arise for determination. Despite this, obiter comments were made describing the hypothetical question of damages as one of 'great doubt and difficulty'[139] and suggesting that the general rule prohibiting a promisee from recovering for loss suffered by a third party for the benefit of whom the contract was entered into was 'most unsatisfactory'.[140]

This sort of judicial sentiment has contributed to the recent expansion of the *Albazero* exception in a line of cases beginning with *Linden Gardens Trust Ltd v Lenesta*

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[136] ibid.

[137] *Woodar Investments Developments Ltd v Wimpey Construction UK Ltd* [1980] 1 WLR 277 (HL). The House of Lords expressed further disapproval for Lord Denning's approach in *Jackson* in *White v Jones* [1995] 2 AC 207 (HL).

[138] *Beswick* (n 126).

[139] *Woodar* (n 137) 284 (Lord Wilberforce).

[140] ibid 291 (Lord Salmon).

Sludge Disposals Ltd,[141] where a building contract provided that the contractor would develop a site owned by the employer. The site was later transferred by the employer to a third party. The proceedings assumed this third party had suffered financial loss in consequence of having to remedy breaches of the building contract committed after this transfer. The contractor defended the employer's action for substantial damages in the predictable way by arguing that he had suffered no loss so any damages must be nominal.

The House of Lords rejected this argument but two distinct bases for this conclusion are evident in the judgments. First, the principal, narrower ground on which the employer's argument in *Linden Gardens* was denied was the one stated by Lord Browne-Wilkinson in *Panatown*. There, his Lordship expressed the view that a promisee can recover a third party's loss on a contract relating to property (whether goods or land) where it was contemplated that the property in question would be transferred to the third party, or where it was otherwise contemplated that loss in respect of that property would be suffered by the third party. Secondly, the employer's claim in *Linden Gardens* was upheld by Lord Griffiths on what has become known as the 'broad ground' for recovery. Lord Griffiths held that a contracting party may suffer financial loss where he has 'had to spend money to give him the benefit of the bargain which the defendant had promised but failed to deliver'.[142] Although other members of the Court expressed sympathy with this view they did not commit to it.[143] Significantly, however, this suggestion was endorsed by Lord Goff and Lord Millett in a similar context in *Alfred McAlpine Construction Ltd v Panatown Ltd*.[144] This case is considered below.

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[141] *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85 (HL).

[142] ibid 97.

[143] This is observed by Steyn LJ in *Darlington Borough Council v Wiltshier Northern Limited* [1995] 1 WLR 68 (CA).

[144] *Panatown* (n 2).

Finally, in *Darlington BC v Wiltshier Northern Ltd*,[145] the Court of Appeal further extended the narrow principle from *Linden Gardens* to a situation in which there was no actual transfer of the property affected by the breach from the promisee to the third party that is claiming for substantial damages. The need for such a holding arose from the particular facts that arose in that case. A local authority wished to develop land that it already owned. Because of government restrictions on local authority borrowing, the transaction was structured so that there was a building contract between the bank financing the development and the builder, as well as a contract between the council and the bank, under which the bank undertook to procure the erection of the buildings, pay all sums due under the building contract and assign the benefit of any rights against the defendant to the council. The bank duly assigned its rights against the defendant to the council, which claimed damages as assignee in respect of defects in the work done by the defendant. The problem faced by the council was that an assignee cannot recover more than the assignor could have done and here the assigning bank had not itself suffered any loss. Nevertheless, the Linden Gardens principle was extended to cover this situation and the correctness of this finding was later approved by the House of Lords in *Panatown*.[146]

The overall effect of these decisions is that a promisee can now recover a third party's loss on a contract relating to property, whether goods or land, where it was contemplated that the property in question would be transferred to the third party or where it was otherwise contemplated that loss in respect of that property would be suffered by the third party. The rationale for this has been said to be that it prevents a defeating of the parties' intentions where it was anticipated that the real loss would be

[145] *Darlington* (n 143).

[146] *Panatown* (n 2) 531 (Lord Clyde), 566 (Lord Jauncey).

suffered by a third party rather than the promisee, thus preventing the disappearance of a substantial claim down a legal 'black-hole' where the promisee can sue but has suffered no loss and, because of the privity doctrine, the third party has suffered loss but cannot sue.[147] As foreshadowed above, this principle was further considered and refined in the important House of Lords decision in *Panatown*.

3. The Significance of *Panatown*

In this case Panatown contracted with McAlpine for the purpose of constructing an office building in Cambridge. Panatown and UIPL were companies controlled by the same parent, Unex. UIPL owned the site in question but Panatown made the contract for the site's development. The purpose of structuring the transaction in this way was so that UIPL could limit its VAT liability. A separate Duty of Care Deed was entered into between McAlpine and UIPL on the same day as the main contract was concluded under which McAlpine accepted limited liability for negligence. This deed contained a reference to the fact that in concluding the building contract Panatown was 'acting on behalf of' the building owner UIPL. However, it was clear that UIPL was not a party to the main contract.

Panatown therefore entered the main contract with McAlpine as principal in its own right and not as an agent for UIPL. Nevertheless, the collateral warranty in the Duty of Care Deed did give UIPL a direct right against McAlpine to claim damages if the latter breached its contractual duty of care to Panatown under the main contract. In the event, the construction work was both late in being completed and defective. However, when Panatown sued McAlpine for breach of contract, claiming damages for defective

[147] See Lord Diplock in *The Albazero* [1977] AC 774, 847. The 'black-hole' terminology originated with Lord Stewart in *GUS Property Management Ltd v Littlewoods Mail Order Stores Ltd* 1982 SC (HL) 157, 166.

performance and delay, the latter responded that Panatown had suffered no financial loss as a result of the breach and was therefore only entitled to nominal damages. The ensuring litigation was protracted and complicated.[148] Relevantly, McAlpine appealed Panatown's partial victory in the Court of Appeal in obtaining substantial damages.[149]

a. Support for a Narrow Interpretation of Loss

The House of Lords upheld McAlpine's appeal by a majority of 3-2. The majority comprised Lord Clyde, Lord Jauncey and Lord Browne-Wilkinson. Their reasoning proceeded in three steps, although in one critical respect their Lordships were not in agreement. First, all three stated that the general rule in an action for breach of contract is that a claimant can recover damages only in respect of its own loss. Secondly, all three recognised the existence of an exception to this general rule in the form of the 'narrow ground' in *Linden Gardens*.[150] It was explained above that this exception provides that a promisee can recover a third party's loss on a contract relating to property where it was contemplated that the property in question would be transferred to the third party or where it was otherwise contemplated that loss in respect of that property would be suffered by the third party. The majority held, however, that this exception is inapplicable when the third party has been given a direct remedy against the promisor, as the duty of care deed did in *Panatown*.[151]

The third and final step in the reasoning of Lord Clyde and Lord Jauncey was a rejection of Lord Griffiths's broader ground for recovery in *Linden Gardens*. There, Lord Griffiths held that a person who enters a contract but does not get what was bargained

[148] See McKendrick, 'The Common Law at Work' (n 101) 152.

[149] *Alfred McAlpine Construction Ltd v Panatown Ltd* (1998) 98 Construction L Rep 46 (CA) 75.

[150] *Linden Gardens* (n 141).

[151] *Panatown* (n 2) 577 (Lord Browne-Wilkinson).

for suffered financial loss merely 'because he has to spend money to give him the benefit of the bargain which the defendant had promised but failed to deliver'.[152] Although this principle was not accepted by Lord Clyde and Lord Jauncey, uncertainty over its status after *Panatown* was created by the judgment of Lord Browne-Wilkinson, since he was prepared to 'assume' Lord Griffiths's principle was 'sound in law' but felt he did not need to decide the point conclusively in this case.[153] This was because of the existence of UIPL's direct remedy against McAlpine in the Duty of Care Deed. Lord Clyde, by contrast, rejected Lord Griffiths's 'broad ground' in *Linden Gardens* on the basis that:

> 'A breach of contract may cause a loss, but it is not in itself a loss in any meaningful sense. When one refers to a loss in the context of a breach of contract, one is referring to the incidence of some personal or patrimonial damage'.[154]

b. Support for a Broader Understanding of Loss

The minority in *Panatown* comprised Lord Goff and Lord Millett. Both of their Lordships supported Lord Griffiths's broad ground in *Linden Gardens* on the basis that it is a general principle of English law that a promisee suffers loss where services contracted for are not performed. Significantly, their Lordships held that because this is a general principle, rather than an exception to a general rule, there was no reason why it should not apply when the third party had its own direct remedy against the promisor. In consequence, on the facts both Lord Goff and Lord Millett held that Panatown was entitled to substantial damages. Thus, the essential question upon which the difference in opinion in *Panatown* turned was whether the mere failure to receive a contractually

[152] *Linden Gardens* (n 141) 97.

[153] *Panatown* (n 2) 577.

[154] ibid 534.

agreed performance is itself a 'loss'. While Lord Clyde and Lord Jauncey thought it was not and Lord Goff and Lord Millett thought otherwise, Lord Browne-Wilkinson's reasoning is equivocal. As explained more fully below, the view endorsed here is that, although the terminology of 'loss' should be eschewed in this context, the position taken by Lord Goff and Lord Millett is correct in substance.[155]

4. Appraising the Current Legal Position

The ratio in *Panatown* is not easily stated but the preferable view is that a majority of the House of Lords recognised that, absent a duty of care deed, Panatown had a right to recover the cost of obtaining the agreed performance, irrespective of whether they suffered any quantifiable financial loss.[156] Nevertheless, even if this view is not accepted, it is clear that, where a contract is made for the benefit of a third party, the law governing the recovery of damages for breach cannot be reconciled easily with the prevailing orthodoxy. Indeed, this is probably the least that can be said. In the view of one set of commentators, writing shortly after the *Linden Gardens* and *Darlington* decisions, and before *Panatown*:

> 'It is now plain that *Dunlop v Lambert* has become the basis of dramatic new departures in the law of damages. It has been credited with propositions far from its reasoning and recruited to solve problems far from its facts. Through the series of building cases discussed... the principle attributed to it by Lord Diplock in *The Albazero* has been extended to situations where: (i) the subject matter of the contract is real rather than personal property; (ii) the contract prohibits

[155] See 127 below.

[156] This was how the decision was understood on the remitter: *Alfred McAlpine Construction Ltd v Panatown Ltd (No.2)* [2001] EWCA Civ 485, [20]. This point is noted in J Edelman, 'Money awards of the cost of performance' (2010) 4 Journal of Equity 122.

assignment of its benefit to third parties; (iii) no property passes during the life of the contract, the identity of the owner remaining constant; and (iv) the party in breach enters into direct legal relations with the owner or other party who bears the loss. In all these situations substantial damages were awarded. The result is that the *Dunlop v Lambert* 'exception' now seems larger than the general rule which spawned it, while the general rule itself seems more hole than target'.[157]

Depending on how one understands the significance of *Panatown*, the *Albazero* principle may have been extended even further now. In more recent developments, the reasoning of Lord Goff and Lord Millett in *Panatown* has been applied by lower courts in *Mirant Construction (Hong Kong) Ltd v Ove Arup & Partners International Ltd*,[158] and *Technotrade v Larkstore Ltd*.[159] This reasoning was also recently endorsed by Stadlen J in *Giedo Van der Garde BV v Force India Formula One Team Limited*.[160] Despite this, the principle remains controversial. In *DRC Distribution Ltd v Ulva Ltd*,[161] it was said that to the extent this principle exists it should be confined to services cases, suggesting that it does not apply to contracts for the sale of goods. The principal reason for this controversy is the dominance of the conventional understanding of contract damages. However, once a preoccupation with loss is jettisoned, awards of the kind just described can be recognised as unexceptional examples of awards substituting for performance.

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[157] N Palmer and G Tolhurst, 'Compensatory and Extra-Compensatory Damages: Linden Gardens and the Lord Griffiths' Principle' (1998) 13 JCL 143.

[158] *Mirant Construction (Hong Kong) Ltd v Ove Arup & Partners International Ltd* [2007] EWHC 918 (TCC).

[159] *Technotrade v Larkstore Ltd* [2006] EWCA Civ 1079.

[160] *Giedo Van der Garde BV v Force India Formula One Team Limited* [2010] EWHC 2373 (QB). This case is discussed further below at 200.

[161] *DRC Distribution Ltd v Ulva Ltd* [2007] EWHC 1716.

B. AWARDS ASSESSED BY REFERENCE TO A HYPOTHETICAL BARGAIN

1. Awards in Lieu of a Restorative Injunction

In *Wrotham Park Estate Co v Parkside Homes Ltd*,[162] the defendant erected homes on its land in breach of a restrictive covenant that required it to obtain prior approval from the claimant before commencing building. The defendant built 14 houses and a road from which it eventually made a profit of £50,000. Shortly after the development work began, the claimant issued a writ seeking a final injunction to restrain any further building on the land and the demolition of the building work done up to this point. At trial, Brightman J refused to order the mandatory restorative injunction sought, finding that it would have constituted an 'unpardonable waste of much needed houses'.[163] Instead, he awarded damages in lieu under Lord Cairns' Act.[164] His Honour thought that the claimant ought to receive damages on a 'fair' basis which he assessed as 5% of the defendant's anticipated profits. This, he described as 'a sum that might reasonably have been demanded 'as a quid pro quo for relaxing the covenant'.[165]

Strictly speaking, the cause of action in *Wrotham Park* was not for breach of contract since the rights arose from a previous contract. Nevertheless, as the Court of Appeal observed in *Blake*, 'the measure of damages cannot depend on whether the proceedings are between the original parties to the contract or their successors in title'.[166]

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

[163] ibid 811.

[164] The Chancery Amendment Act, 1858.

[165] *Wrotham Park* (n 162) 815.

[166] *Attorney General v Blake* [1998] Ch 439 (CA).

Therefore, exactly the same issue would have arisen if the litigation had been between the parties to the initial contract so this aspect of the case should not have affected the result.

The award in *Wrotham Park* cannot be explained as an instance of compensation for financial loss since the claimant conceded that the value of their land was not reduced by the defendant's building, and evidence suggested that the claimant would never have agreed to release the defendant from the covenant. The claimant was therefore financially no worse off as a result of the breach. Nevertheless, Sharpe and Waddams argued that the relevant 'loss' was the lost opportunity to bargain for the release of the covenant.[167] This argument was correctly dismissed by Professor Burrows more than twenty years ago as fictional on the basis that there was no evidence that the claimant would ever have agreed to release the defendant from the covenant.[168]

Burrows recently reiterated this view in the process of arguing forcefully that, whichever way one looks at it, *Wrotham Park* damages cannot be explained as a compensatory award for loss.[169] In addition to considering the possibility that *Wrotham Park* damages are best characterised as compensation for a lost opportunity to bargain, Burrows examined three other possible loss-based explanations of the award, rejecting them all. He considered these suggestions not just in relation to the award in *Wrotham Park* itself but in relation to the subsequent cases that have followed it in awarding damages based on a 'hypothetical release bargain'.

The first suggestion considered by Burrows is that the damages were awarded as compensation for the claimant's lost opportunity to apply for an injunction. He notes

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[167] R Sharpe and S Waddams, 'Damages for Lost Opportunity to Bargain' (1982) 2 OJLS 290.

[168] A Burrows, *Remedies for Tort and Breach of Contract* (1st edn OUP 1987), 275.

[169] A Burrows, 'Are 'Damages on the Wrotham Park Basis' Compensatory, Restitutionary or Neither?' in R Cunnington and D Saidov (eds), *Contract Damages: Domestic and International Perspectives* (Hart 2008) 165.

that this was the language used by Gabriel Moss QC in assessing *Wrotham Park* damages in *Tamares (Vincent Square) Ltd v Fairpoint*.[170] However, Burrows observes that in both *Tamares* and *Wrotham Park* the claimant knew that the development was going on and therefore had the opportunity to apply for an interim injunction before the work was done so this simply cannot be a satisfactory explanation of these awards.

The second possibility examined is Professor McInnes's argument that that the damages in *Wrotham Park* were awarded as compensation for a lost right.[171] Burrows's main objection to this suggestion is that to say that the claimant's rights have been lost 'seems to slide into a false use of the word lost'.[172] This objection is supported here on the basis that to classify breach as a loss conflates the distinction between the infringement of a right and its consequences. Burrows's suggests that what McInnes may really have in mind is that 'the claimant has lost the opportunity to exercise control over property that proprietary rights give'.[173] According to Burrows, this falls foul of the same objection as the explanation based on the alleged loss of opportunity to apply for an injunction.[174]

The third possible compensatory analysis of *Wrotham Park* postulated is that the award is intended to compensate the claimant on an objective basis for any factual benefits lost as a result of the infringement. Burrows suggests that this explanation comes very close to McInnes's argument but avoids talking about compensation for a

[170] *Tamares (Vincent Square) Ltd v Fairpoint* [2007] EWHC 212 (Ch).

[171] See M McInnes, 'Gain, Loss and the User Principle' (2006) RLR 76.

[172] Burrows, 'Wrotham Park Damages' (n 169) 173.

[173] ibid.

[174] ibid.

lost right.[175] Any supposed similarity between these two explanations is rejected here. If the true basis for the award was compensation for lost factual benefits, this is quite distinct from a substantial award for the infringement of a right. Burrows rejects this explanation on the basis that it cannot explain cases, such as *Wrotham Park* itself, where the infringement of the right has not resulted in the objective loss of factual benefits.

Professor Edelman objects to Burrows's dismissal of this argument, arguing that the damages awarded in *Wrotham Park* are best explained as compensation for non-pecuniary loss suffered by the claimant in consequence of breach.[176] This analysis is artificial for two reasons. First, this was clearly not the basis on which Brightman J thought he was awarding damages since there is no mention in the judgment of any of the alleged non-pecuniary losses Edelman mentions. Secondly, unsurprisingly there is no attempt to explain the correspondence between these non-pecuniary losses and the amount awarded.

A preferable analysis is Edelman's previous explanation that it is an award of the market value of the valuable contractual rights transferred from claimant to defendant through breach. Edelman labels this award 'restitutionary damages'.[177] This thesis eschews this terminology in preference for describing the award as a reasonable approximation of the price of release. This is the alternative measure of performance appropriate when awarding the cost of equivalent performance is unquantifiable or unreasonable. The latter measure was unreasonable here because the public interest in preventing the wasteful removal of valuable housing outweighed the claimant's right to substitute performance. Alternatively, this measure might have been unquantifiable

[175] ibid 173.

[176] Edelman, 'The Meaning of Loss and Enrichment' (n 63), 214.

[177] J Edelman, *Gain-based Damages: Contract, Tort, Equity and Intellectual Property* (Hart 2002), 179.

because the houses were on the defendant's land so it was not possible for the claimant to obtain equivalent performance. *Wrotham Park* therefore defies a compensatory analysis. For Burrows, the best interpretation of the award is that it was based upon the gain made by the defendant.[178] A gain-based analysis of the award is possible but for present purposes the aim is simply to demonstrate that the award does not compensate for loss and is therefore at odds with the orthodox understanding of contract damages.

Finally, it should be noted that the kind of award given in *Wrotham Park* based on a hypothetical release bargain has not been limited to the specific facts that arose there. On the contrary, damages of this sort have been awarded in a range of other cases involving a breach of contract where the duty in question has been concerned to protect real or personal property, or an interest analogous to property. For example, such damages have been awarded for breach of a collateral contract restricting the development of land,[179] and for breach of a negative contractual obligation concerned to restrict the defendant's use of master tapes,[180] or of particular initials.[181] Moreover, in *Giedo Van der Garde BV & anr v Force India Formula One Team Limited (formerly Spyker F1 Team Ltd (England))*,[182] Stadlen J held that such awards were not limited to cases based on an invasion of property rights and that there was also no requirement that the claim be based on a breach of a restrictive covenant or that claimant be seeking injunctive relief or damages in lieu of injunctive relief under Lord Cairns' Act.[183] This final point is highly

[178] Burrows, 'Wrotham Park Damages' (n 169).

[179] *Lane v O'Brien Homes Ltd* [2004] EWHC 303 (QB).

[180] *Experience Hendrix* (n 125).

[181] *World Wide Fund for Nature v World Wide Wrestling Federation* [2007] EWCA Civ 286 (CA).

[182] *Force India* (n 160).

[183] ibid [533].

significant in the context of the present thesis in recognising the possibility of awards at *common law* measured by reference to a hypothetical release bargain.

2. Breach of a Prohibitive Injunction

British Motor Trade Association v Gilbert[184] was decided prior to *Wrotham Park* but the case was concerned with the same basic problem. The claimant was trying to control the price of cars during a shortage. It therefore required buyers to covenant not to re-sell for two years any car purchased without the claimant's consent. Consent would only be given if the car was first offered to the claimant at the original price, less tax and depreciation. The defendant bought a car for £1,263 and re-sold it a month later on the open market for £2,200. An injunction had been obtained by the claimant but the car was sold in breach of this. At trial, the validity of the scheme was upheld but the appropriate measure of damages was not clear. The claimant had not suffered a financial loss since the scheme prevented it from selling the car at the free market price. In these circumstances, Danckwerts J ordered the defendant to pay the claimant the difference between the original price of the car and the open market value, which he calculated at £100 less than the sum for which the car was actually sold.

Edelman argues that the sum of £836 awarded in *Gilbert*, like the award in *Wrotham Park*, is best understood as an example of 'restitutionary damages' for breach of contract.[185] In *Blake*, Lord Nicholls cited the case as an instance of profit-stripping.[186] Edelman describes this as 'disgorgement',[187] but suggests that Danckwerts J really treated

[184] *British Motor Trade Association v Gilbert* [1951] 2 All ER 641.

[185] Edelman, *Gain-based Damages* (n 177) 174-75.

[186] *Blake* (n 2) 283.

[187] Edelman, *Gain-based Damages* (n 177) 81.

the case as one of 'restitutionary damages' since his focus on the price at which the defendant sold the car was not for the purposes of quantifying the defendant's actual profit but in order to ascertain the open market value of the car. Edelman appears to derive support for this conclusion from the fact that Danckwerts J calculated the hypothetical market price at £100 less than the sum for which the car was actually sold.[188]

Gilbert defies a compensatory analysis since the claimant did not suffer any loss in consequence of the breach. The award might be explained as a measure of the value transferred from claimant to defendant by breach. Alternatively, it can be understood as an attempt to provide an appropriate substitute for performance in circumstances where actual performance was impossible, and therefore the cost of equivalent performance was unquantifiable. Edelman's explanation is consistent with the account preferred here but this thesis prefers to eschew the 'restitutionary damages' terminology on the basis that, in substance, the award is an attempt to substitute for the performance the claimant was entitled to but cannot now obtain.

In support of this analysis, Edelman himself admits that Danckwerts J was not interested in the defendant's profits for their own sake but because they were evidence of the market value of the contractual right infringed. In view of the definition of loss advocated in this thesis, which excludes the infringement of a right, for the purposes of conceptual clarity it is important that gain also be understood in a purely factual sense. For this reason, this thesis prefers to classify the awards that Edelman labels 'restitutionary damages' as instances of the alternative measure of performance that should be available when awarding cost of obtaining equivalent performance is either unreasonable or unquantifiable. As Chapter Five explains, this alternative measure is an approximation of the reasonable price of release from performance.

[188] ibid 175.

3. Breaches of Exclusivity and Confidentiality

a. Exclusivity

The nature of '*Wrotham Park* damages' was revisited by the Privy Council in *Pell Frischmann Engineering Limited v Bow Valley Iran Limited & Others*.[189] The claimant (PFE) and defendant (BVE) were involved in negotiations for a joint venture following a tender for oilfield contracts with the National Iranian Oil Company (NIOC). In November 1996 they entered into an agreement which provided that BVE not divulge any of PFE's information to a third party, that BVE would not approach NIOC directly on any of the projects without PFE's consent, and that BVE would work exclusively on the projects with PFE. The relationship between BVE and PFE was tumultuous and collapsed in early July, 1997. In addition, PFE 'had irretrievably become *persona non grata* with NIOC'[190] so that NIOC would not conclude a contract with PFE. In breach of the agreement between BVE and PFE, on 28 July 2007 BVE entered into a contract with NIOC on essentially the same terms that had been proposed by the joint venture. BVE's contract with NIOC turned out to be considerably less profitable than expected and BVE's eventual profit was between US $1m and US $1.8m.

At first instance, PFE's claim for certain breaches of contract was unsuccessful save that BVE and one of the other defendants were liable to PFE for breach of the obligation of confidence. £500,000 was awarded to PFE, who appealed to the Court of Appeal of Jersey. BVE cross-appealed as to quantum and interest. The Court of Appeal adopted a different construction of the agreement, finding that the defendants were in breach of express contractual terms, as well as being in breach of an equitable obligation

[189] *Pell Frischmann Engineering Ltd v Bow Valley Iran Ltd* [2009] UKPC 45; [2010] BLR 73.

[190] ibid [53].

of confidence, but held that the award of £500,000 was still appropriate as '*Wrotham Park* damages'.

An appeal by PFE was upheld and the damages for breach of contract increased to £2,500,000. The central issue for the Privy Council was how the '*Wrotham Park* damages' for breach of contract should be measured. Unfortunately, the nature of these damages was not clarified. They were expressed to be awarded for the 'invasion of rights'[191] and, when awarded under Lord Cairns' Act, as 'compensation for the court's decision not to grant equitable relief'[192] and being of 'a quasi-equitable nature'.[193] The discussion revolved around whether the damages were compensatory or restitutionary. Regardless of whether a gain-based analysis is possible, they cannot satisfactorily be characterised as based on financial loss since it was held that PFE and BVE would never have reached agreement on a release and an analysis of the award as one for non-pecuniary loss is very difficult to reconcile with the very substantial amount awarded. Chapter Five again contends that this award is best understood as substitutionary.[194]

b. Confidentiality

An even more recent example of this kind of award in a similar context occurred in *Vercoe v Rutland Fund Management Ltd.*[195] A venture capital company, Rutland, breached the terms of a confidentiality agreement with Vercoe by using confidential proposals about a management buy-in opportunity to proceed with the transaction without

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[191] ibid [48].

[192] ibid.

[193] ibid [54].

[194] This is also the analysis endorsed in T Cutts, 'Wrotham Park damages: compensation, restitution or a substitute for the value of the infringement of the right?' [2010] LMCLQ 215.

[195] *Vercoe v Rutland Fund Management Ltd* [2010] EWHC 424 (Ch), [2010] Bus LR D141.

involving the parties who had proposed the opportunity, as the agreement required. The parties had agreed that if the defendant had breached its obligations, damages should be assessed by reference to what Rutland should have agreed to pay for the consent of Vercoe (and the proposer) to its using the confidential information for a purpose other than the business plan.

Applying *Wrotham Park*, and giving weight to the analysis in *Pell Frischmann*, Sales J agreed that this was the appropriate measure of damages in a case such as this. Significantly, his Lordship stressed that '*Wrotham Park* damages' are not based on a simple assessment of what the parties to an agreement would have *in fact* agreed as the price to be paid by the obligor to the obligee to secure release from the negative covenant in question. Rather:

> 'In assessing damages for breach of the restrictive covenant the court constructed a *hypothetical* agreement, based on what would have been a reasonable payment to make for relaxation of the covenant in all the circumstances of the case'.[196]

If the focus here was on what the parties would have actually agreed, such awards might be characterised as for a lost opportunity to bargain. However, the assessment of the award on the basis of a hypothetical agreement conducted between reasonable parties rather than on what the parties would have actually agreed means that this analysis is fictional. The award cannot be said to be for a loss actually suffered if the innocent party would never have agreed to the release. The possibility of such awards therefore further demonstrates the limitations of the conventional understanding of contract damages. The preferable analysis of such awards, Part II contends, is that they are an appropriate

[196] ibid [290] (emphasis added).

substitute for performance when both compelled performance, and an award of the cost of equivalent performance, are inappropriate.

C. AWARDS FOR 'SKIMPED PERFORMANCE'

On occasion, a party may breach its contract by providing a level of performance that falls short of the contractually agreed standard without causing the innocent party any loss. Recall that this is precisely what occurred in *White Arrow*,[197] which was discussed in Chapter One. This section examines some further examples of this phenomenon in the services context where a substantial sum nevertheless was awarded.

1. Contracts of Employment

In *National Coal Board v Galley*,[198] a deputy was in breach of contract by refusing to work on Saturdays over a period of several months. His refusal was part of wider industrial action. The combined effect of the refusal to work by the defendant and other deputies was that no productive work was possible at the colliery on a Saturday for some two months until the claimant succeeded in obtaining substitutes at a cost. In addition, the claimant suffered a loss in production of nearly £4,000 until the substitute deputies were obtained. The Court of Appeal held that it could not be shown that the claimant's loss of production had been caused or contributed to by the defendant's breach of contract because, due to the others' strike action, he would not have worked at the coal face if he had presented himself for work on Saturdays. Nevertheless, the claimant's failure to prove any consequential financial loss from breach was held not to prevent it

[197] *White Arrow* (n 29).

[198] *National Coal Board v Galley* [1958] 1 WLR 16 (CA).

from recovering a substantial sum measured by reference to the market value of the work which the defendant was contracted to provide.

In *Royle v Trafford Borough Council*,[199] a teacher with a class of 31 pupils had, in breach of contract, refused an instruction to take a further five pupils. The employer had suffered no loss as a result of this breach but, following *Galley,* Park J awarded five thirty sixths of the teacher's salary, which he regarded as representing the notional value of the services which the teacher had not rendered. Thus *Royle v Trafford*, like *Galley*, was a case in which damages for the breach of a contract for services were awarded despite the absence of consequential financial loss. These damages were assessed by reference to the value of the services contracted for but not delivered.

Another example of this type of case is *Miles v Wakefield MDC*,[200] where claimant was a registrar of marriages who refused to officiate at weddings for three hours every Saturday morning. In response, his employer deducted three thirty sevenths from his weekly salary. The claimant sought to recover this difference in salary on the basis that the council had suffered no loss in consequence of breach. This was because, he argued, the only effect of his refusal to conduct wedding ceremonies on Saturdays was that members of the public who wished to be married on that day at the Wakefield District Registry would be disappointed. The House of Lords rejected this argument and held that the employer council was entitled to deduct the wages they had.

The question of quantification is critical in these cases. In both *Royle* and *Miles*, the damages were assessed by reference to a proportion of the contract price that reflected the proportion of the services not provided. Also, in all three cases damages were awarded despite the fact that the claimants did not incur the cost of purchasing

[199] *Royle v Trafford Borough Council* [1984] IRLR 184.

[200] *Miles v Wakefield MDC* [1987] AC 539 (HL).

equivalent services elsewhere and therefore suffered no loss. In *Royle*, for instance, Park J appears to have assumed that the award of damages to the employer in *Galley* of the cost of employing a substitute employee was to compensate it for the financial loss it suffered in *having* to employ a substitute even though it had not actually incurred the cost of employing a substitute during this period.

2. Contracts for Building Work

In certain situations when one party defectively performs a building contract, the law will award the victim the cost of curing this defective performance. Traditionally, such awards have been characterised as one method of compensating a claimant for loss suffered in consequence of breach. Such an award is said to be one of two possible measures of the claimant's financial loss.[201] In addition to the difficulty of simultaneously recognising two very different measures of financial loss,[202] the problem with this understanding is that it is highly artificial to say that this amount constitutes the claimant's loss if at the time of judgment the claimant has not cured the defect or, more importantly, has no intention to do so in the future.

That such an award is possible when the claimant has no intention to cure is demonstrated by *H. Dakin & Co Ltd v Lee*.[203] Concrete had been laid to a depth of 1.5-2 feet rather than four feet as specified in the contract. Following a claim by the builder for the balance due under the contract, the Court of Appeal held that the owner of the land was entitled to set off his entitlement to the cost of curing this defect from the amount owing to the builder under the contract. This was the case even though it was

[201] For example, *Tito v Waddell (No.2)* [1977] Ch 106 (Megarry VC); the other being the 'difference in value' between the performance contracted for and that provided.

[202] This point is made by Smith, 'Substitutionary Damages' (n 6) 96.

[203] *H. Dakin & Co Ltd v Lee* [1916] KB 566.

clear that the claimant thought the work as performed was sufficient for its purpose and therefore had no intention to make the work comply with the contractual specifications. Additional judicial support for the availability of the cost of repairs in circumstances where an intention to repair is not clear exists.[204] These cases are explored more fully in Chapter Five.[205]

A similar but different kind of over-compensation can result from a claim for the cost of repairing a defective performance when the breach has resulted in damage to the innocent party's property, which cannot be rectified without putting the property in better condition than it was before the breach. This occurred in *Harbutt's "Plasticine" v Wayne Tank & Pump Co*,[206] where the breach of contract caused a fire that destroyed the claimant's factory. The Court of Appeal awarded the clamant the full cost of building a new factory even though this put it in a better position than it would have been in had the breach not occurred. Such an award is also inconsistent with the compensatory principle. However, this is not an award that can be explained as a substitute for performance. Rather, the course of action taken by the claimant was necessary to keep their business going and thereby mitigate its loss of profits.[207] Nevertheless, it does further demonstrate that English law does not adhere slavishly to the compensatory principle when there is good reason to depart from this principle.

[204] For example *Darlington* (n 143) (Steyn LJ); *Dean v Ainley* [1987] 1 WLR 1729 (CA) 1737 (Kerr LJ).

[205] See 234 below.

[206] *Harbutt's "Plasticine" Ltd v Wayne Tank and Pump Co Ltd* [1970] 1 QB 447 (CA).

[207] ibid 468 (Denning LJ).

3. Tenant's Obligation to Repair

Although the common law position has now been altered by statute,[208] a similar point can be made in relation to the case law on covenants to render up premises in good repair at the expiration of a lease. In *Joyner v Weeks*,[209] a tenant was in breach of a covenant of repair but the landlord had suffered no realised financial loss because part of the repaired premises would have been demolished and the landlord had entered into another lease under which the subsequent tenant agreed to effect any remaining repairs. Applying the orthodox approach to contract damages, the landlord should not have been entitled to substantial damages as he avoided incurring a loss. Nevertheless, the claim for substantial damages succeeded.

The Divisional Court held that the claimant was entitled to compensation based on the difference in value between the repaired and unrepaired premises. This award is inconsistent with the compensatory principle since the landlord ultimately suffered no financial loss on the facts. Significantly, however, the Court of Appeal overturned this decision, holding that the damages should be assessed by reference to the cost of the repairs. This award is even more difficult to reconcile with the conventional understanding of contract damages since it cannot be said, as it might be in relation to a 'difference in value' award, that this award is a measure of the claimant's immediate financial loss at the date of breach. As the Court of Appeal stated:

[208] Landlord and Tenant Act 1927 s 18(1).

[209] *Joyner v Weeks* [1891] 2 QB 31 (CA).

> 'many cases may be put in which it is plainly immaterial that at the commencement of an action for a breach of contract the plaintiff is in fact no worse off than he would have been if the contract had been performed.'[210]

The Court of Appeal's decision can be understood as an early example of an award of the cost of obtaining equivalent performance in circumstances where there was no intention to undertake the necessary repairs. Moreover, the Divisional Court's ruling can be understood as an early attempt to award the alternative performance measure in circumstances were actual performance would not occur, since the difference in value between the repaired and unrepaired premises constitutes a good approximation of the price a reasonable person in the landlord's position would accept to release the other party from performance. The difference of opinion between the two courts, therefore, is best understood simply as a disagreement about what substitute for performance to provide in the circumstances. *Joyner* therefore both clearly demonstrates the inadequacy of the orthodox account and is powerful support for the particular understanding of contract damages this thesis advances.

D. AWARDS FOR BREACH OF A CONTRACT OF SALE

A substantial area of English law that does not conform rigidly to the compensatory principle is that governing the award of damages for breach of a contract for the sale of goods. Because of the rules that apply here in quantifying damages, a buyer whose contract is breached by the seller may be entitled to a sum of money that places that party in a better position than it would have occupied had the contract been performed. For the purposes of exposition, it is useful to divide this area into cases of

[210] ibid 33.

non-delivery, late delivery and delivery of defective goods.[211] For each distinct area it is shown that sometimes damages are awarded that are inconsistent with the compensatory principle.

Before doing this, however, a potential objection to the inclusion of these cases must be addressed. As outlined below, the appropriate measure of damages for breach of a sale contract is stipulated by the Sale of Goods Act 1979. Because these measures are mandated by statute, it might be claimed that the incompatibility of these cases with the compensatory principle does not contradict the truth of the orthodox account because the purpose of awarding damages for breach of contract at *common law* is to put the innocent party into the same factual position they would have been in had the contract been performed. Any such objection is refuted here for two distinct reasons.

First, even if this measure of damages is characterised as imposed wholly by statute, it has now been discussed and interpreted by judges in a number of cases and this discussion has frequently involved consideration of how these statutory rules fit with the compensatory objective of contract damages.[212] To the extent that these discussions form the ratio of these decisions, it is now part of the corpus of case law that a comprehensive theory must explain. Secondly, and more importantly, the relevant sections of the Sale of Goods Act merely codify the old common law position. For example, in *Jones v Just*,[213] which precedes the first version of the relevant statute,[214] the claimant contracted to buy a quantity of first quality hemp but received second quality hemp. Between breach and trial the market price of the second quality hemp rose and

[211] This is the approach taken in Peel (ed), *Treitel* (n 9) 1017.

[212] See, for example, *Bence Graphics International Ltd v Fasson UK Ltd* [1998] QB 87 (CA).

[213] *Jones v Just* (1868) LR 3 QB 197.

[214] Sale of Goods Act 1897.

the claimant onsold the delivered hemp at substantially the same price at which the first quality hemp had stood at the time of delivery. A strong bench, consisting of Cockburn CJ, Blackburn and Mellor JJ, approved the trial judge's direction to the jury that damages should be measured by reference to the difference between the market value of the hemp contracted for and the hemp received at the date of delivery. These principles have been incorporated into the modern statutory provisions.[215]

1. Non-delivery

By virtue of section 51(3) of the Sale of Goods Act 1979, where a seller fails to deliver goods for which there is an 'available market' (i.e. they can be freely bought or sold at a price fixed by supply and demand),[216] the buyer's measure of damages is '*prima facie* to be ascertained by the difference between the contract price and the market or current price of the goods' at the date of breach. If the buyer does in fact go into the market to purchase substitute goods at the prevailing price, this measure accurately reflects his initial financial loss, although this loss may yet be eliminated, reduced or increased by subsequent events. However, in *Williams Bros v ET Agius Ltd*,[217] it was held that this 'difference in value' measure will not be displaced by demonstrating that on the particular facts of the case the buyer was not actually left as worse off as the 'difference in value' measure would suggest.

In *Williams* the defendant sellers failed to deliver coal that they had agreed to sell to the claimants for 16s 3d per ton. At the time of breach the market price was 23s 6d per ton. The *prima facie* measure of damages under section 51(3) was therefore 7s 3d per

[215] Sale of Goods Act 1979 s 53(3).

[216] This is the definition in Peel (ed), *Treitel* (n 9) 1017.

[217] *Williams Bros v ET Agius Ltd* [1914] AC 510 (HL).

ton. However, the claimants had also agreed to sell coal of the same quantity and description to a sub-buyer at a price of 19s per ton. Although the claimants intended to use the coal from the contract with the defendants to fulfil the contract with the sub-buyer, they were under no obligation to do so. Therefore, they could have fulfilled their contract with the sub-buyers by going into the market to purchase substitute coal. In the event, however, the claimants did not purchase substitute goods at the higher market price.

In addition, for reasons relating to the particular structure of the transaction, there was no chance of their being sued for non-delivery by the sub-buyer. The defendant's breach thus left the claimants with a financial loss (2s 9d per ton) that was less than the damages they were entitled to under s.51(3) (7s 3d per ton). Despite this, the House of Lords refused to reduce the damages payable, awarding the claimants the difference in value between the main contract price and the market price at the date of breach. As Burrows observes, if contract damages are awarded simply to compensate a claimant for actual loss suffered, then the award in *Williams* wrongly over-compensates the claimants.[218]

Professor Bridge has suggested that the justification for the 'market rule' lies in certain benefits it provides such as commercial certainty and simplicity of application.[219] It is true that applying this rule in cases like *Williams* makes the task of quantifying damages simpler and improves the seller's ability to predict his potential liability upon breach. These considerations also provide sound practical reasons for the rule's continued existence, irrespective of whether one accepts the account of contract damages

[218] Burrows, *Remedies* (n 9) 213.

[219] M Bridge, 'The Market Rule of Damages Assessment' in Cunnington and Saidov (eds), *Contract Damages: Domestic and International Perspectives* (Hart Publishing 2008) 431.

advanced here. Nevertheless, there are two problems with the suggestion that such policy concerns justify the rule's existence. First, as the majority observed in *The Golden Victory*, it is not entirely clear why policy concerns such as these should override the compensatory principle. Further argument is needed to show that they are sufficiently important to do so. Secondly, and more fundamentally, while sub-sales are not taken into account where they reduce a buyer's loss, they may be taken into account when they increase a buyer's loss, provided the consequential loss they cause is not 'too remote'.

This second claim is demonstrated by *Re (R & H) Hall Ltd and Pim (WH) (Jnr) and Co's Arbitration*.[220] Although more complicated, the facts there were similar to those in *Williams* in relevant respects. The defendants agreed to sell the claimants wheat at the price of 51s 9d a quarter. Shortly thereafter the claimants' sub-sold goods of the same quality and description to a third party (X) for 56s 9d a quarter. X further agreed to sell such a cargo to Y for a higher price. The defendants then bought a cargo of wheat on board SS Indianic at 60s a quarter and secured agreement from all concerned that all the sub-sales should be treated as re-sales of the goods that constituted the subject matter of the preceding purchase in the chain. The defendant gave notice appropriating the Indianic cargo to its contract with the claimant and that notice was passed down the chain. However, the defendant sold the Indianic cargo to a third party for a price greater than that at which it was contracted to sell to the claimants. Having sold the cargo, the defendant was unable to deliver the documents covering the cargo to the claimant. This constituted a breach of contract. When the cargo arrived, which was the date of breach, the market price was 53s 9d a quarter.

The claimant claimed the difference between the contract price (51s 9d) and the price under the sub-sale to X (56s 9d). The House of Lords found in favour of the

[220] *Re (R & H) Hall Ltd and Pim (WH)(Jnr) and Co's Arbitration* (1928) 33 Com Cas 324 (HL).

claimant, reversing the Court of Appeal's decision to limit damages to the difference between the market price (53s 9d) and the contract price (51s 9d) at the date of the breach. It was further held that the claimant was entitled to an indemnity for the damages and costs which they would have to pay to the buyers who had bought from them and were liable to provide goods under the second sub-sale contract. Consequential loss suffered over and above the 'loss' reflected in the market rule was thus compensated; it being decided that this loss was not too remote because both parties were aware of the likelihood that the cargo would be resold whilst afloat. This was not only on the basis the contract itself provided for resale of the cargo but also because there was correspondence concerning the actual appropriation of the vessel and on the basis that the resale of cargoes whilst afloat was common practice in the relevant industry.

If simplicity of application and commercial certainty provided the true justification for the market rule, the rule would be applied consistently regardless of whether it increased or decreased a buyer's loss. Therefore, it must be that there is some other principle that justifies overriding the compensatory principle when a buyer is given the benefit of the market rule even though his actual loss is less than the amount awarded. This principle is that the claimant's right to performance should be upheld. The reason that the applicable legal rule differs between cases where loss is increased and loss is reduced is that when loss is reduced, the two principles conflict and the more fundamental one must override; when loss is increased, however, the two principles point in the same direction, which means that the various policy considerations supporting a consistent rule are not sufficiently strong to override them.

2. Late Delivery

More difficult than the case law on breach of a sale contract through non-delivery is that concerning breach because of delayed delivery. Where delay in delivery is a ground for rejection, and the right to reject is exercised, the buyer's damages are assessed in the same way as for non-delivery;[221] namely by reference to the difference in value between the market price at the date of breach and the contract price. Where late delivery is accepted, however, the buyer's actual loss would seem to depend on his intended use of the goods. If he intended to keep the goods for himself he has lost the use of those goods during the period of delay as well as any consequential loss that has resulted from him not having possession of the goods during that period. This is subject, of course, to the relevant limiting doctrines that apply to the recovery of such loss. If the goods were intended to be resold his *prima facie* loss is the difference between the market value at the date at which delivery was supposed to occur and the date it actually occurred.

Again, the case law in this area cannot be reconciled with the compensatory principle. In *Wertheim v Chicoutimi Pulp Co*,[222] the defendant agreed to sell the claimant 3,000 tons of wood pulp for delivery by November 1900. Before this agreement was concluded, the buyer contracted to sell 2,000 tons of wood pulp and after the agreement was concluded, they made contracts to sell an extra 1,000 tons. Delivery by the seller was delayed until June 1901 by which time there was an extraordinary drop in the market price from 70s per ton to 42s 6d per ton. Despite the delay, the buyers were able to

[221] Peel (ed), *Treitel* (n 9) 1018.

[222] *Wertheim v Chicoutimi Pulp Co* [1911] AC 301 (PC).

perform their sub-sale contracts. The price obtained by the buyers on these sub-sales was 65s per ton.

The buyers sought to recover the difference between the market price at the time performance was due and the market price at the time of actual delivery. This is the normal measure for delayed delivery,[223] at least if the buyer intended to resell the goods in the market, as was the case here.[224] Nevertheless, the Privy Council refused this claim on the basis that the buyers had avoided the majority of this loss via the sub-sales. This decision is clearly supported by the compensatory principle since, as outlined by Lord Atkinson, an award of such damages would have put the buyers in a better position than if the contract had been performed.[225] The difficulty, however, is that damages were assessed instead by reference to the difference between the market price at the time performance was due and the price under the sub-sales (i.e. 5s per ton). As Professor McLauchlan observes:

> '[This] did in fact overcompensate him... The plaintiff's position if the contract had been performed and his actual position were exactly the same since he was able to fulfil the sub-sales without buying in substitute goods at the higher market price. That price was irrelevant to the damages calculation on the particular facts'. [226]

The best explanation for this award is that it constitutes an early example of a money substitute for performance in circumstances where substitute performance of the

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[223] D McLauchlan, 'Expectation Damages: Avoided Loss, Offsetting Gains and Subsequent Events' in Cunnington and Saidov (eds), *Contract Damages: Domestic and International Perspectives* (Hart 2008) 349, 363.

[224] See Peel (ed), *Treitel* (n 9) 1018-1019.

[225] *Wertheim* (n 222) 308.

[226] McLauchlan, 'Expectation Damages: Avoided Loss, Offsetting Gains and Subsequent Events' (n 223) 363.

contract was not possible. English law has developed significantly since then so that it is now far more willing to make substitutionary awards in these circumstances.[227] As noted already, a major difficulty in this regard is finding an appropriate basis for quantifying an award of this kind since the appropriate measure is not obvious. Chapter Five argues that the best solution is to award the victim of breach an approximation of the amount a reasonable person in her position would have accepted to release the other party from performance. Since the relevant breach in *Wertheim* was only with respect to time, the award there can be seen as an approximation of the amount a reasonable person in the claimant's position would have accepted to waive the entitlement to timely performance. Regardless of whether this explanation is accepted, it is clear that the damages awarded in *Wertheim* are inconsistent with the orthodox account.

3. Defective Goods

The *prima facie* measure of damages for the provision of defective goods under a contract of sale is stipulated by section 53(3) of the Sale of Goods Act 1979. It provides that the receipt of goods that are not up to warranty entitles a buyer to damages assessed by reference to the difference in value between the goods promised and the goods received. Those maintaining the supremacy of the compensatory principle must characterise this measure as accurately capturing the loss suffered by the buyer as a result of the seller's breach. If, after receipt of defective goods, a buyer sells on those goods at the market price of the goods he received then it could be said that the buyer's loss is the difference between the market value of what was promised and the market value of what was received. However, it will be shown that in some situations this measure simply does not reflect the true loss suffered by the buyer.

[227] For example, *Wrotham Park* (n 162); *Pell Frischmann* (n 189); *Vercoe* (n 195).

a. Slater v Hoyle & Smith Ltd

A clear instance of when the measure stipulated by s 53(3) fails to accurately reflect the buyer's loss is when the defective goods are sold on to a sub-buyer. Often times, this occurs under a sub-contract that was entered into prior to the main contract of sale, or, even if the sub-contract is entered into after the formation of the main contract, sometimes the actual transfer of goods between buyer and seller under the main contract will occur after the formation of the sub-contract. When the defective goods are sold on for the same amount that they would have been sold at without the defect, the buyer may not have suffered any actual loss as a result of the seller's breach. It may be that the buyer suffers some financial loss, which turns out to be less than the difference in market value measure. Nevertheless, if he still receives the difference in value measure then damages are not being measured by reference to his actual loss. This is precisely what happened in *Slater v Hoyle & Smith Ltd.*[228]

The claimant buyer contracted to buy unbleached cotton cloth from the defendant seller. After the cloth was delivered, they bleached it and then used it to fulfil a previously formed contract of sale with a third party. The cloth supplied by the seller was inferior in quality to that warranted under the contract and in accordance with section 53(3) of the Sale of Goods Act 1979 the buyer recovered damages assessed by reference to the difference between the market value of the cloth delivered at the time of delivery and the market value of the cloth warranted. This was despite the fact that the buyer finished up in a position no worse off than he would have been in had the goods not been defective since the price under the sub-sale contract was paid in full and no claims were brought by the sub-buyers.

[228] *Slater v Hoyle & Smith Ltd* [1920] 2 KB 11 (CA).

Two attempts have been made to explain the damages awarded in *Slater* as compensation for loss. Ultimately neither of them is convincing. In the case itself, Warrington LJ observed that since the sub-sale contract did not oblige the buyers to deliver to the sub-buyer the same goods that they had received under the main contract of sale, the buyers could have gone out and purchased other goods on the market to fulfil the sub-sale.[229] It could be contended that the difference in value between these two amounts is the loss suffered by the buyers. It is true that if the buyers had actually done this, the difference in value measure would have constituted their true loss since they would have paid the market value of goods conforming to warranty but be in possession of defective goods of a lesser value. However, the problem with this argument is that the compensatory principle is normally understood to be concerned with the innocent party's actual, rather than hypothetical, position, at least where this can be quantified at the date of assessment.

A second explanation of *Slater* is that a buyer who contracts for goods of a particular quality but receives goods of inferior quality suffers actual loss by paying too much for inferior goods. This seems to more accurately reflect Warrington LJ's decision.[230] It is also has academic support.[231] However, this is not a measure of the actual loss suffered by the buyer for the same reason that in the end this did not make a difference to the claimant's actual position when the goods were sold on. Nevertheless, this second attempt to explain the award holds intuitive appeal. This is not because this measure identifies the true loss suffered by the buyer, but because it suggests the real reason why damages should be awarded in such a case.

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[229] ibid 17.

[230] ibid 18.

[231] See C Hawes, 'Damages for defective goods' (2005) 121 LQR 389, 391.

In the process of attempting to explain the result in *Slater* by reference to loss, Hawes notes that a buyer in such a situation has 'simply received less than the agreed consideration for his payment'.[232] In other words, his right to performance has been only partially respected and the amount required enabling him to obtain the performance he was entitled to is the difference in value between what he contracted for and what he received. Although, as it turned out, this deficiency in performance made no difference to his overall financial position, this does not change the fact that the buyer did not get what was contracted for. It is therefore the seller's failure to comply with the buyer's right to performance rather than the compensatory principle or some policy consideration that generates the entitlement to the difference in value measure. This measure is the appropriate substitute for performance because it constitutes the amount required to enable the innocent party to sell the defective goods on the market and purchase the goods desired. Despite suggestions to the contrary, the decision in *Slater* is not consistent with the compensatory principle. The buyers recovered the cost of ensuring performance despite the fact that the seller's breach left them no worse off.

b. Bence Graphics

Similar arguments to those just considered were relied upon by the Court of Appeal to deny a claim for substantial damages in *Bence Graphics International Ltd v Fasson UK Ltd*.[233] The seller (Fasson UK Ltd) was the manufacturer of vinyl film, which it sold to Bence. It was a condition of the contract of sale that the film would stay in good condition for 5 years. Bence printed ID marks on the film and sold it on to customers for use in labelling bulk containers. There was a defect in the film that caused it to degrade so that the marks became illegible, which created the potential for claims against

[232] ibid.

[233] *Bence* (n 212).

Bence. Although some complaints were made by the end user, these resulted in only one relatively minor claim, which was settled by Bence and reimbursed by Fasson. In an action for damages for breach of contract, Bence sought to recover the whole purchase price of £564,000.

At first instance, the judge upheld Bence's claim. He applied section 53(3) of the Sale of Goods Act 1979 in deciding that the appropriate measure of damages was the difference in value between the goods on delivery and the value of the goods as warranted under the contract. After finding that the film delivered was worthless, he thus concluded that Bence was entitled to recover the purchase price in full. However, by a majority, the Court of Appeal allowed an appeal by Fasson holding that the seller's liability was limited to restitution of the price paid for the small amount of film which Bence had not used but returned to Fasson, plus the amount of Bence's liability to the ultimate users since this, in their opinion, constituted Bence's actual loss. While the trial judge's decision was based on a straightforward application of s. 53(3) of Sale of Goods Act 1979, the Court of Appeal's conclusion was based on section 53(2) of the 1979 Act, which was said to express the 'basic rule in terms of *Hadley v. Baxendale*'.

Although the court correctly observed that the actual loss suffered was far less than the damages claimed, preoccupation with loss led it to overlook that damages could and should have still been awarded on the alternative basis outlined above. On its face, the decision in *Bence* supports the conventional understanding of the contract damages but the decision is problematic for two main reasons. First, the majority treated the case as turning upon whether the recovery of the loss claimed was too remote a consequence of breach. This was a mistake. When the sum claimed is cost of curing the defective performance in the market, no issue of remoteness arises. Part II of this thesis argues that the reason for this is that this claim is in reality one seeking a substitute for

performance and the remoteness doctrine only applies to the recovery of compensation for loss. However, even if this is not accepted, it has never been thought that the doctrine of remoteness applies to restrict a claim for this kind of 'direct' loss.[234] Secondly, as Stevens has noted,[235] the *Bence* majority failed to provide any convincing basis for distinguishing the case from the earlier binding decision in *Slater*. For these reasons *Bence's* value as a precedent is minimal. In support of this conclusion, its reasoning has been confined to cases involving the delivery of defective goods.[236]

4. Summary

The discussion above demonstrates that the law concerned with quantifying damages for the breach of a contract of sale cannot be satisfactorily explained by reference to the conventional understanding of contract damages. The significance of this is open to debate. It might be argued that it only establishes that this area of the law exhibits a complex compromise between the compensatory principle and certain conflicting policy objectives such as the desirability of promoting commercial certainty and the efficient settlement of disputes.[237] On this view, the failure to consistently adhere to the compensatory principle may be no more problematic than the challenge posed from the opposite direction by doctrines that limit the amount of compensation a party may recover.

It cannot be denied that such policies have exerted influence over the law's development. Nevertheless, a consistent application of these policies should dictate that

[234] See GH Treitel, 'Damages for breach of warranty of quality' (1997) 113 LQR 188.

[235] Stevens, 'Damages and the Right to Performance' (n 3).

[236] *Bear Stearns Bank Plc v Forum Global Equity Ltd* [2007] EWHC 1576 (Comm).

[237] Bridge, 'The Market Rule of Damages Assessment' (n 219).

they apply equally when loss is reduced, rather than increased, by subsequent events. This is not presently the case. Moreover, even if it might be possible to explain the law by reference to such policies, it is not possible to explain other situations in which the law departs from the compensatory principle in the same way, suggesting that something more fundamental is at stake.

In trying to defend the conventional view, it might be responded that other departures can be explained by reference to different policy concerns applying in particular contexts. In moving the law increasingly further away from the ideal of justificatory coherence,[238] this argument is unappealing. The principle that like cases be treated alike demands that unifying principles be sought where possible. It is therefore necessary to ask whether the law's refusal to adhere stringently to the compensatory principle when awarding damages for breach of contract in a variety of different contexts can only be explained by reference to specific policy considerations operating in these different contexts, or is explicable by reference to a more general principle unifying these various cases in a coherent fashion. This thesis suggests that the aim of providing an appropriate substitute for performance provides the overarching principle explaining most, if not all, instances where the law departs from a strict compensatory analysis.

E. OTHER AWARDS FOR LOSS REDUCED BY POST-BREACH EVENTS

The victim of a breach of contract may be entitled to an award greater than her actual loss when some or all of the loss initially suffered has been made good by events occurring subsequent to breach. The truth of this proposition is well demonstrated by the case law just examined on damages for the breach of a sale contract. This section demonstrates that the existence of this phenomenon is not confined to such

[238] See, for example Dworkin, *Law's Empire* (n 13) and Weinrib, *The Idea of Private Law* (n 17).

circumstances. First, it considers the position when a party's initial loss is reduced by the receipt of money from a third party. Secondly, it considers the effect of other post-breach events reducing an initial loss. Finally, the particular problem raised by the important House of Lords' decision in *The Golden Victory* is considered. This case raises the problem of quantifying contract damages in a highly commercial context, where it is arguable that the demands of certainty are particularly pressing.

1. Payments by Third Parties

In English law, third party payments to the victim of a wrong generally are not taken into account when assessing the victim's entitlement to damages from the wrongdoer.[239] For instance, a party may be insured against certain losses he may suffer following another's breach but the fact that he has recovered under his insurance policy does not prevent the recovery of substantial damages.[240] Similarly, it has been held that, if the claimant receives a benevolent payment from a third party that has the effect of reducing its loss, in principle this should not affect its entitlement to substantial damages.[241] Such payments are said to be *res inter alios actae*.

These rules might be explained as upholding certain policies. For instance, the position with respect to benevolent payments might be explained on the basis that benevolence should not be discouraged.[242] Similarly, the status of insurance payouts might be rationalised on the basis that to do otherwise would be a disincentive to insure, or simply by reference to the perceived unfairness of punishing those who take sensible

[239] For discussion see Burrows, *Remedies* (n 9) 161.

[240] *Bradburn v Great Western Railway Co* (1874-75) LR 10 Exch 1; *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* (1992) 57 Build LR 57 (CA), 85.

[241] *Merrett v Capitol Indemnity Group Corp* [1991] 1 Lloyd's Rep 169.

[242] *Parry v Cleaver* [1970] AC 1 (HL).

precautions against potential future loss. There is also some support for such explanations in the cases.[243] Nevertheless, although these rules may be supported by policy, a more principled explanation for the availability of such damages is that sometimes awards are provided in substitution for performance rather than as compensation for loss..

2. Loss Reduced by Other Acts

In *Needler Financial Services Ltd v Taber*,[244] Needler was the financial adviser of the company that Taber worked for. In breach of its contractual duty of care, Needler advised Taber to transfer the deferred benefits to which he was entitled under an occupational pension scheme to a personal pension with a mutual life assurance society. When Taber retired eight years later he discovered his pension was less valuable, by about £21,000, than it would have been had he not transferred it in accordance with the advice received. A year before this discovery, however, Taber had been given shares in the company to which the society had transferred its business upon demutualisation and had sold these shares for nearly £8,000. Sir Andrew Morritt V-C held that this did not reduce the loss recoverable by Taber on the basis that the benefit:

> 'was not caused by and did not flow, as part of a continuous transaction, from the negligence. In causation terms the breach of duty gave rise to the opportunity to receive the profit but did not cause it'.[245]

This conclusion has been heavily criticised by McLauchlan on the ground that Taber received the benefit from the very transaction induced by breach. He concludes

[243] ibid (Lord Reid).

[244] *Needler Financial Services Ltd v Taber* [2002] 3 All ER 501 (Ch).

[245] ibid 512.

that the case is inconsistent with the compensatory principle and therefore was decided incorrectly.[246] That this award contravenes the compensatory principle is certainly correct. Without the breach of duty, Taber would not have lost £21,000 but he also would not have gained £8,000. On this basis, the case is inconsistent with the orthodox account.

The inadequacy of the orthodox account is demonstrated further by *Gardner v Marsh & Parsons*.[247] The claimants lessees entered into a lease contract with the owner of the relevant property in reliance on a report provided by the defendant surveyors. The report failed to reveal a serious structural defect in the property only discovered three years later when the claimants were attempting to sell the property. The lease contract obliged the owner to repair structural defects. The owner eventually did this, but only after a two year delay which involved protracted negotiations and the threat of legal proceedings from the claimants. Nevertheless, by majority, the Court of Appeal upheld the claimant's action against the surveyors for the full difference between the value of the property without the defects and its market value with defects at the date of purchase.

This decision is difficult to reconcile with the orthodox account. The repair of the defects constituted a post-breach event that reduced the initial loss suffered by the claimant. Moreover, since the lease purchased by the claimants actually conferred a right to repairs from the owner, this is not a case where it can be said that the loss-reducing event was unrelated to the breach.[248] A substantial award might have been made alternatively for legal costs and other expenses incurred in getting the repairs done and

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[246] McLauchlan, 'Expectation Damages: Avoided Loss, Offsetting Gains and Subsequent Events' (n 223) 380.

[247] *Gardner v Marsh & Parsons* [1997] 1 WLR 489 (CA).

[248] Contra Hirst LJ, ibid 503.

attempting to resell the property, or for the substantial inconvenience caused by the whole ordeal. However, this was not the basis on which the award was made.

Finally, the decision in *Rodocanachi Sons & Co v Milburn Bros*[249] provides further evidence that substantial damages may be awarded to a claimant despite the fact that the loss initially suffered has been made good by subsequent events. The claimant charterer brought an action for breach of contract against the defendant ship-owner to recover the market value of cargo lost on account of negligence by the Master of the ship. The charterer had entered into a contract to sell the cargo on at a price considerably lower than the market price pertaining at the time the goods should have arrived. This sale was conducted on a 'to arrive' basis so that the charterer had no obligation to the sub-buyer should the cargo fail to arrive.

The Court of Appeal rejected the defendant's argument that in assessing damages account should be taken of the charterer's sub-sale price because the claimant should not be placed in a better position than he would have been in had the contract not been breached. It was held that the market value of the cargo was recoverable 'independently of any circumstances peculiar to the claimant' since the sub-sale contract was viewed as something 'accidental as between the plaintiff and defendant'.[250] Thus, *Rodocanachi* is inconsistent with orthodoxy since the claimant ended up in a better financial position than he would have been in had the contract been performed. The decision was expressly approved by the House of Lords in *Williams Bros.*[251]

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[249] *Rodocanachi Sons & Co v Milburn Bros* (1887) 18 QBD 67 (CA).

[250] ibid per Lord Esher MR, 77. Similar statements can be found in the judgments of Lindley LJ, 78 and Lopes LJ, 80.

[251] For discussion of this case, see 85 above.

3. Loss Reduced by the Outbreak of War: *The Golden Victory*

The issue that arose in *The Golden Victory* was the appropriate quantification of damages following a ship owner's acceptance of a repudiation of a time charter during its term. The charterer repudiated by returning the vessel to the owner on September 14, 2001 when there were still almost four years left to run. Three days later the owner accepted the repudiation and claimed damages based on the difference between the contract and the market rates of hire for the entire four year period. Although the owner did not actually claim to have entered into a substitute contract at the market rate, in accordance with the earlier decision in *The Elena D'Amico*, this was the appropriate '*prima facie*' measure of damages because an available market was found to have existed at the date of breach.[252] Significantly, the contract provided that either party could cancel the charter if war broke out between any two or more of a number of countries, including the United States, the United Kingdom and the Kingdom of Iraq.

On 20 March 2003 the Iraq War began. If the contract had not already been terminated, the commencement of this War, fourteen months after the repudiation was accepted, would have enabled either party to terminate the contract. It was also accepted as evidence that the charterer would have cancelled under the war clause had the charter still been in force. For this reason the defendant charterer sought to reduce the owner's damages to the difference between the contract and market rate for the fourteen month period rather than the full period remaining under the charter. At first instance, Langley J decided the dispute in favour of the charterers,[253] upholding the finding of the arbitrator. The Court of Appeal affirmed Langley J's decision.[254] In the House of Lords,

[252] *Koch Marine Inc v d'Amica Societa di Navigazione ARL* [1980] 1 Lloyd's Rep 75.

[253] *Golden Strait Corp v Nippon Yusen Kubishika Kaisha* [2005] EWHC 161 (Comm).

[254] *Golden Strait Corp v Nippon Yusen Kubishika Kaisha* [2005] EWCA Civ 1190 (CA).

a bare majority also dismissed the owners' appeal. This decision does not undermine the conventional understanding of contract damages since the owners' were confined to actual loss suffered. However, there is substantial academic support for the approach taken by the minority, which did not restrict the owners' damages to the actual loss suffered. The case is therefore deserving of closer scrutiny.

a. The Majority Approach

The majority in the House of Lords comprised Lord Scott, Lord Brown and Lord Carswell. Their Lordships explained the object of awarding contract damages in terms of providing compensation for financial loss, with such loss being measured against the baseline of the position the injured party would have been in had the contract been performed. The difference of opinion between the majority and the minority in *The Golden Victory* did not concern whether the compensatory principle was applicable but precisely how it should be applied on the facts.

According to the majority, the paramount importance of 'the compensatory principle' had two significant consequences. First, it meant that, assuming the charter had remained on foot, the possibility that it might nevertheless have been terminated early on the occurrence of a particular event must be taken into account in assessing damages. This was true regardless of how likely or unlikely that possibility may be, and the appropriate mechanism for doing this was by way of a discount for the chance of early termination.[255] This meant that even though at the date the contract was terminated the chance of the Iraq War commencing might have been very small, that chance must be taken into account in quantifying the ship owners' damages. Secondly, it meant that when a supervening event actually had occurred prior to the assessment of damages,

[255] ibid [66] (Lord Carswell).

estimates and conjecture in relation to the chance of the supervening event occurring at the date of termination must give way to actual facts. This was said to be an application of the *Bwllfa* principle.[256] Since war had broken out in March 2003 and it was assumed that the charterers would have cancelled the charter at this time, this meant the owners' entitlement to damages was limited to any loss suffered only up until the date of the outbreak of war. In the words of Lord Scott, this ensured the claimant was not put into a better position than he would have been in had the contract been performed.[257]

b. The Minority's Reasoning

The minority in *The Golden Victory,* consisting of Lord Bingham and Lord Walker, did not reduce damages because of the outbreak of war. Their Lordships calculated the owners' damages by reference to the entire four year period that remained on the charter at this date. Lord Bingham gave the leading minority speech. Although affirming the central place of the compensatory principle,[258] his Lordship considered that this principle did not resolve the critical issue in this case, which was whether an injured party's damages are to be assessed at or soon after the date of an accepted repudiation or at a later date, taking into account the occurrence of events subsequent to breach.

Lord Bingham agreed with Lord Scott and the rest of the majority that the compensatory principle dictated that an injured party was to be compensated only for the value of what he *lost*. However, he took a different view to the majority as to exactly what that was. According to his Lordship, the claimant lost the value of his rights assessed at the date the repudiation was accepted, or shortly thereafter. If the contract was terminable on a future event that was 'likely but not certain' then that possibility

[256] *Bwllfa and Methyr Dare Steam Collieries (1891) Ltd v Pontypridd Waterworks Co* [1903] AC 426 (HL).

[257] *The Golden Victory* (n 2) [30].

[258] ibid [9].

should certainly be taken into account in quantifying that lost value but whether this event did in fact occur was wholly irrelevant.[259] In contrast to the majority, Lord Bingham thus held that the *Bwllfa* principle was inapplicable on the basis that the present case was relevantly different.[260] In particular, none of the cases where this principle was applied 'involved repudiation of a commercial contract where there was an available market'.[261] Additionally, Lord Bingham held that if the possibility of the future event were negligible, it should not affect the value of the rights lost.

In reaching a final decision in favour of the owners, Lord Bingham also reasoned that any concerns regarding the owners' alleged over-compensation must give way in the face of the combined force of a variety of considerations that pointed strongly in favour of assessing damages at the date of termination, or shortly thereafter. The first of these considerations was that 'contracts are made to be performed, not broken. It may prove disadvantageous to break a contract'.[262] The second was that to find in favour of the charterers would reward their delay in fulfilling their obligation to pay damages, since if this had been promptly honoured the transaction would have been settled well before the second gulf war became a reality. The third was essentially a reiteration of the reasoning outlined in the previous paragraph, his Lordship stating that:

> 'the owners were... entitled to be compensated for the value of what they had lost on the date it was lost, and it could not be doubted that what the owners lost on that date was a charterparty with slightly less than four years to run... By describing the prospect of war in December 2001 as "merely a possibility"... the

[259] ibid [22].

[260] ibid [12].

[261] ibid.

[262] ibid [22].

arbitrator can only have meant that it was seen as an outside chance, not affecting the marketable value of the charter at that time'.[263]

The fourth consideration was the increased 'certainty and predictability' that results from assessing damages at the date of breach. The majority's response to this argument was that such policy considerations must give way to the 'principle' that the purpose of contract damages is to compensate for actual loss.[264] Finally, his Lordship noted that 'the idea that a party's accrued rights can be changed by subsequent events is objectionable in principle', and that damages for breach of contract are normally assessed at the date of breach meaning that such an approach here contributes to the overall 'coherence' of legal principle.[265]

c. Broader Significance

The Golden Victory has sparked extensive academic debate. While much commentary has supported the outcome reached by the House of Lords,[266] there has been substantial criticism of the majority approach as well.[267] Either way, Lord Mustill seems correct to observe that the decision has in some way 'touched a nerve'.[268] In the case itself, and also in much of the commentary following it, the issue has been presented

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[263] ibid.

[264] ibid [23].

[265] ibid.

[266] For example, D Capper, 'A 'Golden Victory' for Freedom of Contract' (2008) 24 JCL 176; Q Liu, 'The date for assessing damages for loss of prospective performance under a contract' [2007] LMCLQ 273; J Carter and E Peden, 'Damages Following Termination for Repudiation: Taking Account of Later Events' (2008) 24 JCL 145.

[267] For example, B Coote, 'Breach, anticipatory breach, or the breach anticipated?' (2007) 123 LQR 503; J Morgan, 'A victory for "justice" over commercial certainty' (2007) 66 CLJ 263; F Reynolds, 'The Golden Victory - A Misguided Decision' (2008) 38 HKLJ 333; M Mustill, 'The Golden Victory - Some Reflections' (2008) 124 LQR 569.

[268] Mustill, 'The Golden Victory - Some Reflections', (n 267) 569.

largely as a battle between the desirability of a commercially certain rule measuring damages at a fixed date and the fairness of limiting a breaching party's liability to no more than the loss actually caused by breach. However, as Professor Reynolds has observed:

> 'If it is necessary to contrast commercial certainty with actual loss... it is easy to see that the second appears more glamorous... But the law of damages has various purposes in vindicating an obligation. In particular, it is not always concerned to compensate for actual consequential loss, and it need not be inoperative if there is none'.[269]

This statement recognises the possibility of a broader theoretical basis for the outcome reached by the minority. According to Reynolds, this should be supported not for the various policy reasons identified by Lord Bingham but because 'the law marks, and should mark, the deficiency of the performance received'.[270] This thesis advances a similar understanding of contract damages but argues that such awards are best seen as substituting for performance rather than as simply marking a deficiency, which invokes the confusing terminology of loss that this thesis seeks to avoid. Significantly, however, the account advanced here is distinct from that proposed by Reynolds in being reconcilable with the majority's conclusion. The result reached by the majority might be defended by arguing that the case was one of anticipatory breach.[271] However, Reynolds's characterisation of the case as one of actual breach is more convincing.[272] As Chapter Six explains, the best explanation of the decision is simply that no substantial

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[269] Reynolds, 'The Golden Victory - A Misguided Decision' (n 267) 344.

[270] ibid 341.

[271] Liu, 'The date for assessing damages for loss of prospective performance under a contract' (n 266).

[272] Support for this analysis can be found in Mustill, 'The Golden Victory - Some Reflections' (n 267).

substitutionary claim was available on the facts because of the dependent nature of the contractual obligations assumed.

CONCLUSION

This chapter sought to demonstrate that there are many cases that do not fit the conventional understanding of contract damages. Section I outlined cases where English law awards contract damages that do not purport to compensate for loss. First, it considered awards of 'nominal' damages, including substantial 'nominal' damages. The existence of this category of damages demonstrates an awareness of the distinction between the infringement of a right and the consequential loss that may flow from this infringement. Next, the possibility of awards aimed at stripping the defendant's gain from breach was noted. The existence of such awards demonstrates that English law sometimes departs from the aim of simply compensating for loss when awarding substantial damages for breach of contract.

Nominal and gain-based awards might be rationalised as justifiable exceptions to the general rule that damages for breach of contract are always compensatory. However, the numerous other examples of awards for breach that, although purportedly awarded as compensation for actual loss actually put the claimant into a better position than he would have been in had the contract been performed pose a fundamental challenge to the orthodox understanding of the expectation principle. These awards included awards measured by reference to the loss suffered by a third party, awards assessed by reference to a reasonable approximation of the price of releasing the breaching party from performance, awards given following a defendant's failure to provide a service to the contractually agreed standard of performance, certain awards for breach of a contract of sale and other awards measured by reference to the claimant's initial loss even though

this loss is later reduced by subsequent events. The combined effect of these examples is to cast serious doubt on the correctness of the prevailing orthodoxy on contract damages.

CHAPTER THREE – CONCEPTUAL AND TERMINOLOGICAL SHORTCOMINGS IN THE ORTHODOX ACCOUNT

INTRODUCTION

Chapter One outlined the orthodox understanding of contract damages, according to which the aim of such awards is always to compensate for loss. Chapter Two challenged the doctrinal accuracy of this account. The present chapter builds upon this challenge by demonstrating the conceptual deficiencies of this account and the shortcomings in conventional terminology. The conceptual challenge is based upon the artificiality of describing the expectation principle as a measure of loss. Section I outlines this challenge and explains how Fuller and Perdue's suggested response to this difficulty, that the purpose of awarding contract damages is to protect the innocent party's reliance interest, has skewed theoretical debates about contract damages and inhibited true understanding.

Section II focuses on the ambiguity surrounding the meaning of 'loss' in the contractual context. Two principal reasons for this ambiguity are identified. First, it is not clear precisely how the concept of 'loss' fits with the distinction between the mere infringement of a right and the consequences that may follow. Secondly, providing a clear definition of loss is made more difficult by the fact that the concepts typically employed in articulating such a definition are themselves contested. In consequence, the

concept of 'loss' has been used to cover situations where it is inappropriate, stretching its meaning beyond acceptable limits. The discussion concludes by outlining the definition of loss for English contract law endorsed by this thesis.

Section III exposes the ambiguity surrounding the meaning of other important concepts commonly used in this part of the law. It argues that the uncertain meaning of concepts such as 'damages' and 'compensation' has inhibited conceptual clarity. In particular, this uncertainty has led to a failure to distinguish awards substituting for performance from awards compensating for loss. The absence of a clear conception of legal 'remedy' has not helped. In consequence of all this uncertainty, there is a need for clear and stable definitions for these terms. Such definitions are proposed and the chapter concludes by also suggesting an appropriate terminology for money awards substituting for performance.

I. THE CONCEPTUAL INADEQUACY OF THE ORTHODOX ACCOUNT

Debates concerning the kinds of harm included within the expectation principle's compensatory ambit reflect one kind of indeterminacy evident in Parke B's classic formulation. However, as foreshadowed in Chapter One, a second, more fundamental, source of indeterminacy in the expectation principle that is generally overlooked concerns the *purpose* of awarding damages following a breach of contract. Parke B's words do not make it clear whether the object of such awards is limited to compensating the victim for loss or extends to substituting for performance. The traditional preoccupation with loss has led to significant disagreement and sometimes caused errors in major decisions concerning the quantification of contract damages. In contrast to the orthodox view, this thesis contends that the expectation principle is actually a hybrid of

two distinct principles; one concerned with substituting for performance and one concerned with compensating for loss.

A. FULLER AND PERDUE'S MISCONCEIVED CHALLENGE TO THE EXPECTATION MEASURE

This section outlines Fuller and Perdue's famous critique of the expectation measure of damages for breach of contract. It then responds to this critique by observing the valuable and less valuable aspects of the argument they advanced.

1. The Basic Critique

The orthodox understanding of the expectation principle is that it posits the appropriate measure of loss against which compensation for breach of contract should be quantified. According to Fuller and Perdue, the expectation measure constitutes 'a queer kind of compensation' because in a sense it gives the claimant 'something he never had'.[273] This claim is ambiguous since it is unclear whether Fuller and Perdue were merely observing that the expectation measure assumes the existence of a factual position the claimant never occupied, or were making a more fundamental claim about the content of the legal right created by contract formation.

It might be thought, for instance, that what is problematic about the expectation principle is that it takes the claimant's future factual position upon performance as the relevant starting point for the assessment of damages. This cannot be the real concern, however, since whenever a court is called upon to award compensation for loss in response to a wrong it must compare the claimant's current position to the position the claimant would have occupied had the wrong not occurred, to the extent this can be

[273] Fuller and Perdue, 'The Reliance Interest in Contract Damages' (n 23) 53.

determined. This latter, counterfactual position may differ from the party's position at the time of the breach, for example, by including the value of a lost opportunity to profit. What is 'queer' about the expectation measure is thus not the fact that it entails a counterfactual analysis. Rather, the measure is 'queer' because it assumes the existence of a legal entitlement to be put into that future position.

In substance, Fuller and Perdue therefore sought to challenge the very existence of a legal right to performance in their famous critique of the expectation measure. However, as the next chapter demonstrates, there is substantial doctrinal support for the existence of such a right. Moreover, in Chapter Seven a coherent theoretical basis for this right is advanced. Nevertheless, that the expectation principle assumes the existence of a right to performance only serves to highlight the fundamental indeterminacy that surrounds its purpose since it is not clear whether it is concerned only with comparing the differences in the innocent party's financial position with and without breach, or with securing an actual substitute for performance. This indeterminacy was overlooked by Fuller and Perdue in their seminal critique of the orthodox account. Their response to the peculiarity they identified was to argue that fundamentally contract damages must be concerned with protecting a party's 'reliance interest', rather than what they disparagingly termed the 'expectation interest'.[274] Nevertheless, they claimed that adopting the expectation measure as the basis for quantification could be justified on the basis that it encourages efficient bargaining by facilitating reliance and was a good proxy for difficult to quantify reliance losses.[275]

[274] ibid 56.

[275] ibid 60.

2. Response

Professor Friedmann's powerful response to Fuller and Perdue reasserted the primacy of the 'performance interest' and criticised the 'expectation' terminology they introduced.[276] As far as the debate over the appropriate measure of contract damages is concerned, victory is clear. Exceptional circumstances aside, English law accepts that the appropriate baseline for quantifying damages for breach of contract is the position the innocent party would have occupied had the contract been performed rather than the position she would have occupied had the contract never been made.[277] The exceptional cases in which damages are awarded by reference to reliance losses are best explained by evidential difficulties in calculating the position the innocent party would have occupied had the contract been performed.[278] The reliance measure operates as a proxy for the 'expectation' measure in such cases.[279]

Nevertheless, the solution Fuller and Perdue proposed to the conceptual difficulty they identified was understandable given the conventional view that damages awards are necessarily concerned with compensating for loss.[280] If one assumes that the purpose of awarding contract damages is to compensate for loss, scepticism concerning the coherence of the expectation principle as a measure of loss leads logically to suggesting a reliance-based alternative. However, as noted already, Parke B's words are

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[276] Friedmann, 'The Performance Interest in Contract Damages' (n 23).

[277] *Omak Maritime Ltd v Mamola Challenger Shipping Co Ltd* [2010] EWHC 2026 (Comm); [2011] Bus LR 212.

[278] *Anglia Television Ltd v Reed* [1954] 1 QB 292 (CA); *Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64 (HCA).

[279] This was recently reaffirmed in *Omak* (n 277). For academic support see Burrows, *Remedies* (n 9) 70.

[280] See, for example, *Stoke-on-Trent City Council v W & J Wass Ltd* [1988] 1 WLR 1406 (CA) 1410 (Nourse LJ).

ambiguous and can also be interpreted as advocating a performance-oriented approach to the assessment of contract damages.

Against this, it might be argued that a performance-oriented interpretation is ruled out by Parke B's reference to 'loss'. Even putting aside the conceptual difficulty with describing the expectation principle as a measure of loss, there are at least two reasons to reject this suggestion. First, as explained below, the meaning of a 'loss' is notoriously uncertain. There are at least three different interpretations that could be given to the term in Parke B's formulation, which means it is unclear exactly what Parke B meant in invoking the concept of loss, and it is certainly not clear that he meant to exclude the possibility of substituting for performance.[281] Secondly, the reference to 'loss' in *Robinson v Harman* ignores the other, arguably more significant, aspect of Parke B's dictum, which is that contract damages are intended to put the innocent party in the position he would have been in 'as if the contract had been performed'.

B. CONSEQUENCES OF OVERLOOKING THE EXPECTATION PRINCIPLE'S INDETERMINACY

The theoretical challenge to the orthodox account posited by this thesis is that the expectation principle should not be understood as a measure of loss at all. Rather, it is best understood as a hybrid of two distinct principles; one focussing on performance, the other on compensating for loss. Although these two principles often complement one another, Chapter Two demonstrated that they sometimes conflict, which can lead to awards inexplicable on the conventional account. A significant part of the reason that this has not been appreciated is terminological. The ambiguities in conventional

[281] This possibility is supported by Parke B's later decision in *Pell v Shearman* (1855) 10 Ex 766, 769 and his earlier decision in *Thornton v Place* (1832) 1 Mood & R 217, 219.

terminology are outlined in sections II and III of this chapter. The failure to appreciate the possibility of a performance-oriented interpretation of the expectation principle has had two unfortunate, related consequences, which have significantly impeded debates about contract damages. First, it has been assumed that the objective in awarding contract damages is always to compensate for loss.[282] The second is that, in consequence, debates about contract damages have focussed on the appropriate baseline for measuring loss, rather than the more fundamental question of whether compensation is necessarily the purpose of awarding money following breach.

1. The Dominance of Compensation

The failure to appreciate the fundamental indeterminacy in Parke B's formulation is demonstrated by the common invocation of *Robinson v Harman* as authority for the orthodox understanding of contract damages. Often, this interpretation is asserted in the context of contrasting the compensation objective with some other possible goal for an award of damages such as punishing the defendant for breach,[283] or stripping consequential gains.[284] Although it is now recognised that a profit-stripping remedy may be available in exceptional circumstances,[285] it is generally accepted that punitive damages are not available in an action for breach of contract. For example, in *Perera v Vandiyar*, an award of punitive or exemplary damages awarded at trial for breach of contract was

[282] This perspective is demonstrated and criticised in LD Smith, 'Disgorgement of the profits of breach of contract: property, contract and efficient breach' (1995) 24 Can Bus LJ 121.

[283] This contrast is made in *Ruxley* (n 2) 353 (Lord Bridge) and 373 (Lord Lloyd).

[284] This contrast is made in *Tito* (n 201) 332 (Megarry VC).

[285] *Blake* (n 2).

overturned on appeal on the grounds that such damages are not available in English law.[286]

If one limits the legitimate purposes of awarding contract damages to compensation, punishment, or disgorgement, it is unsurprising that compensation is viewed as the dominant objective since it would be exceedingly difficult to justify either of these other two possibilities as a usual response to breach. Neither can be tied naturally to the nature and value of the practice of contracting in an obvious way,[287] representing an extreme response to breach that could be justified only in exceptional circumstances, if ever. Parke B's formulation in *Robinson v Harman*, however, leaves open the possibility of awarding damages in order to substitute for performance, regardless of the amount of actual loss suffered.

That awards of contract damages do not rigidly conform to the compensatory principle's objective of putting the claimant in the same factual position as if the contract had been performed is clear. First, English law imposes certain restrictions upon the recovery of compensation for non-pecuniary loss. The significance of these restrictions is weakened by money's incommensurability with non-pecuniary harm, as this means that damages can only ever be a proxy for such loss.[288] Secondly, even if only financial damage has been suffered, the restrictions imposed upon the recovery of compensation by the doctrines of remoteness and mitigation ensure that English law often fails to put

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[286] *Perera v Vandiyar* [1953] 1 WLR 672 (CA); *Kenny v Preen* [1963] 1 QB 499 (CA). Compare N McBride, 'A Case for Awarding Punitive Damages in Response to Deliberate Breaches of Contract' (1995) 24 Anglo-American Law Review 369.

[287] This is argued in D Kimel, 'The Morality of Contract and Moral Culpability in Breach' (2011) 21 KLJ 213. The argument there accords with Kimel's earlier work on contract, which is explained and supported in Chapter Four.

[288] See MJ Radin, 'Compensation and Commensurability' (1993) 43 Duke University Law Journal 56.

the victim of a breach of contract, or the victim of any civil wrong, in as good a factual position as if the wrong had not occurred.

These restrictions on perfect compensation do not really threaten the status of the orthodox account, however, because they can be accommodated within this account simply by understanding them as policy-based limitations upon the scope of the secondary right to repair that arises upon breach. As Chapter Six explains, this is the understanding advocated in this thesis. In consequence, any fundamental challenge to the conventional understanding of contract damages must come from the opposite direction. In other words, it must demonstrate that damages that put the victim of a breach of contract into a position that is *better* than she would have been in had the breach not occurred are not unknown to English law. The existence of many such awards was demonstrated in Chapter Two.

2. Preoccupation with the Appropriate Measure of Loss

Reliance on *Robinson v Harman* as authority for the conventional understanding of contract damages demonstrates how the fundamental indeterminacy in Parke B's classic formulation has not been appreciated. Instead, it is normally simply *assumed* that the purpose of awarding contract damages is to compensate the victim of breach for loss. A second important consequence of this assumption is that theoretical debates about the nature of contract damages have tended to focus on the correct measure of loss rather than on the more fundamental question of whether loss should be the fundamental normative criterion for assessment.

It is contended that a significant reason that the expectation principle's fundamental indeterminacy has been overlooked is that Fuller and Perdue assumed a loss-based paradigm for contract damages in their seminal critique of the orthodox

account. Since this article has now become the assumed departure point for any subsequent attempt to engage in theoretical debates about contract damages, the extensive literature it has spawned has tended both to replicate its terminology and to engage the relevant issues through the paradigm developed there.[289] The dominance this article has exerted over subsequent theoretical writing about contract damages in Anglo-American law provoked one notable contract theorist to suggest:

> 'it is only a slight exaggeration to say that all subsequent [theoretical] efforts either take up and elaborate lines of argument suggested by this essay or attempt to forge an alternative approach in response to it'.[290]

The discussion in this thesis so far only confirms this. However, the aims of this work are more in keeping with the latter half of the above quotation than the former. Traditionally, the compensatory objective of contract damages has been assumed,[291] with debates focussing on whether damages should be measured by reference to 'expectation' or 'reliance' loss. However, this thesis proposes a new understanding of the expectation principle, which does not conceive of it as a measure of 'loss' but rather as a composite of two distinct principles. A comprehensive explanation of this new account must await Part II. The remainder of this chapter focuses on demonstrating the deficiencies in the conventional terminology used within the orthodox account.

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[289] But see Friedmann, 'The Performance Interest in Contract Damages' (n 23) and Webb, 'Performance and Compensation' (n 7).

[290] P Benson, 'Introduction' in P Benson (ed) *The Theory of Contract Law* (CUP 2001).

[291] For example, Peel (ed), *Treitel* (n 9) 992; McGregor, *McGregor on Damages* (n 9) [1-002], [1-021].

II. CLARIFYING THE MEANING OF LOSS

Chapter Two identified significant inconsistencies between the conventional understanding of contract damages and the relevant case law. This thesis contends that the principal reason that the conventional account has persisted in the face of these inconsistencies is the significant ambiguity surrounding many of the key terms used in this area of the law. This ambiguity has allowed these concepts to be employed in a loose and imprecise manner, which has obscured the true nature of contract damages. The most important source of such ambiguity concerns the relevant meaning of 'loss' itself. The ambiguous nature of this concept has enabled it to be used to refer to different phenomena better viewed as distinct.

A. GENERAL AMBIGUITY SURROUNDING THE MEANING OF LOSS

It has been observed that the meaning of 'loss' is uncertain and difficult to define precisely.[292] According to the Oxford English Dictionary, a loss is the 'diminution of one's possessions or advantages... [or the] detriment or disadvantage involved in being deprived of something'.[293] Thus, at a general level, loss connotes detriment or deprivation. However, this leaves open the question of what kinds of detriment or deprivation are properly regarded as losses. The challenge is to move beyond a vague association of loss with such related concepts to articulate a precise definition.

An acute problem in doing this successfully is that the meanings of the associated concepts often used to describe the meaning of 'loss' are themselves unclear and contested. This phenomenon is demonstrated below through an examination of the

[292] A Tettenborn, 'What is a Loss?' in Neyers, Chamberlin and Pitel (eds), *Emerging Issues in Tort Law* (Hart 2007) 441.

[293] *Oxford English Dictionary Online* (3rd edn, 2008).

relationship between loss and harm. A second important reason for the present uncertainty, it is contended, is that by itself a reference to 'loss' obscures the basic distinction between the infringement of a right and the consequences that may flow from it. This problem is also examined below.

1. The Relationship between Loss and Harm

'Harm' is one of the most significant and controversial concepts invoked in discussions about 'loss'. An instance of this phenomenon occurs in the work of Professor Birks where he essentially uses the two terms interchangeably.[294] The uncertain meaning of 'harm' has been much discussed. One notable exploration is Professor Feinberg's work on the moral limits of the criminal law.[295] Feinberg's discussion begins by observing that 'the word 'harm' is both vague and ambiguous', and that its meaning is highly context-specific. This suggests that a general definition of 'harm' may be impossible, and perhaps even undesirable, given the nature of the concept.

Feinberg distinguishes three different senses of 'harm' in general circulation. The first 'is a derivative or extended sense... in which we can say that any kind of thing at all can be "harmed".'[296] According to Feinberg, this meaning is not philosophically interesting. The second is 'harm' understood as requiring 'a setback to an interest' of a person where an interest is a distinguishable component of a person's well-being.[297] The third meaning of the concept understands 'harm' as occurring whenever another person's

[294] Birks, 'The Concept of a Civil Wrong' (n 108).

[295] See, for example, J Feinberg, *Harm to Others* (OUP 1984).

[296] ibid 32.

[297] ibid 33-34.

rights have been violated.[298] One of the major sources of ambiguity concerning the meaning of 'harm', suggests Feinberg, concerns the distinction between the second and third senses of the concept. This is largely because although the presence of one typically coincides with the presence of the other, it does not always do so.

The conceptual nature of 'loss' and its connection to 'harm' makes the articulation of a generally applicable definition difficult. However, for present purposes all that is necessary is to explain how the concept of 'loss' should be understood in the *contractual* context. Nevertheless, as this thesis seeks to demonstrate, much of the uncertainty surrounding the meaning of loss generally also applies in the contractual context. One reason for this is that contract law throws up a sufficient number of different factual scenarios to raise most, if not all, of the problems involved in defining the concept of 'loss' more generally. Also, in defining the meaning of 'loss' in the contractual context one still faces the problem of needing to invoke other uncertain and contested concepts such as 'harm', 'damage' and 'injury'. For example, the most recent edition of *Treitel* states that, leaving aside the question of the extent to which harm to the person includes injury to feelings, the meaning of 'loss' for the purposes of a damages claim for breach of contract: 'includes any *harm* to the person or property of the claimant, and any other *injury* to his economic position'.[299]

2. The Distinction between Damage and Injury

The definition in *Treitel* thus explains 'loss' by reference to other contested concepts with meanings that are also difficult to define precisely. The ambiguous nature of 'harm' was just observed. However, the meaning of 'injury' is similarly unclear as

[298] ibid 34.

[299] Peel (ed), *Treitel* (n 9) 1000 (emphasis added).

demonstrated by Feinberg's observation that 'harming... is sometimes contrasted and sometimes *identified* with injuring'. According to Feinberg, the reason for this confusion is that while:

> 'in ordinary speech, persons are not said to be injured by inflictions of harm to interests other than that in physical health and bodily integrity... "injury" originally and for many centuries has meant a wrong, or a violation of one's rights, or an injustice'.[300]

This change in the meaning of 'injury' over time has been observed by others as well. Birks noted it in the process of arguing against the proposition that the appropriate legal response to the commission of a civil wrong is always an award of compensation for loss.[301] Birks notes that the word 'injury' derives from the Latin *iniuria* which was formed from the negative particle *in-* combined with *ius*, *iuris*, which was the word for 'right' or 'law'. Thus, historically an injury was something done *non iure* or, in modern English, non-rightly.[302]

This distinction between the infringement of a right, which is simply the logical corollary of a breach of duty[303] ('injury') and the consequential loss or harm that may result from a violation ('damage') is critical for the purposes of the present thesis. The distinction between damnum and iniuria was recognised in Roman law, though it appears that the meaning of damnum was not settled.[304] Birks argued that English law also

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[300] Feinberg, *Harm to Others* (n 295) 107 (emphasis added).

[301] Birks, 'The Concept of a Civil Wrong' (n 108).

[302] ibid 39. Feinberg also notes the word's Latin roots Feinberg, *Harm to Others* (n 295) 107.

[303] W Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays* (Yale University Press 1920).

[304] D Daube, 'On the Use of the Term Damnum' *Studi in Onore di Siro Solazzi* (Jovene 1948) 93.

recognises this distinction.[305] One example is the existence of wrongs actionable *per se*, such as trespass, conversion, or breach of contract. Another is the right of a trust beneficiary to recover gains made by the trustee in breach of trust, irrespective of whether the breach caused the beneficiary any loss.[306]

This distinction between 'damage' and 'injury' is essentially the same as the distinction drawn by Feinberg that was identified above between the second and third senses of 'harm'. Unfortunately, ambiguity in the terminology still persists because of the variety of ways in which these words are used. To give a final example, Professor Tettenborn draws a distinction between 'loss' and 'damage' but not in the way suggested above. According to Tettenborn, 'loss' has inescapably pecuniary overtones, the concept of 'damage' 'wavers uncertainly between tangible loss and the more nebulous idea that the plaintiff has simply been deprived of something she was entitled to'.[307] Although the particular distinction Tettenborn draws between loss and damage is not endorsed here, his suggestion demonstrates the uncertainty pervading this area. In essence, it is uncertain to what extent the concept of 'loss' encompasses harm going beyond both the pecuniary and the tangible.

B. CLARIFYING THE UNCERTAIN MEANING OF LOSS FOR ENGLISH CONTRACT LAW

The preceding discussion explained the uncertainty that surrounds the meaning of loss in general but left open precisely how this ambiguity should be resolved. The current section seeks to resolve the specific uncertainty that exists in the contractual

[305] Birks, 'The Concept of a Civil Wrong' (n 108).

[306] *Boardman* (n 117), but see *Targett Holdings Ltd v Redferns* [1996] 1 AC 421 (HL).

[307] Tettenborn, 'What is a Loss?' (n 292).

context for the purposes of bringing order to the law of contract damages. As just observed, this task is made more difficult by the uncertain meaning of the associated concepts typically used in articulating the meaning of loss. For this reason, it is submitted that any progress towards clarifying the meaning of loss in contract law depends upon the adoption of clear definitions for these associated concepts. One of the principal aims of this thesis is to bring clarity to a part of the law riddled with uncertainty.

1. The Proposed Definition of Loss

The previous section concluded by rejecting Tettenborn's proposed distinction between 'loss' and 'damage'. However, the point of disagreement here was the meaning of damage rather than the meaning of loss. According to Tettenborn, to 'say someone has suffered a loss, we instinctively contemplate her being worse off in some factual, verifiable sense'.[308] This is also the definition of loss supported Lord Hoffmann in *Rothwell v Chemical & Insulating Co Ltd*.[309] There his Lordship treated loss and damage as synonymous and stated that: 'Damage in this sense is an abstract concept of being worse off, physically or economically'.[310]

Stevens also favours this definition of loss, stating that: 'Losses and gains are questions of fact: is the claimant factually worse off or the defendant actually better off as a result of the wrong?'[311] As Stevens observes, such a definition makes clear the

[308] ibid 443.

[309] *Rothwell v Chemical & Insulating Co Ltd* [2007] UKHL 39; [2008] 1 AC 281.

[310] ibid [7].

[311] Stevens, *Torts and Rights* (n 3) 61.

fundamental distinction between damage and injury.[312] This is also the definition of 'loss' endorsed in this thesis. The reasons for this are more in line with those advanced by Stevens than those suggested by Tettenborn. However, the particular understanding of contract damages proposed in this work differs in certain important respects from that advocated by Stevens, as explained in Chapter Six.

In terms of the relationship between the meaning of 'loss' and other key, associated terms, this thesis proposes the following definitions. First, in accordance with Lord Hoffmann's definition in *Rothwell*,[313] 'loss' and 'damage' are terms that should be used synonymously but only to refer to the economic or physical harm that arises *in consequence* of breach. A person suffers loss or damage only when they are made factually worse off in some identifiable sense. Although this includes harm of both a pecuniary and non-pecuniary nature, it does not include the more abstract 'harm' entailed through a failure to receive the performance contracted for. In other words, a breach of contract without more is not loss or damage in the relevant sense. Thus, loss and damage must be contrasted with the concept of 'injury', which denotes the harm entailed by the breach of a duty, or the infringement of a right. Secondly, as the sentence above suggests, 'harm' is a concept that will be understood in the broadest possible sense to include both pecuniary and non-pecuniary 'damage' as well as the 'injury' entailed by the mere breach of a duty. In effect, 'harm' is broad enough to include both damage and injury.

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[312] ibid.

[313] *Rothwell* (n 309) [7].

2. Distinguishing Three Conceptions of Loss in English Contract Law

This thesis draws a distinction between two different sources of ambiguity that arise with respect to the meaning of 'loss' in the context of awarding contract damages. The first is the extent to which the definition of loss encompasses the 'injury' entailed simply through a party's failure to perform, irrespective of any consequences that might follow. Although this thesis claims that an infringement of the right to performance is highly significant in providing the basis for a claim for substantial damages, it also argues that in order to promote the conceptual clarity lacking in this area, it should not be included within the definition of loss.[314]

Nevertheless, even focussing attention purely on the *consequences* of breach, there is a second source of ambiguity concerning the meaning of loss in the contractual context. This is the question considered in Chapter One of the extent to which non-pecuniary consequences of breach are included within the definition of loss. As already explained, in addition to physical injury, substantial physical inconvenience, and damage to reputation, other relevant possibilities here include various forms of psychological damage. Chapter One observed that while traditionally English contract law has allowed recovery for the former three kinds of loss, generally it has been reluctant to award damages for other kinds of non-pecuniary damage. However, there has been a recent trend towards increasing the availability of damages for such loss.

All this demonstrates that there are essentially three distinct ways in which the concept of 'loss' could be defined in the context of awarding damages for breach of contract. Under the first and most restrictive definition, loss is limited to proven *financial*

[314] Contra McKendrick, 'The Common Law at Work' (n 101).

damage, perhaps with some narrowly defined exceptions. This is traditionally how the term was understood in English law. Under a second, more expansive definition of loss, the term potentially includes anything that makes the claimant factually worse off, including all forms of non-pecuniary damage. As well as the three specific categories historically recognised, this definition includes any form of 'mental distress' or 'injury to feelings'. In accordance with the list given by Bingham LJ in *Watts v Morrow* that was outlined in Chapter One, this includes 'distress, frustration, anxiety, displeasure, vexation, tension or aggravation'.[315]

This list does not exhaust the range of what potentially might be called 'mental distress'. There are also additional, more particular forms of mental suffering that a contracting party may incur in the context of a specific factual scenario. The non-pecuniary loss allegedly suffered by the claimant in *Johnson v Gore Wood & Co* provides a good illustration.[316] In the context of a claim against his solicitors for negligence and breach of contract, the claimant alleged that in addition to causing him general mental distress and anxiety, the protracted litigation process to which he had been subjected as a result of the defendant's breach caused him to suffer more specific non-pecuniary harm in the form of 'extreme financial embarrassment... [and] deterioration in his family relationships'.[317]

Although it might be possible to include such harms within the category of 'mental distress', alternatively they could be classified as distinct from the general anxiety, vexation or frustration that may accompany certain breaches. Regardless of the precise classification adopted, breaking down the nebulous concept of non-pecuniary loss into

[315] This list is from the speech of Bingham LJ in *Watts* (n 35) 1445.

[316] *Johnson v Gore Wood & Co* [2002] 2 AC 1 (HL).

[317] ibid 37.

more discrete and specific categories would be desirable since it can only aid the development of clear and consistent principles. This project lies beyond the scope of this thesis. For present purposes, it is only necessary to appreciate that the various forms of harm just identified fall within the broad category of consequential non-pecuniary loss. The extent to which English law should compensate such losses also lies beyond the scope of this thesis.

The final and most expansive possible definition of loss in the contractual context is one in which breach of contract is *itself* a loss. On this definition, a claimant suffers loss simply in virtue of not receiving the performance contracted for. This was the understanding of loss adopted by Lord Nicholls in *Attorney-General v Blake*, when he stated that: 'On breach the innocent party suffers a loss. He fails to obtain the benefit promised by the other party to the contract'.[318]

The current thesis rejects this definition of loss but not because a contracting party's right to performance is unworthy of protection. On the contrary, this thesis aims to advance an account that properly recognises the importance of this right. Rather, this broad definition of loss is rejected because it causes confusion, in particular by conflating the distinction between awards aimed at substituting for performance and awards compensating for loss. Part II of this thesis demonstrates the value of this distinction and explains the basis for quantifying and restricting these awards. Before this is done, however, other important concepts must be clarified. Ambiguity surrounding the meaning of these concepts has contributed to the persistence of the conventional understanding of contract damages, despite the inadequacies so far identified.

[318] *Blake* (n 2) 282.

One important clarification of the definition of loss proposed is in order. A performance-oriented account of contract damages must provide for the recovery of profits expected but not obtained from performance. The failure to obtain profits that, on the balance of probabilities, would have been obtained is the deprivation of a future gain. This constitutes a loss on the definition proposed.[319] Thus, any future profits that a party has been deprived of through breach, provable on the balance of probabilities, are prima facie recoverable as loss consequent on breach, subject of course to the restrictions imposed on loss-based recovery.

III. CLARIFYING OTHER SOURCES OF UNCERTAINTY

This section seeks to clarify various other important sources of terminological ambiguity in the law governing the award of damages for breach of contract. The discussion begins with the meaning of 'damages'. It is argued that the best understanding of 'damages' is 'a money award for a wrong'. Next, the meaning of compensation is considered. It is suggested that although the motivation for suggesting alternative conceptions of compensation is understandable, this term should be reserved for awards that are concerned to rectify or annul a loss. Thirdly, the unstable meaning of legal 'remedy' is noted. It is suggested that a remedy should be understood as a right arising from a judicial command responding to an actual or threatened infringement of a substantive right. Finally, an appropriate terminology for money awards substituting for performance is proposed.

[319] For support see Edelman, 'The Meaning of Loss and Enrichment' (n 63).

A. THE MEANING OF DAMAGES

In private law an award of 'damages' is typically associated with the goal of compensating for loss. Putting to one side any ambiguity concerning the meaning of 'compensation' for the moment, to speak of awarding 'damages' is usually understood to mean providing a sum of money in order to rectify or annul a loss that the claimant has suffered following the commission of a common law wrong. A typical example of this understanding is the definition given by McGregor in all but the most recent editions of his comprehensive treatise.[320] In recognition of the kinds of difficulties this thesis tries to resolve, as well as others, McGregor reluctantly abandons the 'search for a clear-cut, comprehensive definition' of damages in his most recent edition. However, up until the sixteenth edition, McGregor adopted a definition of damages that principally focussed on compensation. There, damages were defined as:

> 'in the vast majority of cases... the pecuniary compensation, obtainable by success in an action, for a wrong which is either a tort or a breach of contract'.[321]

It is apparent from later passages of the book that McGregor understands compensation as necessarily concerned with the rectification of loss.[322] Therefore, in addition to demonstrating the interdependence of meaning between damages and compensation, this definition makes it clear that, for McGregor, damages are also necessarily concerned with loss rectification. McGregor's definition contains two potentially contentious aspects. The first is the claim that damages are restricted to money awards that respond to *common law* wrongdoing. Although a compelling argument

[320] McGregor, *McGregor on Damages* (n 9) [1-001].

[321] ibid.

[322] ibid [1-021].

can certainly be made that there is no real basis in principle or authority for limiting the term in this way,[323] this is an issue of semantics rather than substance and thus of limited importance for the purposes of this thesis. This work focuses upon accepted and common references to 'damages' for breaches of contract and attempts to unpack them.

In contrast to the first contentious aspect of this definition, the second contentious aspect is of considerable significance for the present thesis. It is the suggestion that a damages award is necessarily concerned to rectify loss. It seems likely that this view has its roots in the words used by Sergeant Joseph Sayer in the first English textbook on the subject.[324] In that text, Sayer stated that 'damages are a pecuniary recompense for an injury'. However, as Edelman has noted, Sayer clearly did not intend that 'recompense' be read as synonymous with 'compensation for loss' since one of the examples he provides of an early successful claim for damages is an action for account in which damages were 'recoverable for the profit which *has been made* or might have been made of the money'.[325]

As a matter of history, therefore, it seems clear that damages awards were not restricted to rectifying loss. It is revealing that in the next English book on the subject, which in its current form continues to be considered the leading text today, Mayne avoided reference to 'recompense' or 'compensation' altogether, defining damages as 'the pecuniary satisfaction which a plaintiff may obtain by success in an action'.[326] Although this definition was almost correct, by including successful claims for the enforcement of *primary* rights to money it was over inclusive in an important respect. Claims for the

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[323] J Edelman, 'Gain-Based Damages and Compensation' in A Burrows and Lord Rodger of Earlsferry (eds), *Mapping the Law: Essays in Memory of Peter Birks* (OUP 2006) 141, 144.

[324] J Sayer, *The Law of Damages* (1760).

[325] Edelman, 'Gain-Based Damages and Compensation' (n 323) 143 (emphasis in original).

[326] J Mayne, *A Treatise on the Law of Damages* (1856) 1.

enforcement of primary rights to money such as those for the restitution of value transferred following an unjust enrichment or, perhaps less controversially, for a sum of money owing under a contract, commonly referred to as the action for the agreed sum, must be distinguished from claims for the enforcement of a *secondary* right to damages. Secondary rights are generated by the infringement of primary rights and it is important to distinguish such awards from those that, at least in a *justificatory* sense, are not based on the occurrence of wrongdoing.

As Edelman observes, Mayne's definition would therefore have been correct had the reference to 'action' been qualified by the words 'for wrongdoing'. Perhaps in an effort to address this deficiency, after taking over from Mayne as editor of his book, McGregor devised the new definition of 'damages' quoted above. However, as already mentioned, in the process of remedying the small defect in Mayne's formulation, McGregor introduced two new restrictions of his own. First, he limited the wrongs to which damages respond to those recognised by the common law. Secondly, and, more significantly for the present work, he replaced the word 'satisfaction' with 'compensation'. Given the association of 'compensation' with 'loss', this falsely created the impression that the purpose of awarding damages is confined to rectifying loss.

The necessary association between damages and compensation for loss, however, is unsustainable. This commonly made but false claim is often accompanied by a reference to Lord Blackburn's famous dictum in *Livingstone v Rawyards Coal Co.*[327] McGregor, for example, proposes this statement as the starting point in determining the measure of damages to be awarded for a common law wrong. In the *Livingstone* case Lord Blackburn said:

[327] *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25 (HL).

> 'where any injury is to be compensated by damages... you should as nearly as possible get at that sum of money that will put the party who has been injured, or has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation'.[328]

Yet, as Edelman has noted,[329] in that very case all of the Law Lords recognised that damages may sometimes be non-compensatory.[330] In addition, even McGregor, one of the strongest proponents of the traditional view that the purpose of a damages award is almost always to provide compensation for loss, admits that in relation to awards traditionally viewed as compensatory in nature, 'there are certain circumstances where the claimant will recover more than his loss as defined by Lord Blackburn's general rule'.[331]

All of this makes it unsurprising that in the latest edition of his work, McGregor concedes that due to an increasing number of exceptions and qualifications, 'a clear-cut definition [of damages] is no longer feasible'.[332] Nevertheless, in substitution for an all-inclusive definition, McGregor still adheres to the priority of compensation, stating that other than in exceptional circumstances, the object of an award of damages is 'to give the claimant compensation for the damage, loss or injury he has suffered'.[333] The reference to 'injury' here is significant given the distinction between damage and injury discussed earlier in this chapter. In contrast, it is submitted in this work that the best available definition of damages is 'a money award for a wrong'.

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[328] ibid 39.

[329] Edelman, *Gain-based Damages* (n 177) 8.

[330] *Livingstone* (n 327) 31 (Lord Cairns LC), 34 (Lord Hatherley), 39 (Lord Blackburn).

[331] McGregor, *McGregor on Damages* (n 9) [1-025].

[332] ibid [1-001].

[333] ibid [1-021].

B. THE MEANING OF COMPENSATION

It is contended that conceptual clarity also has been inhibited by confusion over the meaning of 'compensation'. As noted above, the conventional understanding of 'compensation' views it as, by definition, *necessarily* concerned with the rectification of loss. Nevertheless, alternative conceptions have been proposed. Although the reasons motivating these suggestions form part of the motivation for the alternative account of contract damages advocated here, the conventional understanding of 'compensation' as necessarily concerned exclusively with loss rectification is ultimately endorsed. Unsurprisingly, the reason for this is that it contributes to conceptual clarity.

1. The Orthodox Understanding

It has recently been said that 'compensation seeks to nullify the loss of the claimant'.[334] This appears to reflect how the term is generally understood in the legal context. As with an award of damages, the act of compensating is conventionally understood as being achieved by providing a money award in order to rectify or annul a loss. However, as demonstrated, the problem is that the meaning of loss in private law generally, and in contract law specifically, is unclear. In consequence, there is also ambiguity over the meaning of compensation.

Leaving exceptional cases aside, it seems that when judges and commentators speak of 'compensation for loss' they normally use loss in the restricted sense advocated here so that compensation is usually understood as concerned with rectifying factual damage of a verifiable or identifiable nature. In the contractual context such damage is typically pecuniary but, as already observed, may sometimes be non-pecuniary in nature.

[334] F Giglio, *The Foundations of Restitution for Wrongs* (Hart 2007) 34.

The breach of the duty to perform, which is the same as the infringement of the right to performance, is not conventionally understood as being a 'loss' itself. The qualifier 'usually' is important here because alternative conceptions of compensation do exist in which either loss is defined more broadly, or the strict association between compensation and loss is abandoned.

In this way, the conventional understanding of compensation raises similar ambiguities to those considered above in the discussion of 'damages'. In fact, for reasons explained below, the scope for disagreement over the meaning of compensation is potentially even wider than that which exists over the meaning of damages. Despite this, the uncertainty of meaning inherent in the concept of compensation is often overlooked when the term is used. A good example of such oversight occurs when Edelman speaks to 'rights-based compensation' in an article referred to above.[335] It is contended that he means an award given for 'the value of the right violated' rather than an award given to rectify actual loss.

2. Alternative Conceptions of Compensation

a. Alternative Judicial Conceptions of Compensation

So far it has been suggested that compensation is typically understood as being synonymous with loss rectification. Nevertheless, the term is sometimes used in a manner inconsistent with this understanding. Given the lack of a satisfactory loss-based analysis of the *Wrotham Park* award, an example of this might be Sir Thomas Bingham MR's statement in *Jaggard v Sawyer* that 'I cannot... accept that Brightman J's assessment

[335] J Edelman, 'Gain-Based Damages and Compensation' (n 323) 153.

of damages in *Wrotham Park* was based on other than compensatory principles'.[336] However, given that some adhere to a loss-based explanation of *Wrotham Park*, this invocation of 'compensation' might be viewed as consistent with the conventional approach.

A clearer example of a reference to compensation divorced from loss, at least as normally understood, is Lord Hobhouse's reference to the *Ruxley* award in *Blake*. Although referring to *Ruxley* as a case concerned with 'compensation', his Lordship explained that the award was not compensatory in the sense of 'relating to loss as if there has to some identified physical or monetary loss to a plaintiff' but rather a 'substitute for performance'.[337] An even clearer example of a judge invoking the terminology of compensation in a manner inconsistent with the conventional loss-based understanding is Chadwick LJ's reference to the term in the *WWF* case.[338] There, his Lordship said that:

> 'To label an award of damages on the *Wrotham Park* basis as a 'compensatory' remedy and an order for an account of profits as a gains-based remedy does not assist an understanding of the principles on which the court acts. The two remedies should, I think, each be seen as a flexible response to the need to compensate the claimant for the wrong done to him'.[339]

Chadwick LJ's denouncement of rigid categorisation was in the context of a claim for abuse of process rather than a substantive claim for breach of contract. Nevertheless, it is clear that this use of compensation is far more expansive than the orthodox

[336] *Jaggard v Sawyer* [1995] 1 WLR 269 (CA) 281.

[337] *Blake* (n 2) 298.

[338] *WWF* (n 181).

[339] ibid [59].

conception outlined above. There is simply no legitimate way to characterise compensation as being solely concerned with the rectification of loss in this statement since an account of profits is expressly a measure of the defendant's gain. To the extent that a fundamental characteristic of compensation can be identified in Chadwick LJ's statement, it appears to be simply a response to a *wrong* rather than necessarily having anything to do with the rectification of loss.

Chadwick LJ's comments in *WWF* thus constitute a fundamental challenge to the orthodox understanding of compensation. On this approach, the purpose of compensating is broader than simply rectifying loss and includes other potential responses to wrongdoing. This raises the question of whether the conventional definition of compensation is satisfactory. In answering this question it is useful to consider some of the alternative conceptions of compensation proposed by academic commentators and the reasons motivating their proposal as this reveals what is at stake.

b. Alternative Conceptions of Compensation in the Academic Literature

One frequently noted difficulty with the view that the purpose of compensation is only to repair loss is that it can actually only very rarely achieve this objective precisely. Even when responding to purely financial losses, awards of compensation often fail to achieve perfect rectification. For example, losses that are 'too remote' or not proved on the balance of probabilities cannot be recovered. Emily Sherwin focuses on this problem in her critique of the orthodox understanding of compensation, arguing that despite general agreement that the goal of compensatory remedies is to restore victims to their

rightful position, in practice, 'compensatory remedies depart in a number of ways from the assumed goal of reconstructing the claimant's rightful position'.[340]

In an effort to explain the numerous discrepancies she identifies, Sherwin proposes an alternative theory of compensation in which 'the object of compensatory remedies is not simply to adjust the absolute position of the claimant, but also to adjust an outcome in which the relevant positions of the claimant and the defendant are deemed to be unfair'. On this view, the point of compensation is not simply to repair the consequences of the wrong done to the claimant but to 'counterbalance' a wrongful *event*. Sherwin draws support for this view from the Oxford English Dictionary definition of compensation which states that to compensate means not only to 'make amends for' but also to 'counterbalance'.[341] Sherwin also draws attention to the fact that the word 'compensate' is derived from the Latin word *compensare*, meaning 'to weigh one thing against another'. She suggests that it is not necessary that there be a precise equivalence between the compensation awarded and the harm suffered.

A second, more fundamental, problem with the conventional model of compensation arises if one believes that money and non-pecuniary harm are incommensurable. Incommensurability is a term used in various contexts but here it should be understood simply as a reference to the debate in ethics about the possibility of equating different values.[342] This is the problem that Professor Radin focuses on in her critique of a purely loss-based conception of compensation in the tort context.[343] She argues that, contrary to the conventional model, compensation is actually a 'contested

[340] E Sherwin, 'Compensation and Revenge' (2003) 40 San Diego Law Review 1387.

[341] Also 'amends' and the 'rendering of an equivalent'. JA Simpson and ESC Weiner (eds), *The Oxford English Dictionary* (2nd edn, OUP 1989) 601.

[342] For discussion see Radin, 'Compensation and Commensurability' (n 288) 62.

[343] ibid.

concept' with two core conceptions: a commodified conception under which any harm to a person can always be equated with a dollar value and a noncommodified conception under which certain non-pecuniary harm simply cannot be equated with money.[344]

Radin argues that one's preference for one or other of these conceptions essentially comes down to one's acceptance or rejection of the existence of incommensurability. Interestingly, for Radin, 'understanding the relevance of commensurability to the debate about compensation should [also] shed light on the general problem of how to conceive of corrective justice'[345] since if one rejects the notion that non-pecuniary harm can be measured in money, then the payment of money simply cannot restore persons to the position they occupied prior to the wrong that was committed against them whenever such harm is suffered. The corollary of this is that if we understand the goal of corrective justice to be the 'rectification' of wrongful losses, this goal is unachievable whenever non-pecuniary losses are inflicted. Radin thus suggests an alternative conception of corrective justice, in which:

> 'compensation is understood not as a commensurable quid pro quo for harm, but rather as a form of redress: affirming public respect for the existence of rights and public recognition of the transgressor's fault with regard to disrespecting rights'.[346]

On Radin's alternative conception of compensation, its primary purpose is therefore to redress the wrong's occurrence rather than to rectify the loss resulting from that wrong. Obviously one of the best ways to redress a wrong is to annul the bad consequences resulting from it to the extent this is possible. However, although

[344] ibid.

[345] ibid 47.

[346] ibid.

recognised as an important objective, on Radin's conception of compensation the rectification of losses should be seen as secondary to, and subsumed by, the primary goal of redressing the occurrence of the wrong via a public affirmation of respect for the right transgressed.

Given all this, an interesting alternative definition of compensation suggested in a doctrinal textbook on remedies is 'the reparation of a wrong through the delivery of an equivalent'.[347] This definition alludes to both the uncertainties just outlined. First, it makes the *wrong* itself, rather than its consequences, the subject of reparation. The use of the word 'equivalent' reinforces this uncertainty. It begs the question of what exactly is in need of being replaced. It could be the right that has been infringed through the commission of the wrong or the consequences of that wrong. Secondly, the use of the word 'equivalent' refers to another uncertainty. If one assumes the conventional understanding of compensation is correct, there remains the question of whether the amount awarded is meant to correspond *exactly* with what was lost or need only be something *comparable*. This obviously alludes to both Radin's concern over the significance of incommensurability for the concept of compensation and Sherwin's worry regarding the failure of compensatory awards to accurately achieve their supposed aim of rectifying loss.

3. The Proposed Meaning of Compensation

The above discussion demonstrated two points. The first is that judges and academic commentators do not always use the term compensation in a consistent manner. On the orthodox understanding, it is concerned solely with loss rectification. Despite this, the term is sometimes used in a broader way to encompass other responses

[347] M Tilbury, M Noone and B Kercher, *Remedies: Commentary and Materials* (4 edn Lawbook 2004) 47.

to wrongdoing. Therefore, its meaning, like 'damages' and 'loss', is to some extent unsettled. This situation is unsatisfactory. There is a need for a stable definition of compensation. This leads to the second goal of the above discussion, which was to introduce some alternative conceptions of compensation and identify the reasons motivating their proposal. In the two main alternatives presented, Radin and Sherwin both suggest that the conventional understanding of compensation should be abandoned because a sum of money is normally not capable, either in practice or in principle, of accurately nullifying a claimant's loss.

Despite this, the conventional understanding of compensation, which understands it as concerned solely with the rectification of loss, is endorsed here and will be used for the remainder of this thesis. One reason for this is that neither of the respective deficiencies with the conventional understanding identified by Sherwin and Radin actually constitutes the *reason* for the inconsistent use of the term in the case law that was identified above. The motivation behind statements like Chadwick LJ's in *WWF* is not that damages are incapable of accurately annulling a claimant's loss but because there is a perceived need to vindicate the claimant's rights, irrespective of the actual loss suffered.

This begs the question, why support the conventional understanding of compensation rather than a model in which this vindicatory impulse might be more readily accommodated? The reason is that adhering to the orthodox understanding of compensation helps produce conceptual clarity. The vindication of rights through a money award should not be considered a form of compensation because, as explained in Part II of this thesis, such awards are normatively distinct from awards annulling loss. Conceptual coherence demands that these awards therefore have a different label. The question of what this label should be is addressed at the end of this chapter. However,

regardless of the particular label chosen, what is most important is simply that a separate label be used and its meaning be clear.

Significantly, therefore, the reason advanced here for endorsing the conventional understanding of compensation is different from the one usually invoked to support it. According to most commentators, the conventional understanding of compensation should be supported because the purpose of contract damages is simply to repair the loss caused by breach. This thesis rejects this narrow understanding of the purpose of awarding contract damages. It is argued that substantial money awards may be provided to uphold a party's contractual right to performance. Given this, the orthodox, narrow conception of compensation is supported here because it helps make clear the important distinction between the two different kinds of money award identified.

C. THE CONCEPT OF A LEGAL REMEDY

Conventionally, an award of contract damages is described as a legal *remedy* awarded by a court in response to a defendant's breach of contract. Birks demonstrated that the concept of a legal remedy is unstable, being capable of a variety of different meanings.[348] In particular, Birks identified five different ways in which the word 'remedy' is employed in legal discourse.[349] It is therefore necessary to explain precisely how the term is used in this thesis. In what follows, a clear definition of legal remedy is outlined and the relationship between legal rights and remedies explained. The discussion begins with a brief explanation of the relevant understanding of legal rights.

[348] P Birks, 'Rights, Wrongs and Remedies' (2000) 20 OJLS 1.

[349] ibid.

1. Legal Rights

Hohfeld distinguished four different legal concepts that have been labelled 'rights' in legal discourse, namely: claim-right, privilege, power and immunity.[350] In addition, Hohfeld identified the correlative of each of these four concepts, namely: duty, no-right, liability, and disability. According to Hohfeld it is only a claim-right that is a legal right properly so-called. It is the correlative of a legal duty and signifies one's affirmative legal claim against another. It is to be distinguished from a 'privilege' which is merely one's freedom from the claim of another. In the same way that right correlates to duty, privilege correlates to no-right. These are first-order legal relations.[351] Second-order rights are powers and immunities. A power enables someone to change the content of a set of instances at law, whereas an immunity protects someone from having their legal relations changed by another.[352]

Hohfeld's purely analytic conception of legal rights is sufficient for the current purpose of explaining the particular understanding of legal remedy employed in this thesis. However, a different understanding of legal rights is necessary for some of the arguments presented in Part II, which recognises the possibility of a normative conception of legal rights. The particular account adopted is that proposed by Professor Raz. According to Raz, rights, including institutional rights such as legal rights, are best understood as reasons for action. The fundamental purpose of rights is to protect 'interests' and a right exists whenever there is an interest of sufficient strength to justify

[350] Hohfeld, *Fundamental Legal Conceptions* (n 303).

[351] For helpful discussion see P Eleftheriadis, *Legal Rights* (OUP 2008) 109.

[352] ibid.

imposing a duty on another.[353] Raz's account is explained in more detail below in the context of the arguments invoking it.[354]

2. The Proposed Definition of Legal Remedy

The understanding of legal 'remedy' adopted in this thesis is that proposed by Rafal Zakrzewski in *Remedies Reclassified*.[355] There, Zakrzewski presents both a clear definition of a legal remedy and a comprehensive classification of the various legal remedies ordered by courts operating within the common law tradition. After outlining the various different meanings ascribed to the term 'remedy' in English law, Zakrzewski claims that the best definition of a legal remedy is:

> 'the rights immediately arising from certain judicial commands and statements which aim to address a pre-suit grievance, usually an actual or threatened infringement of a substantive right'.[356]

This is the understanding of legal remedy adopted in this work. One significant reason for the definition proposed by Zakrzewski is his belief in the importance of distinguishing remedial rights from substantive rights – the latter being the rights said to exist prior to the making of a court order and the former being those rights created by a court order. Following Austin,[357] Zakrzewski divides substantive rights into primary and secondary rights. The distinction between the two is based 'on the origin of the right' so that, while 'primary rights exist independently of a wrong', 'a secondary right arises from

[353] J Raz, 'Legal Rights' in J Raz (ed) *Ethics in the Public Domain* (OUP 1994).

[354] See 174 below.

[355] R Zakrzewski, *Remedies Reclassified* (OUP 2005).

[356] ibid 2.

[357] Lecture XLV in R Campbell and J Murray (eds), *Lectures on Jurisprudence* (5th edn, 1885, reprinted by Lawbook Exchange 2005).

a legal wrong'.[358] As should by now by clear, this is also the division of substantive rights adopted here.

The other noteworthy aspect of Zakrzewski's account is its *classification* of remedial rights. According to Zakrzewski, all remedies are either replicative or transformative. Replicative remedies replicate pre-existing rights while transformative remedies seek to change the content of the original right on which they are based. In this thesis, the most relevant example of a remedy replicating a primary right, on Zakrzewski's definition, is an order compelling a defendant to perform a contractual obligation. An example of a remedy replicating a secondary right is an award of compensatory damages following breach. This replicates the secondary legal right to repair generated by the breach of a primary legal duty. Examples of transformative remedies on Zakrzewski's classification include foreclosure orders and the creation of a remedial constructive trust.

As already mentioned, the definition of a legal remedy Zakrzewski adopts is one of two main points of interest his book possesses for the current thesis. In essence, Zakrzewski claims that the best definition of a legal remedy is the rights arising from court orders that aim to address a pre-suit grievance. There are two salient aspects to this definition. The first is his explanation of remedies in terms of rights. Zakrzewski's focus on rights is useful because one of the main themes of this work concerns the connection between primary rights, secondary rights and 'remedial' rights. Zakrzewski's definition of legal remedies in terms of the rights to which court orders give rise thus provides a helpful foundation upon which to build the arguments in this thesis.

[358] ibid 13. Zakrzewski defines a wrong in the usual way as 'a breach of duty'.

The second noteworthy aspect of Zakrzewski's definition is that a remedy does not necessarily *respond* to the infringement of a right. Although the claimant's request for a remedy will usually arise in response to the defendant's violation of his primary right, the remedy awarded will not necessarily be a response to this in the sense that the *violation* of the right provides the reason for the order made. For example, a request for specific performance of a contract will usually only be made once the defendant has committed a breach but the occurrence of breach itself plays no role in justifying the content of the order. This is demonstrated by the possibility of commencing an action for such an order prior to the date by which performance is due.[359]

This demonstrates that it is the right to performance that grounds an order for specific performance rather than the occurrence of breach. Although there must be a threat of breach, this is simply because without this threat there would be no reason for the court to waste its limited resources on intervening in the dispute. By contrast, the conventional understanding of all contract damages awards is that they uphold a secondary right of repair generated by breach of the primary right.[360] In opposition to the conventional view, this thesis argues that there are broadly speaking two different kinds of money awards are available in response to contractual breach: awards substituting for performance and awards compensating for loss. Like an order for specific performance, the basis for the former award is the primary right to performance. The basis for compensatory awards is the secondary right to repair that arises upon breach.

[359] *Hasham v Zenab* [1960] AC 316 (PC).

[360] *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827 (HL).

3. The Classification of Legal Remedies

For present purposes, the classificatory scheme Zakrzewski advances is the other noteworthy aspect of his book. The division of substantive rights into primary and secondary and the division of remedial rights into replicative and transformative is of particular relevance for the present thesis. The former division originated with Austin in his *Lectures on Jurisprudence*. Since then this division has been used regularly by legal commentators and has received judicial acceptance as well.[361] However, the later distinction is novel and originates with Zakrzewski. Whilst recognising that this distinction slightly oversimplifies matters, it is contended that it helps illuminate the law's basic structure.

The main advantage of distinguishing replicative and transformative remedial rights lies in distinguishing court orders that seek to alter significantly the parties' original rights from those that essentially try to duplicate the parties' pre-existing entitlements. This distinction also highlights the fact that remedies that might traditionally have been seen as performing very different functions are actually analytically similar. On Zakrzewski's understanding, for instance, although an order for specific performance is different from an award of damages for breach in that one replicates a primary right and the other replicates a secondary right, the two remedies are structurally similar in that both replicate, rather than transform, the underlying substantive right.

For Zakrzewski, an order for specific performance is a paradigm instance of a replicative remedy. However, this replication is clearly not perfect since the original right to performance is usually replaced by a new right to a similar, but not identical, performance. The content of a specific performance order is not necessarily the same as

[361] Austin's 'two-tiered structure was given prominence in the law of contract by Lord Diplock': *Remedies Reclassified* (n 355) 13.

the content of the primary right because, most obviously, unless the request for the order is made prior to breach,[362] the time stipulated for performance will be later than the time stipulated by the original contract. In addition, the court may give the content of the obligations greater specificity and will normally impose additional sanctions for non-performance, such as the possibility of a contempt of court order or further punishments in the cases of a deliberate failure to comply with the new order. Procedural mechanisms, such as garnishee orders, also exist to enforce an order for specific performance.

Similarly, the suggestion that a money award always replicates a secondary right to repair that arises upon the commission of a wrong can be questioned. Some awards actually substitute for a primary right by transforming it into an appropriate sum of money. Such a sum is, for instance, the result of an order for an account in equity.[363] This thesis argues that this can occur in relation to the primary right to performance created by a contract. However, this right should be complemented by an additional entitlement to compensation for consequential loss that replicates the secondary right of repair that arises upon breach.

Two contrasting lessons can be drawn from the above discussion. The first is that the basic distinction highlighted by Zakrzewski between remedies that replicate underlying primary and secondary rights and remedies that transform such rights is valuable. An order compelling the defendant to perform his unperformed contractual obligations clearly attempts to replicate the underlying primary right. Similarly, an order upholding a party's right to performance through an appropriate monetary substitute

[362] See *Hasham* (n 359). Of course, the order obtained cannot compel the defendant to perform prior to the date performance is due.

[363] Edelman, 'Money awards of the cost of performance' (n 156).

clearly transforms the content of the underlying right in some way. Nevertheless, the second lesson is that this distinction should be applied with caution since Zakrzewski's rigid classification obscures the fact that many remedial orders sit somewhere between perfect replication and complete transformation.[364] For instance, as noted above, an order for specific performance does not perfectly replicate the underlying primary right. Conversely, a money award upholding a contracting party's right to performance is closer to a transformation than a replication of the underlying right. However, the content of the underlying right determines the amount awarded. This remedy thus appears to sit somewhere between replication and transformation.

D. THE APPROPRIATE LABEL FOR A MONETARY SUBSTITUTE FOR PERFORMANCE

This chapter has argued that one of the principal reasons that the account proposed here has not been appreciated is the existence of ambiguity concerning the meaning of 'loss', as well as other important concepts such as 'compensation' and 'damages'. The labels given to legal concepts matter. It is therefore important that the particular label used to describe a money award substituting for performance is appropriate. Possible labels include 'performance damages' or 'performance interest damages'. The latter was used recently by Stadlen J in *Giedo van der Garde BV v Force India Formula One Team Ltd* (*Force India*).[365] On its face, this suggestion is intuitively appealing. It is both relatively simple and conveys the fundamental point that the purpose of the award is to uphold a claimant's interest in performance.

[364] This point is also made by S Smith, 'Book Review: Rafael Zakrzewski, Remedies Reclassified' (2006) 122 LQR 164.

[365] *Force India* (n 160).

Despite this, both labels are problematic. Earlier in this chapter it was argued that the best definition of 'damages' is a money award for a wrong. However, as already noted, the basis for a money substitute for performance is the right to performance rather than the secondary right created by breach. Breach does provide a reason for substitution but the possibility of anticipatory breach demonstrates that the court may have reason to do this before an actual breach has occurred. In consequence, a money substitute for performance is not provided in response to a wrong. Therefore, despite the intuitive appeal of 'performance damages' or 'performance interest damages', these labels must be rejected. Another possible label is 'substitutive compensation'. This label has been used to describe claims for a money substitute for the performance of a trustee's primary duty to the trust beneficiary in equity.[366] It is also problematic, however, because it is inconsistent with the definition of compensation outlined above. It is only awards concerned with loss that should be described as compensation.

The problem of finding an appropriate label for money awards substituting for performance therefore persists. Lord Lloyd has referred to a 'cost of reinstatement' award as 'the monetary equivalent of specific performance'.[367] This description is endorsed here so that awards of this kind hereafter are referred to as awards for the cost of equivalent performance. However, since this thesis argues that awards of the price of release are also monetary substitutes for performance, the labels 'performance money award', or simply 'performance award', are proposed as more general descriptors for the two distinct monetary substitutes for performance identified.

[366] S Elliott, 'Compensation against Trustees', DPhil Thesis, (University of Oxford 2002).

[367] *Ruxley* (n 2) 365.

CONCLUSION

Chapter Two demonstrated the existence of a significant discrepancy between the orthodox understanding of contract damages in English law and the decided case law. The purpose of the present chapter was to continue the attack by demonstrating the conceptual shortcomings of the orthodox account and the inadequacy of conventional terminology. This exposition had a further important purpose as well, which was to show that the widespread use of this terminology helps explain why the purely loss-based conception of contract damages has persisted for so long in the face of the doctrinal and theoretical difficulties identified.

Section I focussed on the conceptual inadequacy of the conventional account. The failure to appreciate the fundamental indeterminacy in the expectation principle has meant that this principle, which assumes the existence of a right to performance, is understood as a measure of loss. The consequence of this, it was argued, has been that debates about contract damages have assumed a compensatory paradigm, focussing on the appropriate measure of loss rather than on the prior question of whether the essential purpose of such awards is to compensate for loss at all.

Section II explored the uncertainty surrounding the meaning of loss in English contract law; suggesting that this uncertainty stems from two sources. The first is that the words used to describe the concept of loss are themselves ambiguous. The second, related source of confusion is that it is not entirely clear how the definition of loss takes account of the distinction between the infringement of a right and the consequences that may follow. The law needs to recognise both forms of harm but at the moment it lacks a satisfactory terminology for doing so. Three distinct conceptions of loss in the contractual context were outlined. Although English law has moved beyond the

narrowest of these to allow recovery for certain forms of non-pecuniary damage, it should not adopt the broadest conception in which breach itself is understood as a loss since this would obscure the critical distinction between the infringement of a right and its consequences.

Section III suggested that an understanding of contract damages has also been hindered by the ambiguous meaning of other important concepts applicable to this area of the law. In particular, it was demonstrated that the meaning of 'damages', 'compensation' and 'remedy' are all somewhat uncertain. Clear and stable definitions of these terms were suggested. The overriding objective underpinning the definition proposed was to secure conceptual clarity so that the distinction between substitutionary and compensatory awards is properly appreciated.

PART II: A NEW ACCOUNT OF CONTRACT DAMAGES IN ENGLISH LAW

This Part of the thesis proposes an alternative account of contract damages in English law. On this account there are two distinct kinds of money award available following an action for breach. The first is an award substituting for performance. The basis for this award is the right to performance that arises upon contract formation. The second is an award compensating for loss. The basis for this award is the secondary right to repair that arises upon breach. Chapter Four outlines the foundations of this account by defending the existence of a right to contractual performance and the basic distinction between substitutionary and compensatory awards. Chapter Five explains the quantification and restriction of money awards substituting for performance. Chapter Six focuses on money awards compensating for loss. It defends their independent existence and explains how the distinction this thesis proposes operates in practice. Finally, Chapter Seven explains how the performance-oriented account advanced in this thesis is consistent with English law's preference for providing monetary substitutes for performance rather than directly compelling a breaching party to perform.

CHAPTER FOUR – FOUNDATIONS OF THE NEW ACCOUNT

INTRODUCTION

This chapter outlines the foundations of the new account this thesis advances. Section I argues that the formation of a valid contract creates a legal right to performance in each of the parties. The contrary suggestion that it does not is generally based upon English law's supposed preference for awarding 'damages' over ordering specific performance. Section I.A argues that the true doctrinal position is more nuanced than this objection suggests. Additional doctrinal support for the existence of a right to performance is outlined as well. More fundamentally, it is argued that this objection is based on a flawed understanding of legal rights, which fails to distinguish the question of existence from that of enforcement. Section I.B explores the theoretical basis for the right to performance. After outlining the failure of traditional accounts, it expresses support for Kimel's more coherent explanation for the right to performance, which draws on insights from Raz about the nature of promising, contract law and the value of personal autonomy.

Section II defends the existence of the basic distinction this thesis proposes between money awards substituting for performance and money awards compensating for loss. Section II.A argues that English law recognises the basic distinction between substitutionary and compensatory awards. The existence of this distinction is most easily seen by the possibility of money awards greater than the loss actually suffered by the innocent party as well as the fact that principles of remoteness and mitigation do not apply to restrict such awards. Section II.B outlines a theoretical explanation for the

proposed distinction. The essence of this account is that, following breach, the reasons justifying the right to performance persist and press for next-best conformity. Achieving this requires both that an appropriate substitute for performance be provided and that harm caused to the victim of breach be repaired.

I. IN DEFENCE OF THE RIGHT TO PERFORMANCE

This section argues that the formation of a valid contract invariably creates a legal right to performance in each of the parties. This claim is defended on both doctrinal and theoretical grounds. The doctrinal defence occurs in section I.A. It is based on refuting the claim that English law's preference for money awards over coercive responses to breach is inconsistent with the existence of a legal right to performance. The theoretical defence occurs in section I.B. It is based on demonstrating the distinctive benefits that the institution of contract law creates and that the realisation of these benefits depends upon the fact that contract formation creates legal rights to performance in each of the parties.

A. THE DOCTRINAL BASIS FOR THE RIGHT TO PERFORMANCE

An important assumption underpinning the new account of contract damages is that formation of a valid contract invariably creates a legal right to performance. Although this assumption might seem obviously true, some have challenged it.[368] The principal basis for this challenge is that a damages award, not specific performance, is the default response to breach. This section responds to this challenge by arguing that this objection provides a weak basis for questioning the existence of a legal right to

[368] For example OW Holmes, *The Common Law* (Little, Brown and Co 1881). Significantly, Professor Lionel Smith claims that Holmes's famous comments on the non-bindingness of contractual obligations should be understood as making a point about the nature of legal obligations generally rather than about contractual obligations specifically. See LD Smith, 'Understanding Specific Performance' in N Cohen and E McKendrick (eds), *Comparative Remedies for Breach of Contract* (Hart Publishing 2005) 221.

performance for three main reasons. First, English law is less hostile towards compelling performance than the Holmesian objection suggests. Secondly, there is additional significant support for the right to performance. Thirdly, and most fundamentally, this objection misunderstands the nature of legal rights by conflating the question of their existence with their enforcement.

1. The Basic Objection: 'Damages' are the Default Response to Breach

It is normally said that an award of damages, rather than an order for specific performance, is the default remedy for breach of contract.[369] On this basis, English law's capacity to directly enforce the primary contractual obligation to perform is sometimes queried, and with it, the very existence of such an obligation.[370] In reality, the common law contains a robust regime for upholding primary contractual rights. In particular, there are at least three distinct coercive orders that a court can make. The first is an order compelling a defendant to perform as yet unfulfilled contractual obligations. The second is an injunction ordering a defendant not to breach. The third is the order following a successful action for the agreed sum, which compels a defendant to pay a debt which has become due. While the first two orders had their origins in the courts of chancery, the third is a common law response to breach.

Turning the basic objection on its head, it could be argued that the clearest *support* for the right to performance is that, in the face of an actual or threatened breach of contract, courts ever make orders compelling a breaching party to perform. The most

[369] *Co-operative Insurance Society Ltd v Argyll Stores Ltd* [1998] AC 1 (HL).

[370] Holmes, *The Common Law* (n 368). See also P Atiyah, *Essays on Contract* (OUP 1986) Essay 3: 'Holmes and the Theory of Contract', 57, 62.

logical and obvious basis for such orders is that the formation of a valid contract creates a legal right to performance.[371] Significantly, in this regard, the action for the agreed sum is actually the most common response to breach.[372] Whenever a party is owed money under a contract he is entitled to an order for the payment of this sum rather than to an award of compensation for loss. The significance of this should not be overlooked. It provides powerful support for the existence of the right to performance.

Nevertheless, as already mentioned, the fact that when faced with the enforcement of a contractual obligation *other* than the payment of a sum of money English law generally exhibits a preference for awarding money over compelling performance has led some to dispute the existence of the right to performance. Since it is not always possible to compel a breaching party to perform, it is argued that the entitlement created by the formation of a contract is not always a right to *performance*. Proponents of this view all tend to assume the truth of the orthodox understanding of contract damages. However, once it is accepted that the right to performance can be given effect to via an appropriate monetary substitute, the limited availability of specific performance no longer provides a compelling basis for disputing the existence of this right. Nonetheless, to rely on the proposed account to demonstrate the existence of a right to performance would assume the conclusion to prove the premise. Alternative support for the right to performance is necessary to defend the proposed account from such attacks. Various doctrinal considerations that weaken the force of Holmes' basic objection are now outlined.

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[371] Contra P Jaffey, 'Damages and the Protection of Contractual Reliance' in R Cunnington and D Saidov (eds), *Contract Damages: Domestic and International Perspectives* (Hart 2008) 139.

[372] For statistical support see Zakrzewski, *Remedies Reclassified* (n 355) 67.

2. 1st Response: English Law's Preference for Money Awards is Weaker than Supposed

It is important not to exaggerate the strength of the objection just outlined. In particular, four important considerations weaken its force. First, English law's preference for awarding money in favour of ordering specific performance is largely a product of the historical separation of law and equity. Secondly, English law's alleged preference for money awards is not as strong as traditionally supposed. Thirdly, there are some obvious practical considerations that limit the potential for a court to order specific performance even when a monetary remedy might be inadequate. Finally, a decree of specific performance is not the only way in which a court can coerce a party to perform its primary contractual obligation. Other coercive responses exist and are usually less difficult to obtain than specific performance.

a. The Historical Separation of Law and Equity

The orthodox position under civilian law is that specific performance, rather than a monetary award, is the default response to breach. Although it has been observed that the differences between civilian and common law systems in this regard can be overstated,[373] the subsidiary status of specific performance under English law is clearly a feature calling for explanation. Substantive reasons for English law's preference for monetary responses are provided in Chapter Seven. However, in a descriptive sense the principal explanation for the traditional status of specific performance is that its historical origins lie in the Court of Chancery, which meant that specific performance was simply

[373] McKendrick, 'The Common Law at Work' (n 101).

unavailable at common law.[374] The traditional status of equitable remedies as available only on a discretionary basis to ameliorate harsh common law results goes a significant way towards explaining English law's restrictive approach to the availability of specific performance. Before the passing of the Judicature Act, it was simply not open to a common law court to make a decree of specific performance. However, although this explanation provides a coherent historical explanation for the traditional approach to specific performance, by itself it does not provide a satisfactory explanation for the law's present state. Moreover, as Kimel observes, even within the boundaries of this explanation 'the problem is bound to resurface: once courts have the discretion to order specific performance, why exercise this discretion so sparingly?'[375]

b. The Status of the Adequacy of Damages Test

The second reason for caution in assessing the strength of the objection outlined above is that the preference for money awards in English law is weaker than the orthodox view suggests. The traditional position is that specific performance is only available following an action for breach when damages are 'inadequate',[376] but this is an oversimplification. For instance, in *Beswick v Beswick*,[377] emphasis was placed on the overall justice of making such an order rather than simply on the inadequacy of damages. Megarry J also expressed a similar sentiment in *Tito v Waddell (No 2)*,[378] though his Lordship decided not to order specific performance or its monetary equivalent in that

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[374] For the history of equitable jurisdiction see RP Meagher, JD Heydon and MJ Leeming, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (4th edn Butterworths, Lexisnexis 2004) [3-85].

[375] D Kimel, *From Promise to Contract: Towards a Liberal Theory of Contract* (Hart 2003) 96.

[376] *Argyll Stores* (n 369) 11.

[377] *Beswick* (n 126).

[378] *Tito* (n 201) 322.

case. More recently, in *Rainbow Estates Ltd v Tokenhold Ltd*,[379] Lawrence Collins QC appeared to accept that English law has now shifted towards the position that the availability of specific performance should be determined by reference to whether it is the more appropriate remedy in the circumstances rather than by reference to whether damages were inadequate.[380]

In response, it might be argued that this general trend towards the greater availability of specific performance has been undermined by the recent House of Lords' decision in *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd*.[381] This case appears to reaffirm the orthodox view that specific performance is only available when damages are 'inadequate'. The defendant breached a term of its lease requiring it to keep open a supermarket in a large commercial shopping centre. Many of the other tenants depended on the supermarket's existence to make their own businesses viable, given its ability to attract customers to the centre. The landlord sought an order to compel performance.

In the leading speech, Lord Hoffmann referred to the adequacy of damages test and held that the discretion whether or not to order specific performance was governed by well-established principles.[382] Although specific performance was denied on the facts, this decision was attributable to certain considerations said to 'bar' the availability of specific performance. In particular, the remedy was refused because it would involve 'constant supervision', require the court to specify new obligations on the defendant with respect to opening hours and the like, and contravene the established principle that

[379] *Rainbow Estates Ltd v Tokenhold Ltd* [1999] Ch 64.

[380] ibid 72-73.

[381] *Argyll Stores* (n 369).

[382] ibid 9.

courts will not force a party to run a business.[383] In view of this, the decision should not necessarily be read as indicating a significant reversal of the more liberal attitude towards specific performance developed in recent years.

This explanation of the case raises the status of the various 'bars' to specific performance. Unfortunately there is not space to examine these various bars properly within the confines of this thesis. To the extent that they constitute justifiable restrictions on the availability of specific performance, they simply provide particular reasons, in addition to more generally applicable reasons, for not compelling performance in particular circumstances. This balance of reasons means that a monetary award is a more appropriate substitute for performance in the particular case.

Overall, it seems that the English law on specific performance, much like the law of contract damages more generally, is presently in a state of flux.[384] The precise circumstances in which such an order will be available are unclear. Obviously this is somewhat inevitable given its discretionary nature but some increased certainty is desirable. Suggesting a new formulation is beyond the scope of this work but it is contended that the uncertain status of specific performance is at least partly attributable to the prevailing orthodoxy on contract damages. An additional benefit of acceptance of the performance-oriented understanding of contract damages proposed here, therefore, may be to facilitate clarification of the precise relationship between monetary awards and specific performance. That said, for present purposes, it is only important to appreciate that recently the position appears to have shifted towards increasing the availability of this response. In consequence, it can probably now be said that, subject to the operation

[383] ibid 11, citing *Braddon Towers Ltd v International Stores Ltd* [1987] 1 EGLR 209, 213 (Slade J).

[384] This is also the view taken in E McKendrick, *Contract Law: Text, Cases and Materials* (3rd edn OUP 2008) 960.

of various bars that restrict its availability in particular situations, specific performance will be available when it will 'do more perfect and complete justice than an award of damages'.[385]

c. Practical Restrictions on the Availability of Specific Performance

The third reason not to exaggerate the significance of English law's preference for money awards over specific performance is that there are some practical considerations that give a court less reason to order the latter. The first is that the claimant may actually prefer a money substitute for performance to an order for specific performance. One reason for this is that delay may have reduced the value that the claimant places on receiving performance.[386] Another reason may be that the relationship between the parties has been damaged irreparably. Finally, it may be because, although the claimant still values performance highly, he has little faith in the defendant and wishes to avoid having to return to court to seek further assistance in enforcing his rights.

The second practical consideration limiting the availability of specific performance is that the time for useful performance may have passed. The most obvious situation where this occurs is when the contract stipulates that time is 'of the essence'. However, the time for useful performance may also pass because there is a significant delay between breach and trial or because of the nature of the relevant breach. The facts in *Pell Frischmann*,[387] illustrate the latter possibility, where the obligation breached was one to work exclusively with the claimants on any projects involving a

[385] *Tito* (n 201) 322; *Rainbow Estates* (n 379) 72.

[386] On the significance of the subjectivity of value in contract remedies see D Friedmann, 'Economic Aspects of Damages and Specific Performance Compared' in Cunnington and Saidov (eds), *Contract Damages: Domestic and International Perspectives* (Hart Publishing 2008) 65.

[387] *Pell Frischmann* (n 189).

third party. Once breached, this obligation was no longer capable of performance so specific performance could not be ordered. This characteristic is common to all confidentiality agreements.

The problem that arose in *Pell Frischmann* often arises where the obligation breached is one to refrain from doing a certain act. Nevertheless, it should be noted that *Wrotham Park*[388] is a case involving the breach of a negative covenant where performance in accordance with the contract remained possible but a money substitute was still awarded. The houses built in breach of the covenant could have been torn down but Brightman J refused to make such an order because it would have constituted an unjustifiable waste of valuable housing. This is yet a different reason for refusing specific performance. Here, the court could have undone the breach of the obligation not to do something. Its reason for declining to do so was not impossibility *per se* but undesirability by reference to an extraneous reason of public policy. This decision is a good example of the approach endorsed in Chapter Seven as the basis for reconciling the existence of a right to performance with English law's preference for money awards. In addition to considering the claimant's interest in performance, the law must take account of various other considerations in determining the best substitute for performance in the circumstances.

Strictly speaking, there is a further restriction on the availability of specific performance: it is a response that only applies to the enforcement 'in specie' of an executory contract.[389] An executory contract is one that requires the execution of an instrument, or the doing of an 'act in the law',[390] which will put the parties in the position

[388] *Wrotham Park* (n 162).

[389] *J C Williamson Ltd v Lukey and Mulholland* (1931) 45 CLR 282 (HCA) 297 (Dixon J).

[390] ibid.

relative to each other that the contract contemplates. Examples include contracts for the sale of land, which require the execution of a conveyance, or contracts for the sale of goods requiring the performance of some legal act before property will pass from seller to buyer.[391] By contrast, an executed contract is one that does not require the execution of an instrument or the doing of an act in law to put the parties in the position that the contract contemplates. If the court directs a party to an executed, rather than executory, contract to perform its obligations, that it is not specific performance in the proper sense but relief approximate to specific performance.[392]

This distinction is of practical importance. In cases of true specific performance, it is necessary for the claimant to plead and prove performance of, or readiness and willingness to perform, its own obligations under the contract.[393] In addition, an order for true specific performance is an order that the whole contract, rather than individual obligations under it, be performed.[394] An order of the latter kind is normally reserved for executed contracts and referred to as either a prohibitive or mandatory injunction depending on whether the relevant underlying obligation is a negative or positive one.[395] Also, there may be further practical consequences in terms of the defences available to the defendant in seeking to persuade the court not to exercise its discretion in favour of the claimant.[396] The existence of this technical distinction, however, does not affect the basic point that the practical restrictions on the availability of specific performance, as a

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[391] Meagher, Heydon and Leeming, *Equity: Doctrines and Remedies* (n 374) [20-010].

[392] This terminology comes from *Pakenham Upper Fruit Co Ltd v Crosby* (1924) 35 CLR 386 (HCA), 394 (Isaacs and Rich JJ).

[393] Meagher, Heydon and Leeming, *Equity: Doctrines and Remedies* (n 374) [20-015].

[394] See ibid [20-130].

[395] ibid [20-015].

[396] ibid [20-055].

discretionary response, only serve to demonstrate that English law is not as reticent to compel a breaching party to perform as is sometimes suggested.

d. Other Direct Enforcement Orders

Finally, it is important to emphasise that specific performance is not the only response to breach that directly enforces the primary right. In addition to the commonly claimed action for the agreed sum, prohibitory and mandatory injunctions are available to prevent a future breach, or undo a past breach, respectively. Moreover, although discretionary in nature, absent particular hardship to the defendant, a prohibitory injunction will normally be granted as a matter of course.[397] As Lord Cairns LC stated in *Doherty v Allman*, speaking with regard to negative covenants:

> 'If parties, for valuable consideration, with their eyes open, contract that a particular thing shall not be done, all that a Court of Equity has to do is to say, by way of injunction, that which the parties have already said by way of covenant, that the thing shall not be done; and in such case the injunction does nothing more than give the sanction of the process of the Court to that which already is the contract between the parties. It is not then a question of the balance of convenience or inconvenience, or of the amount of damage or of injury – it is the specific performance, by the Court, of that negative bargain which the parties have made, with their eyes open, between themselves.'[398]

Perhaps, as Dixon J suggested, Lord Cairns spoke too absolutely, and the position is rather, or at least should be, that if 'a clear legal duty is imposed by contract to refrain from some act, then, prima facie, an injunction should go to restrain the doing of

[397] *Doherty v Allman* (1878) 3 App Cas 709 (HL).

[398] ibid 720.

that act'.[399] In addition, although the grant of a prohibitory *interlocutory* injunction may not be made quite so readily when it effectively amounts to a final determination of the parties' rights, such an order is still available, taking account of the strengths and weaknesses of the respective cases, and the likelihood of the claimant's eventual success at trial.[400] Moreover, where the defendant was proposing to act in clear breach of a negative covenant there must be special circumstances before the court would exercise its discretion to refuse an injunction.[401] Thus, the position of the claimant is significantly stronger than the defendant in both interlocutory and final hearings, further demonstrating the weighty protection English law affords the right to performance.

3. 2nd Response: The Right to Performance has Additional Doctrinal Support

The preceding discussion demonstrated that English law is less averse to compelling a party in breach to perform subsisting contractual obligations than the classic Holmesian objection might suggest. Not only are coercive responses ordered more regularly than sometimes suggested but in practice there are a number of considerations that limit the situations in which coercive orders are sought. In what follows, further doctrinal evidence for the existence of a right to performance is outlined. This evidence provides even stronger grounds for concluding that the creation of a contract invariably creates a legal right to performance in the parties.

[399] *Lukey* (n 389) 299.

[400] *Araci v Fallon* [2011] EWCA Civ 668.

[401] ibid [39].

a. The Pacta Sunt Servanda Principle in Operation

In *Ruxley*, Lord Mustill referred to the *pacta sunt servanda* principle in stating that the court should honour the claimant's choice of what performance he required in exchange for the contract price.[402] At an abstract level, regular invocation of this principle in a variety of contexts supports the claim that the formation of a contract gives each party a legal right to performance. For instance, in *George Mitchell (Chesterhall) Ltd v Finney Lock (Seeds) Ltd*,[403] in the context of considering the proper construction of an exclusion clause, Oliver LJ stated that 'the purpose of a contract is performance and not the grant of an option to pay damages'.[404] A similar sentiment was expressed by Roskill LJ in *Cehave NV v. Bremer Handelsgesellschaft mbH* (*The Hansa Nord*).[405] In the context of determining the appropriate classification of a term, his Honour cautioned against being overly willing to classify terms as conditions on the basis that:

> 'contracts are made to be performed and not to be avoided according to the whims of market fluctuation and where there is a free choice between two possible constructions I think the court should tend to prefer the construction that will ensure performance, and not encourage the avoidance of contractual obligations'.[406]

The decision in *Cooper v Jarman* provides a further illustration of English law's support for *pacta sunt servanda*.[407] Jarman entered into a contract with a builder for the

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[402] *Ruxley* (n 2) 360.

[403] *George Mitchell (Chesterhall) Ltd v Finney Lock (Seeds) Ltd* [1983] QB 284 (CA).

[404] ibid 304.

[405] *Cehave NV v. Bremer Handelsgesellschaft mbH (The Hansa Nord)* [1976] QB 44 (CA).

[406] ibid 70-71.

[407] *Cooper v Jarman* (1866) LR 3 Eq 98.

construction of a house but died before completion. Following Jarman's death, the builders completed the work and were paid by the administrators of Jarman's estate. The report is unclear but it appears that the contract price of completing performance was more than the compensatory damages the builders would have been entitled to recoup had the administrators repudiated the contract, as they were entitled to do. The issue for determination was whether the estate was liable for the full cost of performing the contract or could limit its liability simply to the compensatory damages claim as that was the expense the administrators could have chosen had they repudiated. The case therefore raised the question of whether the administrator had a duty to perform even though the contract was for personal services and therefore not specifically enforceable. The Court held that all costs paid out for the completion of the building were properly expenses of the estate on the basis that the administrator had 'a clear duty to perform'.[408] This result was approved by the Privy Council in a case with very similar facts.[409] Lord Romer stated that 'the breaking of an enforceable contract is an unlawful act.... it can never be the duty of... an administrator to commit such an act'.[410]

b. The Concept of Breach and the Doctrine of Frustration

More fundamentally, the existence of a right to performance, and a correlative duty to perform, is logically implied by the very concept of breach. One might respond that the content of this right or duty is an open question but logically the content of the duty must be to perform the contractual obligations stipulated since it is only this failure that is described properly as a 'breach'. A breach of contract is a breach of some aspect

[408] ibid 102.

[409] *Anguilla (Ahmed) bin Hadjee Mohamed Salleh Anguillia v Estate and Trust Agencies (1927) Ltd* [1938] AC 624 (PC).

[410] ibid 635.

of the duty to perform. Assuming the correlativity of legal rights and duties,[411] the concept of breach therefore implies the existence of a legal right to performance.

Less abstract support for the existence of a right to performance can be found in the doctrine of frustration. If the right created by the formation of a contract was not to performance as stipulated under the contract but only to either performance *or* compensatory damages for loss caused by non-performance, the doctrine of frustration would not operate as it currently does. This is because, leaving aside a case where the defendant is actually incapable of paying damages to compensate the claimant for loss, it should always be possible for the defendant to fulfil its obligation to perform.[412]

c. The Significance of Anticipatory Breach

The possibility of bringing an action for breach prior to the date at which performance is due is also premised upon the existence of a duty to perform. Normally the response sought in this context is a money award.[413] However, further support for the existence of a right to performance can be derived from the possibility of seeking an order for specific performance *prior* to the date on which performance is due. This was held in *Hasham v Zenab*,[414] where the defendant was in anticipatory breach of a contract for the sale of land. Some weeks before the last day for completion, the claimant instituted proceedings for specific performance. That proceedings were instituted prior to the date by which performance was due did not affect the claimant's entitlement to seek the order.

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411 Hohfeld, *Fundamental Legal Conceptions* (n 303).

412 See Stevens, 'Damages and the Right to Performance' (n 3) 172 and Smith, *Contract Theory* (n 5) 384.

413 *Hochster v De la Tour* (1853) 2 El & Bl 678, 118 ER 922.

414 *Hasham* (n 359).

d. The Restrictive Approach to One-sided Contractual Modifications

A one-sided contractual modification is an agreement reached by the parties subsequent to their original contract in which one party agrees to give more or accept less for the same performance by the other than it was entitled to under the contract. In English law such modifications are generally only enforced in the presence of consideration.[415] The purpose of the rule is to prevent opportunistic exploitation of one party by the other. Although this is a worthwhile objective, in reality the circumstances existing at contract formation may change significantly due to later events, thereby making performance practically impossible, or at least very different, without some adjustment of the original obligation.[416] Nevertheless, this change in circumstances may be insufficient to establish that the contract has been frustrated.[417]

The existence of this rule has been criticised.[418] Its effect has been eroded somewhat by the finding that a 'practical benefit' can constitute good consideration.[419] Nevertheless, the basic rule remains intact and the extension of the 'practical benefit' principle to the part payment of a debt has been doubted.[420] Moreover, in *Williams* it was observed that the threat posed by the risk of opportunistic exploitation is now adequately dealt with by the modern doctrine of economic duress, which did not exist when the earlier cases generating the basic rule were decided. It is not that English law has now

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[415] *Stilk v Myrick* (1809) 2 Camp 317; *Foakes v Beer* (1884) 9 App Cas 605 (HL).

[416] For a recent discussion see M Chen-Wishart, 'A Bird in the Hand: Consideration and Contract Modifications' in Burrows and Peel (eds), *Contract Formation and Parties* (OUP 2010) 89, 91.

[417] This is because it may not be 'radically different'. See *Davis Contractors Ltd v Fareham UDC* [1956] AC 696 (HL), 729 (Lord Radcliffe).

[418] J Dawson, *Gifts and Promises: Continental and American Law Compared* (Yale University Press 1980) 4.

[419] *Williams v Roffey Bros* [1991] 1 QB 1 (CA).

[420] *Re Selectmove* [1995] 2 All ER 531 (CA).

relaxed the level of protection afforded to contractual rights, but rather that it employs a different doctrinal mechanism to achieve this objective. This cautious approach to enforcing one-sided contractual modifications is further evidence of the existence of a right to performance.

e. Collateral Support from the Law of Torts

Finally, the existence of the tort of inducing breach of contract assumes the existence of a right to contractual performance.[421] If a breach of contract did not constitute the infringement of the right to performance then inducing another party's breach could not give the other contracting party a cause of action against the relevant third party inducing the breach. A similar point can also be made in relation to the tort of causing loss by unlawful means since the requirement of an unlawful threat can be satisfied by a threat from the defendant to break a contract with the claimant or a third party.[422]

4. 3rd Response: The Basic Objection Misunderstands the Nature of Legal Rights

At an abstract level, the more fundamental problem with the argument that English law's preference for money awards over compelled performance undermines the existence of a right to performance is that it rests on a flawed understanding of legal rights. The argument conflates the question of a right's existence with that of its enforcement. On a normative understanding of legal rights that recognises their critical role in practical reasoning, rights are best understood as reasons for action. This

[421] The classic statement occurs in *Lumley v Wagner* (1852) 1 De G M & G 604.

[422] See *OBG v Allan* [2007] UKHL 21; [2008] 1 AC 1.

conception of rights recognises their dynamic aspect, which allows the content of the duties they ground to change over time. On such an understanding of rights, there is an important distinction between the existence of a right and the appropriate response to its infringement.

a. Distinguishing the Existence and Enforcement of Legal Rights

The objection currently under discussion presupposes that the existence of a legal right can be equated with its enforcement in a particular way. In particular, the argument assumes that the creation of a legal right to contractual performance brings with it an entitlement to obtain an order for specific performance following breach. This argument is fundamentally misconceived because it conflates two distinct inquiries. The question of whether a right exists is distinct from the question of how it should be enforced following breach. The existence of this distinction is evident throughout private law. For instance, the fact that a party cannot always obtain an injunction to prevent the commission of a threatened tort, even when it is certain to occur, does not contradict the existence of the underlying right. It simply means that absolute protection of this right must give way to other competing interests.

This principle can be generalised. The normative force exerted by other considerations means that it is not always appropriate to protect rights maximally. These interests may be sufficiently strong to ground conflicting rights and duties or they may not. In either case, these interests will limit the scope of operation of the competing right. The basic distinction between the existence and enforcement of rights is particularly germane in the legal context where practical, as well as normative, considerations are relevant to a court's decision regarding the most appropriate response to breach. The principal normative consideration relevant to the question of the appropriate response to breach is the extent to which the defendant's liberty is limited.

Practical considerations also matter. The fact that specific performance will not be ordered when there is a need for 'constant supervision' is a good example of this.[423] Similarly, English law's restrictive approach towards the recovery of damages for non-pecuniary loss might be explained partly by a concern amongst judges with regard to their ability to differentiate valid claims from fraudulent ones.[424]

b. Rights as Reasons for Action

Hohfeld's purely analytic account of legal rights was outlined in Chapter Three. The focus of Hohfeld's account was not on making clear the distinction between the existence and enforcement of legal rights but on classifying the various different legal relations that exist between persons. However, the distinction between the existence and enforcement of legal rights is highlighted by a normative account of rights, which understands rights as reasons for action. The understanding of legal rights advanced by Raz is one prominent example. Raz's account of rights begins with the logically prior concept of an 'interest'. A person has an interest whenever an aspect of their well-being is affected.[425] According to Raz, interests play a special role in explaining institutional, including legal, rights.[426] On Raz's account, a right exists whenever an interest of the individual right-holder is a sufficient reason to hold some other person or persons under one or more duties to protect or promote that interest. For Raz:

> 'If conflicting considerations show that the basis of the would-be right is not enough to justify subjecting anyone to any duty, then the right does not exist. But

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[423] *Argyll Stores* (n 369).

[424] For criticism of this justification for the restrictive approach see Burrows, 'Mental distress damages in contract - a decade of change' (n 53) and S Harder, *Measuring Damages in the Law of Obligations* (Hart 2010) 113.

[425] J Raz, *The Morality of Freedom* (OUP 1986) 166, 180.

[426] See Raz, 'Legal Rights' (n 353) 254.

> often such conflicting considerations, while sufficient to show that some action cannot be required as a duty on the basis of the would-be right, do not affect the case for requiring other actions as a matter of duty. In such cases the right exists, but it successfully grounds duties only for some of the actions which could promote the interest on which it is based'.[427]

This account can be used to explain how the existence of a legal right to contractual performance is consistent with English law's regular refusal to compel performance following breach. The balance of considerations relevant to determining the content of the duty grounded by the right to performance is different following breach from the balance relevant to determining the content of the duty at the point the right is generated by contract formation. The idea that the content of the duty that correlates to a particular right can change may appear strange. However, as the above extract makes clear, Raz's explanation for this is that there is a dynamic aspect to rights, meaning they have a capacity to generate new duties with changing circumstances. All this leaves unanswered the question of exactly why the formation of a valid contract creates a legal right to performance in at least one of the parties. This question is the basis of a longstanding debate in contract theory. The view supported in this thesis is outlined in the next section.

B. A THEORETICAL BASIS FOR THE RIGHT TO PERFORMANCE

The correct understanding of legal rights is contentious,[428] but engaging with this long-standing jurisprudential debate is beyond the scope of this thesis. As just highlighted, on one notable theory, a legal right exists whenever there are interests of

[427] Raz, *The Morality of Freedom* (n 425) 183.

[428] See, for example M Kramer, N Simmonds and H Steiner (eds), *A Debate over Rights: Philosophical Enquiries* (OUP 1998); Eleftheriadis, *Legal Rights* (n 351).

sufficient strength to justify imposing a duty on another.[429] On this account, comprehensively demonstrating the existence of a right to contractual performance would require weighing all the interests that favour recognition of this right against those that do not. Given that the strength of the various interests for and against recognition of a right may vary from case to case it is unclear whether this task is possible. In any event, it is certainly not attempted here. The current discussion is limited to outlining two distinctive ways that the existence of a right to performance benefits a person's interest in personal autonomy. It contends that these benefits provide sufficient reason for concluding that formation of a valid contract generates a legal right to performance. In order to appreciate the distinctive benefits that arise from an institution that creates legal rights to the performance of certain voluntary undertaken commitments, it is necessary to appreciate the nature and value of such commitments. In view of this, this section is divided into three sub-sections. The first briefly outlines the failure of traditional attempts to explain the basis for the right to performance. The second explains the important insights of Raz concerning the nature of promissory and contractual obligations.[430] These insights were built upon by Kimel in developing an account of contract law that explains why contracts create legal rights to performance.[431] The section concludes by explaining this account.

1. The Failure of Traditional Accounts

This section documents the failure of traditional attempts to explain the theoretical basis for the right to performance. It argues that both of the major traditional

[429] See, for example, J Raz, 'Free Expression and Personal Identification' (1991) 11 OJLS 303, 306.

[430] J Raz, 'Book Review: Promises in Morality and Law' 95 HLR 916.

[431] See Kimel, *From Promise to Contract* (n 375).

accounts suffer from a serious flaw. An alternative explanation is required. The account proposed by Stephen Smith is considered but it is argued that ultimately this is also unconvincing.

a. Promissory Theories

The traditional and probably still the most widely accepted understanding of contractual obligations is that they are self-imposed, voluntarily undertaken commitments akin to the moral obligation created by a promise. For this reason, it is occasionally suggested that the justification for the legal enforcement of contractual undertakings is the same as the moral justification for promissory obligations. The classical 'will' theories of the 19th century provide examples of this understanding but probably the most famous modern defence is Professor Fried's *Contract as Promise*.[432]

The fundamental problem for promissory theories is their apparent contravention of Mill's harm principle, which stipulates that the only justification for state-sanctioned restriction of personal liberty is the prevention of harm to others.[433] Promissory theories therefore appear to sanction the legal enforcement of a purely moral obligation to benefit another. Promissory theorists usually respond to this objection with arguments based on social convention. For instance, in *Contract as Promise* Fried attempted to circumvent this objection with the following argument:

> 'There exists a convention that defines the practice of promising and its entailments. This convention provides a way that a person may create expectations in others. By virtue of the basic Kantian principles of trust and

[432] C Fried, *Contract as Promise* (Harvard University Press 1981).

[433] See JS Mill, *Utilitarianism, Liberty, Representative Government* (Everyman ed. 1910).

respect, it is wrong to invoke that convention and to make a promise, then to break it'.[434]

Despite the ingenuity of this response, there appears to be general acceptance that Fried's attempt to conquer the objection based on the harm principle ultimately fails.[435] The basic reason for this is that Fried's argument does not explain why a *social* convention should ever be *legally* enforced. At its very best, Fried's explanation provides a defence of the moral obligation to perform a promise, but it does not answer the fundamental question of why the state is justified in transforming this moral obligation into one with the backing of legal sanctions for its infringement.

b. Transfer Theories

The other principal kind of explanation for the right to performance is that contract formation constitutes a transfer of entitlements, akin to property rights, between the two parties. According to transfer theories, a contract does not create new rights but simply *transfers* pre-existing rights from one party to the other. Notable modern proponents of the transfer theory of contractual obligation are Professor Benson and Professor Barnett,[436] but Benson notes that the origins of such theories can be traced back as far as Grotius.[437]

Transfer theories of contractual obligation do not suffer from the harm principle objection identified above. However, as Smith observes, such theories must overcome a

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[434] Fried, *Contract as Promise* (n 432) 17.

[435] See, for example, Smith, *Contract Theory* (n 6) 71.

[436] See P Benson, 'The Idea of a Public Basis of Justification for Contract' (1995) 33 Osgoode Hall Law Journal 273 and R Barnett, 'A Consent Theory of Contract' (1986) 86 Columbia Law Review 269.

[437] See P Benson, 'Contract' in D Patterson (ed) *A Companion to the Philosophy of Law and Legal Theory* (Blackwell 1996) 42, discussing H Grotius, *The Law of War and Peace* (first published 1625, tr FW Kelsey, Clarendon 1925).

significant conceptual difficulty if they are to be accepted as valid. This difficulty lies in explaining how the rights said to be transferred through the formation of a contract were actually in existence prior to contract formation.[438] In recent work, Benson has attempted to address this difficulty by arguing that the right transferred by a contract is not a right to the performance of a future act, but rather, a right to the very thing promised in the contract.[439] This response, however, does not deal adequately with the fundamental conceptual objection to which transfer theories are susceptible. As Smith has observed:

> 'Except for contracts to sell a specific object, a contracting party does not own, at the moment just prior to contracting, rights to the 'things' that this response assumes are transferred by a contract. Leaving aside whether it makes sense to speak of a service as a 'thing', we cannot own, at the present moment, something which does not yet exist.'[440]

It therefore seems that both of the major traditional explanations for how contract formation can create legal rights to performance are flawed. Promissory theories contravene the harm principle whilst transfer theories appear to face an insuperable conceptual objection. To rationally explain how and why a contracting party obtains an entitlement to performance upon formation something further is required. Smith has attempted to solve this conundrum by proposing an account that draws on aspects of both of the theories just considered.

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[438] Smith, *Contract Theory* (n 6) 101.

[439] P Benson, 'The Unity of Contract Law' in P Benson (ed) *The Theory of Contract Law* (CUP 2001) and P Benson, 'Contract as a Transfer of Ownership' (2007) 48 William and Mary Law Review 1673.

[440] Smith, *Contract Theory* (n 6) 102.

c. A Possible Alternative

Promissory and transfer theories are what Smith terms 'analytic' theories of contractual rights in that they are concerned with describing the *nature* of contractual obligations rather than explaining their normative justification.[441] However, Smith observes that any comprehensive theory of contractual obligation must contain both a normative and an analytic account of contractual rights. The account Smith proposes combines the attractive features of the two accounts just considered by arguing for a version of the promissory theory that, like transfer theories, regards contractual rights as akin to property rights.

For Smith, contracts are promises and the basis for understanding contractual obligations is an appreciation of the intrinsic value of promising. Drawing on Raz,[442] Smith argues that the existence of promissory rights is justified by the fact that promise-making and promise-keeping are constitutive elements of a close relationship, a valuable aspect of personal autonomy.[443] The basis for this claim is explained more fully in the next section where Raz's own account of contractual obligation is explained. For the moment, it is important simply that this aspect of promising explains why making a promise creates a reason for performing its subject-matter that excludes consideration of certain other reasons for not performing the promise. This is what Raz terms an exclusionary reason for action. That promises create exclusionary reasons for action entails the existence of a duty to perform since, on Raz's theory of rights, these protected reasons are the basis for duties.[444] Significantly, the special relationships that justify

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[441] ibid 54.

[442] J Raz, 'Promises and Obligations' in P Hacker and J Raz (eds), *Law, Morality and Society* (Clarendon 1977).

[443] Smith, *Contract Theory* (n 6) 74.

[444] See Raz, 'Promises and Obligations' (n 442).

promissory obligations are created *only* if promises generate exclusionary reasons for action because if it were generally acceptable to break a promise when other considerations favoured an alternative course of action, promises would not create the special relationships they do.

This argument explains how and why promises can create moral rights to performance. However, Smith's argument is flawed in asserting that 'thus understood, promissory obligations may legitimately be enforced by the state',[445] since there is nothing in this argument just outlined that explains why the moral obligation to keep a promise should ever be *legally* enforced. This error is exposed most clearly by Kimel, who proposes an understanding of contractual obligation that focuses on the much overlooked differences between promising and contracting. In particular, Kimel explains how the very same intrinsic value Smith invokes to justify promissory obligations is actually destroyed when those obligations are capable of being enforced by the state. Therefore, although Kimel endorses the account of *promising* Smith supports, he argues that the enforcement of voluntarily undertaken commitments by the state must be justified on other grounds.

As between promissory and transfer theories, Kimel's explanation is closer to the former as it recognises both a structural and functional similarity between contractual and promissory undertakings. The functional similarity is only partial, however, since the main objective of Kimel's account is to explain the distinctive value created by the option to undertake certain commitments against a background of legal enforceability. This benefit is essentially that the ability to undertake binding contractual obligations enables parties to co-operate for mutual benefit in the absence of any pre-existing relationship of

[445] Smith, *Contract Theory* (n 6) 76.

trust. Like Smith, however, Kimel's account draws heavily upon earlier observations by Raz so the focus of the discussion now shifts to an explanation of that account.

2. Raz's Account: Contract Law Protects the Institution of Voluntary Undertaking

a. The Purpose of Contract Law

The suggestion that contract law can be explained by reference to a single normative principle is theoretically appealing and has provoked a variety of different suggestions, which include the promotion of personal liberty,[446] economic efficiency,[447] and distributive justice.[448] No doubt there is some truth in all these suggestions and perhaps in others as well. Nevertheless, short of postulating a principle so abstract that it fails to reveal anything particularly illuminating or distinctive about contract law, such as that the purpose of contract law is to improve people's lives, it seems difficult to explain a complex legal institution like contract law comprehensively by reference to a single overarching principle. As Raz observes, 'the law reflects too many competing strands of thought' for this.[449]

It seems undeniable, therefore, that contract is influenced by a variety of different moral and pragmatic considerations. For instance, given the important facilitative role contract plays both in the lives of individuals and in the functioning of the modern, market economy, it seems highly unlikely that contract law can be explained

[446] For example, Fried, *Contract as Promise* (n 432).

[447] For the different meanings of efficiency in this context see R Craswell, 'Two Economic Theories of Enforcing Promises' in P Benson (ed) *The Theory of Contract Law* (Cambridge University Press 2001).

[448] A Kronman, 'Contract Law and Distributive Justice' (1980) 89 YLJ 472.

[449] Raz, 'Promises in Morality and Law' (n 430) 933.

comprehensively without reference to personal liberty or economic efficiency. Unsurprisingly, contract law's market function has spawned substantial debate concerning the extent to which it is economically efficient. Although there is not space here to properly engage with this considerable body of literature, it has been argued that economic analysis is simply incapable of explaining contract law because its predictions are 'indeterminate' and its normative recommendations are 'implausible'.[450] Whatever its merits, economic analysis therefore seems unable to provide a complete explanation of contract law.

The suggestion that contract law cannot be explained by reference to a single normative principle does not prevent the identification of a principle with *dominant* explanatory power. Raz has argued that the purpose of contract law is to protect and promote the institution of voluntary undertaking.[451] This suggestion raises the question of why protecting this practice could be a legitimate goal for the law to pursue. This requires understanding how the practice itself may be valuable, since an appreciation of the potential value in voluntary undertaking makes clear the desirability of protecting this institution. As foreshadowed above, in essence Raz argues that involvement in the practice is both a constitutive aspect of, and valuable contribution to, 'personal autonomy'.

b. The Value of Personal Autonomy

For Raz, personal autonomy 'is a constituent element of the good life. A person's life is autonomous if it is to a considerable extent his own creation'.[452] More

[450] E Posner, 'Economic Analysis of Contract Law After Three Decades: Success or Failure?' (2003) 112 YLJ 829, 830.

[451] Raz, 'Promises in Morality and Law' (n 430) 933.

[452] Raz, *The Morality of Freedom* (n 425) 408.

particularly, Raz distinguishes two different dimensions of an autonomous life. The first is that of self-definition, which recognises that a person's life is 'a continuous process of self-creation' constituted to a significant extent by 'successive choices'.[453] The second dimension of autonomy focuses on the fact that our choices are only valuable to the extent that they are made from 'among diverse and valuable options'.[454] According to Raz, the autonomy principle is a perfectionist principle.[455] Others agree.[456] This distinguishes Raz's version of liberalism from the account offered by Rawls, which claims that the state must remain neutral on the question of what constitutes a good life.[457]

The distinction between neutral and perfectionist accounts of liberalism is immensely significant in the context of broader debates about the nature of political morality. However, its present salience is limited to appreciating that Raz's conception of personal autonomy is richer, justifying greater state action, than the more minimalist conceptions embraced by other versions of liberalism. In particular, Smith distinguishes three distinct ways in which Raz's understanding of autonomy goes beyond a conception grounded purely in the notion of 'negative liberty'.[458] The first is that the mere absence of coercion is not a guarantee of autonomy. The existence of certain other conditions is also necessary such as that the choice was made in the context of an adequate range of alternative options. Secondly, even when such conditions are met, a choice will not be truly autonomous if not exercised in pursuit of a valuable goal. Finally, it is in the nature

[453] J Raz, *Ethics in the Public Domain* (OUP 1994) 104.

[454] ibid.

[455] Raz, *The Morality of Freedom* (n 425) 417.

[456] W Lucy, 'Review: Ethics in the Public Domain' (1996) 59 MLR 145.

[457] See J Rawls, *Political Liberalism* (Columbia University Press 1993) 190-195. For Rawls's classic account see J Rawls, *A Theory of Justice* (Belknap Press 1971).

[458] S Smith, 'Future Freedom and Freedom of Contract' (1996) 59 MLR 167, 177.

of autonomy that it must be judged over the course of a life rather than in isolation. Smith usefully distinguishes horizontal and vertical aspects of autonomy. The former 'is autonomy across a significant portion of life's concerns', while the latter 'is autonomy throughout the different historical stages of a life'.[459]

c. The Value of Promising

The distinctive value of promising was introduced in the previous section. To recapitulate, according to Raz, the important and distinctive feature of a promise is that it gives the promisor an exclusionary reason to act in accordance with the course of action it proposes.[460] This aspect of promising creates a particular relationship between promisor and promisee. The significant constituent of this relationship is the 'special bond' created by the peremptory force which the promisor must give to the promisee's claim to have the promise performed. Consequently, says Raz, promissory obligations can be justified only if the creation of such special relationships is itself valuable.[461] Raz identifies two ways in which such relationships might be valuable. The first is that any special bond between people must be intrinsically valuable since sharing special ties with people is part of what imbues human life with meaning.

The second way in which the binding aspect of promises is valuable follows from what Raz terms 'the desirability of special relations voluntarily shaped and developed by the choice of participants'.[462] The emphasis here is on the *voluntary* aspect of a promise – the fact that the promisor himself specifically chose to undertake it. Not only is it desirable that people be able to create special relationships with each another but it is

[459] ibid.

[460] Raz, 'Promises in Morality and Law' (n 430).

[461] ibid 928.

[462] ibid.

additionally valuable that they can do so in the distinctive and individual way that promising allows. This enables the particular personal relationship created to be distinguished from other relationships. By providing the facility for two parties to mould their relationship by reference to their own unique choices, promising, and the undertaking of informal voluntary obligations more generally, has an additional value over and above the creation of special ties.

d. Strengths and Weaknesses of Raz's Account

Raz's theory has many attractions. First, it provides an explanation of the objective test of contract formation. As Raz says, 'if people were often to let it appear that they have promised when they have not, the currency of promises would be debased and their appeal and utility greatly diminished'.[463] Secondly, Raz's explanation has the capacity to reconcile theories of contract law that otherwise may appear diametrically opposed. In particular, both contract law's market function and its capacity to enhance personal liberty can be accommodated within the broader purpose of protecting the institution of voluntary undertaking. Similarly, Raz's theory appears to provide a basis for reconciling the fundamental divide between rights-based and utilitarian theories of contractual obligation because both teleological and deontological considerations are relevant to the justificatory enterprise on Raz's account. This is demonstrated by the fact that the value of personal autonomy is both promoted, and *constituted*, by the practice of voluntary undertaking.

Nevertheless, a weakness of Raz's account, which is particularly significant in the context of the present thesis, is that it struggles to explain the emphasis given to protecting a contracting party's entitlement to performance through the responses

[463] ibid 936.

available for breach. According to Raz, 'one protects the practice of undertaking voluntary obligations by preventing its erosion – by making good any harm caused by its use or abuse'.[464] Raz recognises that, taken in isolation, this statement of purpose may appear to support the *reliance* measure of damages as the default response to breach. However, Raz acknowledges that 'the argument is more complicated and requires another twist'.[465] Since the harm that contract law must protect against is not limited to personal harm, but includes the *institutional* harm of 'erosion or debasement of the practice of undertaking voluntary obligations', Raz recognises that a stronger enforcement regime may be justified as means to this end.[466]

Raz therefore acknowledges that it may be necessary to remedy contractual breaches with an 'expectation-value measure of the legal protection of contracts' in order to protect the institution of voluntary undertaking effectively.[467] Aside from using the outdated terminology this thesis seeks to eradicate, this explanation of contract law's conventional approach is theoretically unsatisfying because it gives insufficient weight to a contracting party's right to *performance*. The traditional approach is justified not by reference to this entitlement directly but indirectly through the desirability of minimising 'the frustration of expectations', 'expensive litigation' and the possibility of 'frequent judicial mistakes'.[468] A more satisfying explanation of contract law's focus on the innocent party's hypothetical position following performance is needed.

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[464] ibid.

[465] ibid 937.

[466] ibid.

[467] ibid.

[468] ibid 938.

3. Kimel's Account of the Distinctive Value of Contracting

An attractive feature of Raz's account is that it recognises the undeniable connection between the institutions of contracting and promising without adopting the oversimplified view that the purpose of contract law is simply to enforce a certain set of promises. This vindicates the basic intuition that there is something unique and special about legal obligations assumed *voluntarily* that distinguishes them from the obligations generated by the law of tort or unjust enrichment.[469] This distinction between legal and extra-legal promises forms the inspiration for Kimel's account of contractual obligation.

a. The Distinction between Contract and Promise

According to Kimel, part of the reason for recognising binding promissory and contractual obligations is that they facilitate 'the co-ordinated or joint pursuit of potentially valuable projects and goals'.[470] However, in addition to this 'instrumental' value, which contract and promise share, the practices each possess an 'intrinsic' value, each of which is 'diametrically opposed' to the other.[471] Building on Raz's account of promising, Kimel suggests that its intrinsic value lies in 'its capacity to promote and reinforce personal relationships'.[472] In Kimel's words, promising is a particularly valuable way of developing personal relationships because it is a 'unique device' with which to invoke trust and respect, which he claims, 'are among the most fundamental building blocks of personal relationships'.[473]

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[469] Contra P Atiyah, 'Contracts, Promises and the Law of Obligations' (1978) 94 LQR 193.

[470] Kimel, *From Promise to Contract* (n 375) 80.

[471] ibid 78.

[472] ibid.

[473] ibid 28.

By contrast, contracting provides a mechanism for parties to undertake voluntary obligations in circumstances where the interpersonal trust normally required for such undertakings to be successful is absent. The intrinsic value of *contracting*, therefore, is that it facilitates future co-ordination for mutual benefit under conditions of *personal detachment*. The distinctive benefit of contracting, therefore, is that it provides an alternative means by which the instrumental benefits that promising provides can be achieved. As a result, contract law not only protects the institution of voluntary undertaking but also allows this practice to be extended to situations where it could not otherwise operate effectively. Therefore, through its instrumental function, contract, like promise, provides one specific type of freedom. However, 'as a facilitator of personal detachment, the legal practice of contract is a source of yet another, very different freedom'.[474] This is the freedom from dependence upon the interpersonal trust normally necessary for the successful functioning of its non-legal equivalent.[475]

b. Advantages and Consequences of Kimel's Account

Kimel's conception of contract law shares some of the advantages of Raz's own theory. In particular, Kimel's explanation of the function or value of contract law also allows him to recognise the distinctively voluntary nature of contractual obligations, and thereby distinguish them from other sorts of legal obligations, whilst denying that contract law is simply about enforcing a certain class of promises. In addition, for Kimel the intrinsic value of contracting is concerned with detachment rather than with its ability to create intrinsically valuable human relationships. This is significant because the law treats contractual undertakings made by corporations in exactly the same way as those

[474] ibid 80.

[475] For an argument that neither Kimel nor Fried present a truly 'liberal' theory of contract law, see C Bridgeman, 'Liberalism and Freedom from the Promise Theory of Contract' (2004) 67 MLR 684.

made by natural persons. This feature of contract law is something that certain other theories find difficult to explain.

Kimel's account also provides a nuanced and satisfying explanation of the way that social and legal practices interact in the context of voluntary undertaking. One of Kimel's main reasons for rejecting Fried's 'contract as promise' theory is his claim that any attempt to regulate a social practice inevitably changes that practice in some way. On Kimel's view of the intrinsic value of contracting:

> 'contract emerges not *as promise*, but as a *substitute for* promise… [This] represents the abandonment of the over-simplified notion that the law can systematically replicate existing moral or social institutions or simply enforce the rights or obligations to which they give rise, without altering these institutions in the process'.[476]

Combining the insights of Raz and Kimel suggests that the purpose of contract law should be both to protect and to promote the undertaking of valuable voluntary obligations. Raz focussed on protection, observing that one protects the institution by preventing its erosion and debasement. The objective test of contract formation constitutes one important way that contract law fulfils this aim. Kimel's insights demonstrate that contract law also has the capacity to *promote* the institution of voluntary undertaking by extending the range of situations where it can be invoked successfully, thereby further promoting personal autonomy.

The above discussion demonstrates that the relationship between the formal and informal institutions of voluntary undertaking is more complicated than first appears. However, it is also far richer and more symbiotic. On the view sketched here, the

[476] Kimel, *From Promise to Contract* (n 375) 79 (emphasis in original).

existence of an institution that creates legally enforceable rights to another's future performance makes three distinct valuable contributions to personal autonomy. The first of these benefits is the benefit Raz focuses upon, which is that it helps protect the *informal* practice of voluntary undertaking by preventing its erosion and debasement. Kimel identifies two additional benefits. First, contract law makes it possible to secure another's future co-operation in the absence of the trust normally required for the assurance of performance. Secondly, it increases the potential for valuable participation in the informal institution of voluntary undertaking by giving people the choice whether to invoke the formal or informal institution of voluntary undertaking. Given that participation in this informal practice is considered intrinsically valuable because it contributes to realising and increasing personal autonomy, this is valuable.

Significantly, for the purposes of the account advocated in this thesis, these benefits can only be realised fully when the content of the obligation created by a contract is to *perform* rather than simply, say, to provide compensation for loss flowing from non-performance. This is because much of the value of contract law just identified is that it offers a genuine *alternative* to the non-enforceable regime with which it co-exists. If the obligation assumed by a contractual undertaking was not one to perform, it could not truly be said that one is securing another's future co-operation to achieve a mutually desired objective. In consequence, it is contended that this understanding of contractual obligation provides a compelling basis for claiming that formation of a valid contract invariably creates a legal right to performance.

II. DEFENDING THE DISTINCTION BETWEEN SUBSTITUTIONARY AND COMPENSATORY MONEY AWARDS

The previous section demonstrated significant doctrinal and theoretical support for the claim that contract formation invariably creates a legal right to performance in each of the parties. This section demonstrates that there is also significant doctrinal support, and a coherent theoretical basis, for the existence of the distinction advanced in this thesis between money awards substituting for performance and money awards compensating for loss. Given that the prevailing orthodoxy is that *all* money awards following breach compensate for loss, the focus here is on demonstrating the existence of awards that substitute for performance. Section II.A outlines the doctrinal support for this distinction. It begins with the uncontroversial example of the order following an action for the agreed sum before moving on to demonstrate that substitutionary awards are provided in more controversial contexts as well. Finally, it observes that the restrictive doctrines of mitigation and remoteness do not apply to such awards. This is best explained by the fact that these awards are not concerned to compensate for loss.

Section II.B provides a theoretical explanation for the proposed distinction. It commences by observing that the precise conceptual relationship between substantive and remedial rights in contract law is unclear. It then outlines a coherent conceptual basis for the new account of contract damages this thesis proposes. On this account, breach does not destroy the primary right to performance but leaves the reasons underpinning it pressing for next-best conformity. Next-best conformity has two distinct aspects. First, it requires that innocent party receive an appropriate substitute for performance. Secondly, it requires that certain harm caused to the innocent party through breach be repaired. The appropriate substitute for performance depends upon

the balance of relevant considerations, while reparation for harm is always achieved through an award of compensation for loss.

A. Doctrinal Support for the Proposed Distinction

The possibility of an award compensating for loss in addition to an order for specific performance is one important source of support for the basic distinction this thesis proposes.[477] This section demonstrates that English law also sometimes provides an innocent party with a substantive money award with the aim of substituting for performance rather than compensating for loss. Significantly, an award substituting for performance will often have the *effect* of compensating for actual loss suffered. However, as Chapter Two demonstrated, it will not always do so. This overlap helps explain the tendency to conflate the fundamental distinction this thesis identifies between substitutionary and compensatory awards. However, the possibility of substantive awards greater than the amount of loss suffered shows that sometimes the justification for the award is the innocent party's right to performance rather than the contingency that loss has been suffered in consequence of breach.

1. The Action for the Agreed Sum

The clearest example of money award substituting for performance is the order made following a successful action for an agreed sum. In this situation the contract bestows upon one party a right to receive a particular sum of money from the other. If the latter party fails to pay this sum by the due date, the former is entitled to a court order that he do so. However, it is important to recognise that in English law the former party's ability to enforce his right to payment is not unlimited. Both the existence and

[477] Supreme Court Act 1981, s 50. Damages for delay in completion in addition to specific performance were awarded in *Ford-Hunt and another v Raghbir Singh* [1973] 1 WLR 738 (Ch).

content of this restriction was explained by Lord Reid in *White & Carter Councils v McGregor*.[478] The appellants agreed to attach plates to bins advertising the respondents' garage business over a period of three years. The respondents repudiated the contract on the same day it was made but the appellants nevertheless prepared the plates, displayed them for a period, and sought the full amount due under the contract, claiming the advantage of an accelerated time provision.

A majority of the House of Lords upheld the claimants' action for the agreed sum following its decision to affirm the contract in the face of the other party's repudiatory breach. The majority comprised Lord Reid, Lord Tucker and Lord Hodson. The proposition for which the case generally is understood to stand is the basis upon which Lord Reid decided the case. His Lordship stated that the recovery of an agreed sum under a contract following one party's repudiatory breach, where the right to payment was contingent upon the claimant's performance, was not possible where the claimant had no 'legitimate interest' in performance.[479] Significantly, however, Lord Hodson and Lord Tucker did not express agreement with Lord Reid. The former thought that the claimants' interest in performance was deserving of even greater protection, holding that they had an unfettered discretion whether to accept the breaching party's repudiatory breach or to affirm the contract and continue performance in accordance with its terms,[480] while the latter also declined to endorse Lord Reid's restrictions.

Given this disagreement, a question arose as to the exact principle for which the decision stands. In *Hounslow London Borough Council v Twickenham Garden Developments*

[478] *White & Carter Councils v McGregor* [1962] AC 413 (HL).

[479] ibid 431.

[480] ibid 445.

Ltd.,[481] Megarry J endorsed the view that the ratio of the case is to be found in the view expressed by Lord Reid.[482] This is undoubtedly the correct interpretation of the case since without Lord Reid's limitations there was no majority. At the other end of the spectrum were Lord Keith and Lord Morton in dissent. The former took a far more defendant-friendly position based upon a requirement that the claimant minimise the damage suffered in consequence of breach, as embodied in the doctrine of mitigation.[483] This was despite the fact that it is clear that this doctrine does not apply to an action for the agreed amount.[484] Analogously, it has been held that a claimant seeking specific performance owes no duty to mitigate his loss, provided he possesses a legitimate interest in continuing to insist upon performance.[485]

McGregor thus contains the whole spectrum of views concerning the degree of respect English law should afford a party's right to insist upon obtaining a contractually agreed performance. Although this thesis expresses some sympathy for the view expressed by Lord Hodson, it recognises that English law adopts the more moderate position adopted by Lord Reid. It is worth reiterating, however, that this requirement is distinct from that which operates in the context of mitigation. An order for the payment of the agreed sum is not one for the payment of compensation for loss. Rather, it is an order that the defendant fulfil his primary contractual undertaking to pay the sum agreed upon. Lord Keith's focus on mitigation in *McGregor* conflates the distinction between awards substituting for performance and awards compensating for loss.

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[481] *Hounslow London Borough Council v Twickenham Garden Developments Ltd* [1971] Ch 233.

[482] ibid 254.

[483] ibid 439.

[484] *Jervis v Harris* [1996] Ch 195 (CA) 202.

[485] *Asamera Oil Corp Ltd v Sea Oil and General Corp* [1979] 1 SCR 633, 666 (Estey J).

The restriction on the recovery of compensation encapsulated by the contractual remoteness principle is also inapplicable to an action for a contractually agreed sum. This was recently affirmed in *Jervis v Harris*.[486] The claimant leased premises to the defendant, who promised either to repair or, failing repair, to reimburse the claimant for any expenses incurred in effecting repairs. In the event, the defendant failed to repair and the claimant landlord expended money in doing the repairs himself. The Court of Appeal emphasised that the landlord's claim that the defendant pay the cost of repairs in performance of his required obligations was not a claim for damages but a claim for *debt*. It was said that a claimant:

> 'who claims payment of a debt need not prove anything beyond the occurrence of the event or condition on the occurrence of which the debt became due. He need prove no loss; the rules as to remoteness of damage and mitigation of loss are irrelevant'.[487]

That an order for the payment of a contractually agreed sum is not an award of compensation for loss is demonstrated by three further propositions. First, in an action for the price of goods it is irrelevant how much the goods were actually worth.[488] Secondly, the availability of such an order is unaffected by the occurrence of a post-breach event that reduces the actual loss suffered by the claimant.[489] Thirdly, it is also significant that, as with an order for specific performance, where the agreed sum is not

[486] *Jervis* (n 484) 202.

[487] ibid 201.

[488] Peel (ed), *Treitel* (n 9) 1093.

[489] *Jervis* (n 484).

paid and the claimant suffers additional loss, she may be able to bring a claim for the recovery of this sum *and* the recovery of compensation for loss.[490]

The availability of the action for the agreed sum demonstrates that the common law provides money awards substituting for performance. However, the right in question here is one to a sum of money. The possibility of a performance money award when the content of the right to performance is not to a sum of money, such as a right to goods or services, is more controversial. Nevertheless, this thesis argues that such awards, analogous to the action for the agreed sum, both are and should be available in English law. This is demonstrated first in relation to money awards provided in lieu of specific performance and then, in the next section, through the possibility of other money awards enforcing contractual obligations to provide goods and services.

2. Money Awards in Lieu of Specific Performance

The availability of money awards in lieu of specific performance further supports the existence of the proposed distinction. The way such awards are measured makes it clear that their basis is the innocent party's right to performance rather than the loss suffered in consequence of breach. In *Wroth v Tyler*,[491] the defendant vendor entered into a contract for the sale of the bungalow where he lived with his wife and adult daughter. After contracts were exchanged, his wife entered a notice onto the Land Register of her rights of occupation under the Matrimonial Homes Act 1967 in an attempt to prevent the sale from proceeding. The defendant could not persuade her to remove the notice and informed the purchasers he could not complete. The purchasers sought specific performance and equitable relief under Lord Cairns' Act, in addition to other relief.

[490] *Overstone Ltd v Shipway* [1962] 1 WLR 117 (CA).

[491] *Wroth v Tyler* [1974] Ch 30 (ChD).

Megarry J refused specific performance on the grounds that it might split up the family but awarded the claimants equitable damages in lieu.

A question arose as to the appropriate date for assessment. This was held to be the date of trial, rather than the date of breach, during which time the value of the bungalow had risen from £7,500 to £11,500. In reaching this conclusion, Megarry J reasoned that different principles govern the assessment of damages at common law and equity for two reasons. The first was that it was clear that damages are available under Lord Cairns' Act in situations where they cannot be awarded at common law. An example of this provided by Megarry J was where the House of Lords awarded equitable damages in lieu of a *quia timet* injunction.[492] The second reason for the difference in approach was that the wording of section 2 of The Chancery Amendment Act 1858:

> 'at least envisages that the damages awarded will in fact constitute a true substitute for specific performance'... [so they should be quantified to give to the claimant] as nearly as may be what specific performance would have given'.[493]

Applying this principle, Megarry J concluded that an award of 'damages in lieu' should be assessed at the date of judgment so as to reflect the fact that specific performance was a 'continuing remedy'.[494] This conclusion is consistent with the account proposed in this thesis in which an innocent party's primary right to performance persists and presses for next-best conformity following breach. However, it is important to note that in *Johnson v Agnew* Lord Wilberforce questioned Megarry J's judgment to the extent that it establishes different principles for the assessment of damages between the

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[492] *Leeds Industrial Co-operative Society Ltd v Slack* [1924] AC 851 (HL).

[493] *Wroth* (n 491) 58-59.

[494] ibid 60.

common law and equity.[495] There, his Lordship held that although damages might be awarded in lieu of specific performance in some cases where they could not be recovered at common law, The Chancery Amendment Act 1858 did not warrant the assessment of damages other than on a common law basis.[496]

Professor Mitchell has observed that there are strong grounds for challenging Lord Wilberforce's apparent claim that the assessment of damages at common law and in equity should always be governed by the same principles.[497] The author also notes that this has been recognised by subsequent judicial discussions of Lord Wilberforce's comments.[498] Although these discussions generally demonstrate deference, they tend to strictly confine the application of Lord Wilberforce's comments to situations where equitable and common law damages are recoverable in respect of the same underlying cause of action so that they 'cannot sensibly have any application where the claim at common law is in respect of a past trespass or breach of covenant and... [the claim] under the Act is in respect of future trespasses or continuing breaches of covenant'.[499]

Moreover, it should be stressed that in *Johnson* itself, Lord Wilberforce stated that, in a case of the breach of a contract for the sale of land, common law damages should be assessed at the date the contract was lost, if the innocent party reasonably tried to have the contract completed. On this basis, he held that the date for the assessment of damages here should be that on which the remedy of specific performance became

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[495] *Johnson v Agnew* [1980] AC 367 (HL).

[496] ibid 400.

[497] C Mitchell, 'Johnson v Agnew' in C Mitchell and P Mitchell (eds), *Landmark Cases in the Law of Contract* (Hart 2008) 351, 369.

[498] ibid, citing *Gur v Bruton* (CA) 29 July 1993 (Dillon LJ) and *Jaggard* (n 336) (Millett LJ)

[499] *Jaggard* (n 336) 291 (Millett LJ), where the relevant issue was the basis for assessing damages in lieu of granting an injunction to restrain a threatened or continuing trespass or breach of a restrictive covenant.

aborted rather that the date of breach. This flexible approach to the assessment of *common law* damages further supports the account advanced here. The result can be explained on the basis that the claimant's right to performance persisted after breach, with the Court initially inclined to enforce this right through an order for specific performance. Once it became clear that specific performance was no longer an appropriate remedy, the right to performance was given effect through the next-best substitute available at that time, which was a money award assessed at the date of trial.

The Canadian Supreme Court decision in *Semelhago v Paramadevan* provides further support for the proposed account.[500] The defendant breached his contract to convey an estate in land to the claimant. It was agreed that specific performance was available in principle but the claimant was limited to an award of damages in lieu because the estate had already been conveyed to a third party. The value of the estate rose between breach and trial and the claimant retained possession of his own house during this time. The defendant argued that the amount awarded should take account of this rise in value of the claimant's property on the basis that, had the defendant performed, the claimant would have sold his old house and therefore not acquired this gain. The Court rejected this argument, holding that the purpose of awarding damages in lieu of specific performance is not to put the relevant party into the position he would have been in had the breach not occurred, but 'to be a true equivalent of specific performance'.[501]

3. Other Examples of Substitutionary Money Awards

Two distinct situations in which English law provides money awards substituting for performance rather than compensating for loss suffered in consequence of breach

[500] *Semelhago v Paramadevan* [1996] 2 SCR 415.

[501] ibid [19].

were just outlined. Although these awards may sometimes have the effect of compensating the innocent party for loss, the fact that a monetary substitute for performance does not correspond to the loss actually suffered by the innocent party is not a bar to that party's recovering the monetary equivalent of specific performance. However, the two monetary substitutes outlined above arise in special circumstances. The action for the agreed sum is only available in respect of a contractually owed debt and an award in lieu of specific performance is only available when the court has jurisdiction to order specific performance.

On this basis it might be suggested that these monetary substitutes for performance are exceptional responses to breach that do not pose a significant challenge to the status of the orthodox account. This is not the case. The current section demonstrates that, in addition to awarding money substitutes for performance in the situations outlined above, English law provides money awards that substitute for the performance in other situations. The discussion demonstrates that sometimes the amount awarded can only be explained as a substitute for performance since it is greater than the actual loss suffered by the innocent party. Following this, the distinction between substitutionary and compensatory awards is further highlighted by showing that the various doctrines restricting the amount of compensation recoverable by an innocent party in an action for breach do not apply to awards that substitute for performance.

The clearest example of a money award substituting for a primary right to goods or services occurs when a claimant's right to performance arises under a deed, unsupported by consideration.[502] The defendant may fail to perform but cause the claimant no loss such as where the one party promises to pay money to another under a deed and the other party does not rely on this promise in any way nor incur any other

[502] For discussion of the effect of a deed see *Halsbury's Laws* (4th edn, LexisNexis 2007) vol 13 [57].

loss in consequence of the promise. Nevertheless, in English law an action for debt lies in such a case. It is an abuse of loss to say that the promisee suffers loss in not getting what he was entitled to get. This thesis supports this position and argues that it should, and generally does, apply equally to *contractual* agreements.

That such an award is available in the context of a contract for the sale of goods is demonstrated by a number of the authorities outlined in the final section of Chapter Two.[503] There it was observed that because many of these awards can be understood alternatively as a measure of the innocent party's immediate financial loss at the date of breach, the true nature of these awards remains unappreciated. Nevertheless, the fact that the entitlement to the difference in market value between the goods provided and those contracted for is not generally affected by the occurrence of a post-breach event demonstrates that the fundamental purpose of such awards is to substitute for performance rather than to compensate for loss.

Such awards are also available in the context of contracts for the provision of services. A significant House of Lords' authority supporting this proposition is *Panatown*. In finding Panatown entitled to substantive damages, both Lord Goff and Lord Millett held that it is a general principle of English law that a promisee suffers 'loss' where services are not performed for which it has contracted. In addition, their Lordships held that because this is a general principle, rather than an exception to a general rule, there was no reason why the principle should not apply when the third party had its own direct remedy against the promisor. By contrast, although Lord Browne-Wilkinson was prepared to 'assume' that this general principle was 'sound in law', he felt he did not need

[503] For example, *Wertheim* (n 222); *Agius* (n 217); *Slater* (n 228); *Hall* (n 220).

to decide the point conclusively here because of the existence of UIPL's direct remedy against McAlpine.[504]

The reference to 'loss' here is confusing because the claimant has not suffered any loss in the sense in which this term is typically understood. Rather, to the extent that a 'loss' had been suffered, it was a loss of the performance the innocent party was entitled to under the contract. However, in accordance with the definitions proposed in Chapter Three, the mere occurrence of breach, without more, is not a loss in the relevant sense. A loss has been defined as the deterioration in a person's factual position. Thus, although this thesis disagrees with the result reached by Lord Clyde it does endorse his comment that:

> 'A breach of contract may cause a loss, but it is not in itself a loss in any meaningful sense. When one refers to a loss in the context of a breach of contract, one is referring to the incidence of some personal or patrimonial damage'.[505]

By contrast, although the description of breach as a loss by Lord Goff and Lord Millett in *Panatown* is rejected in this thesis, the result reached by their Lordships in the case is strongly endorsed on the basis that a party in Panatown's position has a right to receive the performance contracted for. When the other party commits an actual or anticipatory breach of contract, the law must decide whether to compel the breaching party to perform in substitution for the original obligation or to require the breaching party to pay an appropriate monetary substitute for performance, or limit the innocent party to loss actually suffered. *Prima facie*, the appropriate monetary substitute for performance is the cost of obtaining equivalent performance from another source.

[504] *Panatown* (n 2) 577.

[505] ibid 534.

When this measure is either unquantifiable or unreasonable, the alternative measure that should be provided is a reasonable approximation of the price of release.

Recently, in *Force India*, the reasoning of Lord Goff and Lord Millett was endorsed at first instance as the majority approach in *Panatown*.[506] The claimant and the defendant entered into two agreements that, inter alia, required the defendant to permit the claimant to drive a Formula One racing car in testing, practising or racing for a minimum of 6,000 kilometres. In consideration, the claimant was required to pay the defendant $3 million. This amount was paid. The claimant's reason for entering this contract was to further his aspirations to become a Formula One driver. In the event, the defendant failed to permit the claimant to drive a Formula One car as agreed, restricting the number of kilometres he was allowed to drive to 2,004.

On the conventional understanding of contract damages, the claimant's difficulty was demonstrating that the relevant breach had caused him any loss. This was because he could not establish that if he had been permitted to drive the remaining kilometres that constituted his contractual entitlement, he would have been any more likely to succeed in his quest to become a Formula One driver. Thus, in addition to a claim in unjust enrichment, a speculative claim for the loss of opportunity to make a profit and a claim for '*Wrotham Park* damages', the claimant brought an action seeking damages for breach of contract measured by reference to the value of the performance that the defendant had agreed, but failed, to provide. Stadlen J upheld this so-called 'performance interest damages claim' and awarded the claimant the (market) value of the kilometres and associated benefits that should have been provided.[507]

[506] *Force India* (n 160).

[507] ibid [498].

Significantly, Stadlen J's decision to uphold this claim was on the basis that it was not inconsistent with any authority brought to his attention and that it was supported by analogy to the approach to the assessment of damages for non-delivery of goods in section 51(3) of the Sale of Goods Act 1979, as well as the old common law authorities this section reflects.[508] He also argued that the award was consistent with the decisions and approach in *Miles v Wakefield*,[509] *National Coal Board v Galley*,[510] and *Royle v Trafford*,[511] which were outlined in Chapter Two. In addition, Stadlen J held that the award was analogous to the approach to the assessment of damages for delivery of inferior services articulated by Sir Thomas Bingham MR in *White Arrow*,[512] and was also supported by Lord Nicholls's speech in *Blake*.[513] This award of the (market) value of the services agreed under the contract but not in fact provided is another unequivocal example of a substantial money award substituting for a contractually agreed performance.

4. Restrictions on Compensation do not apply to Substitutionary Awards

The distinctiveness of an award substituting for performance compared to an award compensating for loss is further demonstrated by the inapplicability of doctrines such as remoteness and mitigation, which place limits on the recovery of compensation

[508] ibid [486].

[509] *Miles* (n 200).

[510] *Galley* (n 198).

[511] *Royle* (n 199).

[512] *White Arrow* (n 29).

[513] *Blake* (n 2). The performance-oriented account advanced in this thesis does not purport to be able to explain the decision in *Blake*. However, to the extent that the profit-stripping remedy provided there was awarded with the aim of protecting the right to performance in a generalized sense by deterring cynical breaches it is at least potentially consistent with the understanding of contract damages proposed here.

for loss, to awards substituting for performance. The conventional understanding of contract damages has caused much confusion in this regard, which has meant that these doctrines on occasion have been misapplied to limit the recovery of an award upholding the right to performance.[514] Nevertheless, on the whole courts have respected the distinction between substitutionary and compensatory awards. That the restrictions imposed by the remoteness and mitigation doctrines are not applicable to substitutionary awards makes perfect sense upon appreciating that these doctrines are concerned with placing limits on the recovery of compensation for loss.

It was explained above that these restrictions do not apply to a claim for the recovery of an agreed sum.[515] However, they are also inapplicable to an award upholding a right to a *non-monetary* performance. This is demonstrated by the decision in *Joyner v Weeks*.[516] In that case a tenant was in breach of his covenant to repair. Any initial loss suffered by the landlord had been mitigated because part of the repairs would have been demolished and the landlord had entered into another lease under which the subsequent tenant agreed to effect any remaining repairs. Nevertheless, the Court of Appeal held that the landlord was entitled to damages assessed by reference to the cost of repairs. This is a clear example of a money award substituting for performance. It is also a clear demonstration of the principle that acts of mitigation do not affect the availability of this award. Although the specific ruling in *Joyner* has now been overturned by statute,[517] the truth of the general proposition that acts in mitigation do not affect the availability of an award substituting for performance was reaffirmed by the Privy Council,[518] in a decision

[514] For example in *Bence* (n 212). See discussion below.

[515] *Jervis* (n 484).

[516] *Joyner* (n 209) see 82 above.

[517] Landlord and Tenant Act 1927, s 18(1).

[518] *Jamal v Moolla Dawood, Sons & Co* [1916] 1 AC 175 (PC).

subsequently followed by the Court of Appeal.[519] In these two cases the buyer's liability to the seller, following the latter's acceptance of the former's repudiatory breach, was assessed at the date of breach despite a subsequent fluctuation in the subject-matter of the contract that reduced the seller's actual loss.

The truth of all this may have been obscured by the tendency to express the restriction imposed on the recovery of awards substituting for performance in terms of whether such an award is 'reasonable'. Understandably, this had led to parallels with the mitigation doctrine.[520] However, as Chapter Five explains, this restriction is best understood as an independent constraint concerned with deciding whether the circumstances make it reasonable for the innocent party to insist upon obtaining the performance contracted for. The misapplication of mitigation principles in quantifying primary awards is somewhat understandable given the common terminology used in both contexts.

Perhaps surprisingly, a similar mistake is sometimes made in relation to the applicability of principles of contractual *remoteness*. A notable example of this phenomenon is the Court of Appeal's decision in *Bence Graphics*.[521] Recall that the majority's decision to limit the buyer's damages to the factual loss it suffered as a result of the seller's breach of quality was based on an application of *Hadley v Baxendale*. However, as Sir Guenter Treitel argued forcefully at the time, this is not where the analysis should have begun.[522] The claim in *Bence* was one for the difference in value between the goods contracted for and the goods provided, not one for consequential

[519] *Campbell Mostyn (Provisions) Ltd v Barnett Trading Co* [1954] 1 Lloyd's Rep 65 (CA).

[520] A notable example of this is the minority's reasoning in *McGregor* (n 9).

[521] *Bence* (n 212). See 94 above.

[522] Treitel, 'Damages for breach of warranty of quality' (n 234) 190.

loss. Upholding a claimant's right to performance may sometimes be unreasonable, but it will never be beyond the reasonable contemplation of the parties at the time of contract formation. The reason for this confusion is the conflation of substitutionary and compensatory awards within the orthodox account.

Finally, it is worth noting that the remoteness and mitigation doctrines, as well as those operating on the recovery of damages for non-pecuniary loss, also do not apply to restrict the entitlement to the alternative monetary substitute for performance that is measured by reference to an award approximating the reasonable price of release. The idea that such an award should be subject to such restrictions appears nonsensical, since no question of the remoteness of loss or the need to mitigate loss arises. This highlights that in reality such awards aim to substitute for performance rather than compensate for loss.

B. A THEORETICAL EXPLANATION OF THE PROPOSED DISTINCTION

This section outlines the theoretical basis for the distinction this thesis proposes between money awards substituting for performance and money awards compensating for loss. On the account proposed, the reasons justifying the existence of the right to performance persist following breach and press for next-best conformity. The reasons justify the innocent party's continued entitlement to performance. The law gives effect to this entitlement by ordering an appropriate substitute for performance. What constitutes the appropriate substitute for performance depends upon the balance of relevant considerations in the circumstances. In addition, the persisting reasons that justified the original right to performance also generate a new, secondary right to reparation for any harm caused by breach. English law gives effect to this secondary right to repair by awarding compensation for loss.

1. Uncertainty over the Relationship between Primary and Secondary Rights

Part I of this thesis outlined certain doctrinal, conceptual and linguistic shortcomings in the orthodox account of contract damages. In addition to these shortcomings, there is also uncertainty concerning the precise conceptual relationship between substantive and remedial contractual rights. Lord Diplock famously attempted to fill this lacuna in a passage in *Photo Production v Securicor*. There his Lordship stated that:

> 'Leaving aside those comparatively rare cases in which the court is able to enforce the primary [contractual] obligation by decreeing specific performance of it, breaches of primary obligations gives rise to *substituted or secondary* obligations on the part of the party in default... to pay monetary compensation to the other party for the loss sustained by him in consequence of the breach'.[523]

In addition to reiterating the loss-based orthodoxy, this statement is somewhat ambiguous through its use of the phrase 'substituted or secondary'. Lord Diplock appears to suggest that, leaving specific performance aside, a breach of the substantive right to performance triggers a substitution of this right with a new, secondary right to monetary compensation. In glossing over the details, this explanation arguably raises more questions than it answers. Much of the uncertainty is clarified by the paragraphs that follow where his Lordship suggests that, at least leaving two exceptional cases aside, the primary obligation to perform is not really substituted with a secondary obligation to pay compensation at all. Rather, the 'general secondary obligation' to pay compensation for non-performance arising in all cases of breach appears to be a new obligation generated by breach itself, since his Lordship states that, 'with two exceptions, the

[523] *Securicor* (n 360) 848 (emphasis added).

primary obligations of both parties so far as they have not yet been fully performed remain unchanged' by breach.[524] The two situations that Lord Diplock identifies where the primary obligation to perform does not remain following breach are:

> 'where the event resulting from the failure by one party to perform a primary obligation has the effect of depriving the other party of substantially the whole benefit which it was the intention of the parties that he should obtain from the contract... [and] where the contracting parties have agreed, whether by express words or by implication of law, that any failure by one party to perform a particular primary obligation... irrespective of the gravity of the event that has in fact resulted from the breach, shall entitle the other party to elect to put an end to all primary obligations of both parties remaining unperformed'.[525]

With these qualifications Lord Diplock's account is far more coherent and compelling. Nevertheless, unanswered questions remain concerning why certain breaches transform the primary right to performance into a new right to 'monetary compensation' and how this is consistent with decrees of specific performance. The significance of court orders also remains unexplained on this account. Further clarification is required.

2. The Proposed Understanding

The account proposed here is that, following an actual, or anticipated, breach of contract, the reasons justifying the existence of the right to performance persist and press for next-best conformity. As explained above, these reasons pertain mainly to the valuable contribution to personal autonomy that the facility to undertake binding

[524] ibid 849.

[525] ibid.

contractual obligations provides. While the contract remains on foot, these reasons exert their normative force by continuing to justify a right to performance. If the contract is brought to an end, the primary right to performance ceases but the reasons that justified its previous existence are given effect by the creation of a new court-ordered right to an appropriate substitute for performance. The content of this right is determined by combining these reasons with any other relevant considerations that now apply. In addition to requiring an appropriate substitute for performance, next-best conformity also requires that the damaging consequences of beach be repaired. This new, secondary right generated by breach is legally enforced through an award of compensation for loss. Next-best conformity is the response to breach of contract that the normative basis for contractual obligation demands;[526] the right to substitutionary performance and the right to compensation are the remedies the law awards in effecting that response.

This account is essentially an application of Professor Gardner's explanation of the corrective justice norm that operates in the law of torts.[527] This account applies with equal or greater force in the contractual context, where it is often possible to provide a closer substitute for the original primary right following breach than it is following breaches of other primary rights.[528] On Gardner's account the secondary right to repair that is generated by a breach of the primary right is synonymous with the requirement of next-best conformity, rather than simply an aspect of it. However, his account is provided in the context of explaining the duty to repair wrongfully caused losses in the law of *torts*, where compensation always looks backwards to a victim's earlier position rather than forwards to a future one, as it does in the law of contract. The law of torts,

[526] The basis for this claim is explained more fully in Chapter Seven.

[527] See J Gardner, 'What is Tort Law for? Part 1: The Place of Corrective Justice' (2011) 30 Law & Philosophy 1.

[528] In this context it is significant that the example from which Gardner develops his account is that of a broken promise, ibid 28.

in other words, lacks the forward-looking aspect of next-best conformity present in contract law so recognising the two distinct aspects of next-best conformity this thesis proposes is consistent with Gardner's general approach.

As already noted, philosophically these two entitlements might be understood as simply two different aspects of the next-best conformity demanded after breach. Doctrinally, however, they are better understood as distinct. Fundamentally, this is because the right to performance is created at contract formation, while the right to repair only arises upon breach and because, other than at the highest level of theory, the motivation for the two awards is fundamentally different. Substitutionary awards aim to substitute for performance. Compensatory awards aim to compensate for loss. For this reason, in translating this theoretical picture into coherent legal doctrine, it is preferable that these two rights be distinguished. The interests of conceptual and doctrinal clarity are furthered by recognising these two distinct components of next-nest conformity.

Regardless of how precisely one prefers to conceptualise this account, its consequence is that, leaving exceptional circumstances aside where the law might decide that a stronger response such as the disgorgement of profits is called for, following a successful action for breach a court must decide upon the most appropriate way to uphold the innocent party's entitlements to performance and to reparation for harm caused by breach. With regard to the entitlement to performance, the immediate choice is usually between specific performance and the minimum cost of obtaining equivalent performance, though sometimes both responses may be inappropriate and an approximation of the price of release is the preferable substitute. For reasons explained in Chapter Seven, English law generally adopts a preference for money awards rather than ordering specific performance.

With regard to the secondary right to repair, the only choice open to the court is to award compensation for loss. With respect to financial loss this is the natural way of upholding the entitlement. However, as noted above, for non-pecuniary harm financial compensation is awarded not because it accurately annuls this harm but because it is the best the law can do in the circumstances. In translating this secondary right to reparation into a monetary sum the law imposes restrictions on the recoverable loss. The basis for these restrictions is examined in Chapter Six. It is argued that they cannot be explained wholly by reference to the underlying agreement. This further demonstrates the distinctiveness of compensatory awards from awards substituting for performance.

CONCLUSION

This chapter had two objectives. Section I sought to defend the claim that the formation of a valid contract invariably creates a legal right to performance. Principally on the basis that 'damages' rather than 'specific performance' is the default response to breach, this claim is sometimes denied. The existence of a general legal right to performance was defended by outlining various considerations that undermine this objection. In addition to outlining a number of considerations that weaken the force of this objection, even on its own terms, the substantial additional doctrinal support for the existence of this right was outlined. Additionally, it was argued that this objection is fundamentally flawed because it is based on a misunderstanding of the nature of legal rights. Finally, a coherent theoretical basis for the right to performance was outlined according to which the distinctive value created by the institution of contract law is its ability to instrumentalize performance.

Section II aimed to demonstrate the existence of the basic distinction proposed in this thesis between substitutionary and compensatory money awards. There are some

awards made following breach that substitute for performance rather than compensate for loss. First the action for the agreed sum and money awards provided in lieu of specific performance were considered. It was shown that in relation to both of these awards the aim is to provide the innocent party with a monetary equivalent for performance rather to compensate for actual loss suffered. This principle also applies more generally to promises made under a deed and to certain contractual promises for the provision of goods and services. The distinction between substitutionary and compensatory awards was highlighted further by showing that the restrictions that apply to limit compensatory awards do not apply to limit substitutionary awards. Finally, a coherent theoretical basis for the proposed distinction was outlined. According to this account, the reasons justifying the right to performance persist following breach and press for next-best conformity. This requires both that an appropriate substitute for performance be provided and that any harm caused to the victim of breach be repaired.

CHAPTER FIVE –MONEY AWARDS SUBSTITUTING FOR PERFORMANCE

INTRODUCTION

The final section of Chapter Four argued that English law recognises a distinction between money awards substituting for performance and money awards compensating for loss. The remainder of Part II of the thesis further explains and defends this account. The present chapter focuses on money awards substituting for performance. The status of such awards is controversial. However, as previously explained, there is clear doctrinal support for their existence. Chapter Six focuses on money awards compensating for loss. The availability of such awards is uncontroversial but their nature and scope have been misunderstood.

Section I of this chapter explains how the *prima facie* performance measure is quantified. The appropriate measure for a performance award depends upon whether it is reasonable for the innocent party to insist upon performance, and whether equivalent performance is possible, in the circumstances. If insistence is reasonable and equivalent performance is possible, the appropriate measure is the minimum cost of equivalent performance. If insistence is unreasonable or equivalent performance is not possible, the appropriate substitute for performance is an approximation of the price a reasonable person in the innocent party's position would have accepted to release the other party from performance. This is the alternative performance measure. Section I.A makes two claims. The first is that principle supports the availability of the *prima facie* performance measure. The second is that there is also significant doctrinal support for its existence.

Section I.B examines the 'reasonableness' restriction on awards for the cost of equivalent performance. It begins with a critique of its current interpretation. In particular, it is argued that English law's traditional preoccupation with loss has skewed the interpretation of this restriction to focus excessively on the innocent party's intention to obtain equivalent performance. It is argued that, while a claimant's intended use of any potential award may be relevant in deciding whether such an award is reasonable, it should not determine the inquiry. Doctrinal support for this position is outlined.

Section II focuses on the alternative measure of performance available when the primary measure is unreasonable. Four claims are made. The first is that if the cost of obtaining equivalent performance is unreasonable or unquantifiable because substitute performance is no longer possible, the next-best substitute for the innocent party's primary right is a reasonable approximation of the amount that party would have accepted to release the other party from performance. The second is that, although the cases do not speak with one voice, there is doctrinal support for this approach. The third is that, despite the lack of justification for doing so, the availability of this measure is sometimes restricted. The fourth is that this is principally because the conventional understanding of contract damages is so entrenched.

I. AWARDS OF THE COST OF EQUIVALENT PERFORMANCE

As Chapter Four explained, this thesis contends that upon a threatened or actual breach of contract, the reasons underpinning the right to performance persist and press for next-best conformity.[529] If the contract is brought to an end, the right to performance (or the reasons underpinning it) are given effect through a court-order for an appropriate substitute for performance. When it remains possible to perform the

[529] This is an application of Gardner's account of corrective justice, which was considered above. See Gardner, 'The Place of Corrective Justice' (n 527).

substance of the bargain, this might be specific performance. Alternatively, the influence of other considerations will often mean that, on balance, an appropriate monetary substitute for performance is preferable. Chapter Seven defends English law's preference for the former over the latter. For the moment, however, the concern is with quantifying a money award substituting for performance.

A. QUANTIFICATION

In determining how a monetary substitute for performance should be quantified the appropriate starting point is that a contracting party has a right to performance. This means that, at least when it remains possible for the innocent party to obtain the substance of what was bargained for, the appropriate measure for a performance award should be the amount required to enable the victim to obtain substitute performance from elsewhere. Thus, the *prima facie* performance measure should be the cost of obtaining equivalent performance. The purpose of the present section is to defend this claim and demonstrate the existence of this measure in the case law. The discussion divides according to these two objectives.

1. Justification

The justification for a money award substituting for performance is simply that the innocent party has a right to performance. The availability of such an award does not depend in any way upon the victim's suffering loss as a result of breach. As already mentioned, a further important consequence of this view is that breach's role in justifying the entitlement to a money award substituting for performance is only indirect. Its occurrence, often accompanied by the innocent party's termination, provides the court with a good reason to intervene and enforce the claimant's primary right. However, by itself breach does generate an entitlement in the innocent party to have the harmful

consequences of breach repaired. A court gives effect to this secondary right via a new court-ordered right to compensation for loss.

The objective of a performance money award is to provide the victim of breach with the best substitute for performance in the circumstances. Given this objective, the appropriate measure for such an award is normally the minimum cost of obtaining an equivalent to the performance contracted for. The intuitive appeal of this claim is demonstrated by the following example. Suppose that a party contracts for the sale and delivery of a crane. The crane is delivered but is seriously defective. The defect is so severe that the cost of repairing it so that it would comply with the contract specifications is £200,000. The cost of purchasing a new crane is only £100,000. In this situation, the lesser sum is obviously the appropriate one to award because it is the minimum amount required to enable substitute performance.

According to the orthodox understanding of contract damages, this award would be explained as a measure of the victim's loss. Burrows, for instance, might say that this sum is simply a true reflection of the loss suffered by the innocent party.[530] However, this award is better understood as one substituting for performance in accordance with the original agreement. The sum awarded is the minimum cost of ensuring this. This constitutes the best explanation of why it is the appropriate one to award in the circumstances.

The basic principle identified in the previous paragraphs has two important aspects. The first is that the sum awarded must be sufficient to ensure that the innocent party can obtain a substitute for the performance bargained for. This follows directly from the idea that formation of a valid contract creates a legal right to performance in

[530] See Burrows, *Remedies* (n 9) 210.

each of the parties. Although some have queried the existence of a right to contractual performance, there is significant doctrinal and theoretical support for such a right, which was detailed in Chapter Four.

The second noteworthy aspect of the principle underpinning this measure is that the sum awarded must be the minimum amount required to obtain equivalent performance. This requirement can be explained as a simple application of the minimum contractual obligation principle. As conventionally understood this principle applies in the context of assessing compensatory damages for loss. However, once the possibility of an award substituting for performance is recognised, it is clear that by analogy this principle should apply equally in this context. It provides that:

> 'where a contract entitles a party to perform in alternative ways... damages are generally assessed on the basis that the breaching party would have performed in the way most favourable to herself'.[531]

Application of this principle would mean that when there is reason to award a monetary substitute for performance, the amount awarded should be limited to imposing the minimum financial burden on the breaching party. More generally, the minimum contractual obligation principle, both as conventionally understood and as just outlined, can be seen as a specific application of the harm principle.[532] This thesis supports the view that much of contract law's remedial scheme can be understood as upholding this principle. The conclusion stemming from this discussion is that an award of the cost of equivalent performance is justified only to the extent that it gives effect to the innocent party's entitlement to performance in the cheapest possible way. To do otherwise would

[531] ibid 147. For application see *Withers* (n 37); *The Rijn* [1981] 2 Lloyd's Rep 267.

[532] JS Mill, *On Liberty* (JW Parker and Son 1859), 21-22. For a modern restatement based on the protection of 'personal autonomy' see Raz, *The Morality of Freedom* (n 425) 412, discussed below at 324.

require the breaching party to go beyond the legitimate objective of substituting for performance. At least in effect, if not in purpose, this arguably amounts to a kind of punishment for breach.

2. Examples

It is argued that, contrary to the orthodox view, English law generally conforms to the principled position just outlined. Two basic kinds of case are distinguished. The first involves claims for the cost of repairing a defective performance. In these cases the court awards the claimant the minimum amount required to rectify the defendant's defective performance, with this sum normally being assessed at the time when the claimant could, with reasonable diligence, have discovered the defect.[533] Assessing the award at this date is consistent with understanding its purpose as being to give the claimant the minimum amount required to obtain equivalent performance since the claimant can only reasonably be expected to take such action once she becomes aware of the defect.

The second kind of case identified involves a claim for the cost of purchasing an appropriate market substitute for goods or services not provided. Such claims depend upon the existence of an available market for both the performance contracted for and the performance provided. In such cases the appropriate measure for a performance award is the difference between these two market values. This sum gives the innocent party the amount required to obtain a substitute for the agreed performance by selling the defective performance in the market and purchasing goods or services conforming to the original contract. For both goods and services, this measure may be adopted even though the innocent party will not actually purchase the substitute. The appropriate time

[533] *East Ham BC v Bernard Sunley Ltd* [1966] AC 406 (HL).

for quantification is either the date of breach,[534] or the date at which the innocent party could have discovered the defect acting with reasonable diligence.[535] Again, this is consistent with the purpose of such awards, which is to provide an appropriate substitute for performance.

a. Claims for the Cost of Repairs

The possibility of awarding the cost of equivalent performance in the context of a claim for building repairs was recognised in *Ruxley*.[536] However, as explained above,[537] this award was held to be unreasonable by the House of Lords on the facts and therefore not granted. The basis for this finding is considered below. However, the usual availability and primacy of this measure was not questioned by the House of Lords. In the leading speech, Lord Lloyd noted that this is usually the appropriate measure of damages following the defective performance of a building contract.[538] Such awards were made, for example, in *East Ham BC v Bernard Sunley Ltd*,[539] and *Radford v De Froberville*.[540]

A majority of the House of Lords also recognised the availability of this measure in *Panatown*. There, Lord Goff and Lord Millett accepted,[541] and Lord Browne-Wilkinson was prepared to assume,[542] that a promisee could recover the cost of correcting defective

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534 Sale of Goods Act 1979, s 51(3).

535 ibid s 53(3).

536 *Ruxley* (n 2).

537 See 36 above.

538 *Ruxley* (n 2) 365-66.

539 *East Ham* (n 533).

540 *Radford v De Froberville* [1977] 1 WLR 1262 (Ch).

541 *Panatown* (n 2) 548 (Lord Goff), 587 (Lord Millett).

542 ibid 577-78.

performance even where work was performed on the property of another. On the facts, Lord Goff and Lord Millett held that Panatown was entitled to this award. However, Lord Browne-Wilkinson held that it was not necessary to decide conclusively whether recovery was possible under the broad ground because of a duty of care deed between McAlpine and Unex, the third party owner of the land, which gave the latter a right to claim substantial damages. For his Lordship, this meant that there was no actual damage to the 'performance interest' of Panatown.[543] This conclusion is premised on the false view that money awards for breach of contract are only concerned to compensate for loss.

The availability of an award of the cost of repairs also received strong endorsement recently from the High Court of Australia in *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd*.[544] Office premises were leased for a period with the tenant covenanting not to make any substantial alterations or additions to the premises without written approval. A director of the landlord discovered that the recently installed foyer was being destroyed by the tenant with a view to its replacement. She was upset given the care she had lavished over its design and decoration. Nevertheless, over her protestations, the tenant continued with the planned replacement of the foyer, relying upon an apparent assumption that destruction and replacement would cause little, if any, diminution in the value of the building.

Although this assumption found favour at first instance, the High Court of Australia upheld the Full Federal Court's decision to increase this award to the cost of restoration. The clause breached was an express negative covenant capable of grounding

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[543] ibid.

[544] *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* (2009) 236 CLR 272 (HCA). For discussion see M Bell, 'After Tabcorp, for Whom Does the Bellgrove Toll? Cementing the Expectation Measure as the 'Ruling Principle' for Calculation of Contract Damages' (2009) 33 MULR 684.

injunctive relief, had the tenant's 'contumelious disregard' for the landlord's rights not prevented this possibility. The Court cited Oliver J's statement in *Radford v De Froberville* with approval that the words 'the same situation, with respect to damages, as if the contract had been performed' do not necessarily mean 'as good a financial position as if the contract had been performed'.[545]

Significantly, in upholding the landlord's entitlement to the 'cost of reinstatement', the High Court noted that this entitlement was subject to a restriction. In the earlier case of *Bellgrove v Eldridge*,[546] cited with approval in *Tabcorp*,[547] the High Court had stated that the entitlement to an award of the cost of restoration following the defective performance of a building contract depended upon whether undertaking the work was both 'necessary to produce conformity' and 'a reasonable course to adopt'.[548] As explained below, there is also a condition in English law that the restoration work be reasonable before the cost will be awarded, which was affirmed and applied in *Ruxley*. In *Tabcorp* itself, the Court noted that it is rare that the cost of restoration will be unreasonable. It cited with approval the hypothetical example given in *Bellgrove* of a builder who builds a wall out of new, rather than second-hand, bricks as stipulated in the contract. In such a case the cost of restoration would be unreasonable.[549]

b. Claims for the Cost of a Market Substitute

In Chapter Two it was explained that section 51(3) of the Sale of Goods Act 1979 provides that, where a seller fails to deliver goods for which there is an 'available

[545] *Radford* (n 540) 1273.

[546] *Bellgrove v Eldridge* [1954] HCA 36, (1954) 90 CLR 613 (HCA).

[547] *Tabcorp* (n 544) [17].

[548] *Bellgrove* (n 546) 617-18.

[549] ibid, discussed in *Tabcorp* (n 544) [17].

market',[550] the buyer's measure of damages is '*prima facie* to be ascertained by reference to the difference between the contract price and the market or current price of the goods' at the date of breach. In accordance with the conventional understanding of contract damages, traditionally this 'difference in value' award has been understood as a measure of the innocent party's financial loss at the date of breach.[551]

If the buyer does go into the market to purchase substitute goods at the prevailing price at the date of breach or soon after, this measure will indeed reflect his actual financial loss. However, such loss may yet be eliminated or reduced by subsequent events. On the conventional understanding of contract damages this should be reflected in the amount awarded. However, as explained already, *Williams Bros* held that this 'difference in value' measure will not be displaced by demonstrating that on the particular facts of the case the buyer was not left worse off as a result of the seller's breach.[552] This result is clearly at odds with the conventional account. For this reason, this kind of award is better understood as an example of the *prima facie* performance measure because the difference in value between the market price and the contract price of the goods at the date performance was due is a measure of the minimum cost of obtaining equivalent performance.

The award of this measure is also evident in the case law on defective goods. The *prima facie* measure of damages for the provision of defective goods under a contract of sale is the difference in market value between the goods contracted for and those received.[553] Again, however, such an award does not always accurately reflect the buyer's

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[550] This means goods that can be freely bought or sold at a price fixed by supply and demand. See Peel (ed), *Treitel* (n 9) 1017.

[551] See, for example, Burrows, *Remedies* (n 9) 209.

[552] *Agius* (n 217). See 85 above.

[553] Sale of Goods Act 1979, s 53(3).

actual loss. The clearest example of this is when the defective goods are sold on to a sub-buyer and the original buyer manages to avoid, or at least to minimise, the negative consequences of receiving the defective goods. This is demonstrated by *Slater v Hoyle*,[554] also discussed in Chapter Two.

It may be recalled that in *Slater* the innocent buyer contracted to buy unbleached cotton cloth from the seller. After the cloth was delivered, the former bleached it and then used it to fulfil a previously formed contract of sale with a third party. The cloth supplied by the seller was inferior in quality to that warranted under the contract and in accordance with the relevant statutory provision the buyer recovered damages assessed by reference to the difference between the market value of the cloth delivered at the time of delivery and the market value of the cloth as warranted. This was despite the buyer ending up no worse off than he would have been had the goods not been defective since the price under the sub-sale contract was paid in full and no claim was brought by the sub-buyers for breach of their sub-sale contracts.

As explained in Chapter Two, none of the different loss-based explanations of *Slater* is convincing. Awarding the difference between the market value of the cloth delivered at the time of delivery and the market value of the cloth as warranted, therefore, is best understood as another example of a performance money award. The sum awarded was the minimum cost of obtaining equivalent performance by giving the innocent party the amount required to go into the market and obtain goods conforming with the contract specifications upon a sale of the defective goods received.[555] Significantly, although the basis for this measure is that it constitutes the amount

[554] *Slater* (n 228).

[555] Note that in claims of this kind, the fact that the time for meaningful substitute performance has passed does not matter since the cost of obtaining equivalent performance will be the same as a reasonable approximation of the price of release. The next section explains that this is the appropriate alternative measure of performance when the cost of equivalent performance cannot be quantified.

required to obtain substitute performance, it is not necessary that the innocent party actually use the award to purchase substitute performance. This is consistent with the position in relation to clams for the cost of repairs, as demonstrated in the next section.

Finally, it must be noted that the principles outlined above in relation to the sale of goods also apply to the defective performance of service contracts. The decision in *White Arrow* was outlined in Chapter One. Although counsel's approach in claiming for failure of consideration made recovery difficult there, Sir Thomas Bingham MR recognised the possibility of such an award, measured by reference to the difference in market value between the services contracted for and the services provided. A substantial sum substituting for the performance of services not provided in the absence of financial loss was awarded recently in *Force India*. Citing Sir Thomas Bingham MR's comments in *White Arrow* with approval, Stadlen J awarded the claimant the market value of the kilometres and associated benefits which should have been, but were not, provided.[556] A similar award was also made in *Regus (UK) Ltd v Epcot Solutions Ltd*.[557] There the claim was for various breaches of contract, including that the air-conditioning provided on the leased premises did not meet the contractually agreed standard. Again, in claims of this kind it is not necessary that the innocent party actually use the money to obtain substitute performance.[558]

It is also important to appreciate that the sum of money to which the claimant is entitled in a claim of this type does not necessarily depend upon the original contract price. Nevertheless, in an appropriate case an inference may be drawn from the contract price as to the market value of the services that the innocent party has failed to receive.

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[556] *Force India* (n 160) [498].

[557] *Regus (UK) Ltd v Epcot Solutions Ltd* [2008] EWCA Civ 361(CA).

[558] This is discussed further below at 234.

Thus, the contract price will often still be relevant in an *evidential*, rather than substantive, sense. This proposition was reasserted by Stadlen J in *Force India*.[559] This is supported by the following comment by Morritt LJ in *White Arrow*, endorsed by Stadlen J in *Force India*:

> 'It may be that there are cases in which because there is no readily identified market the contractual price for the benefit promised but not provided is adopted as the best evidence of the market value of that benefit... But if it is it is because it is accepted as the market value *and not because it is the contract price*'.[560]

Further confirmation of this claim can be derived from *Regus*, where Rix LJ held that, in the absence of evidence to the contrary, the appropriate measure of damages in such a case was to be calculated 'on the assumption... that the cost of the fees [in the contract] reflects the market value of the services promised'.[561] Although his Lordship referred to this award as one in respect of 'loss', it constitutes another example of an award substituting for performance.

B. RESTRICTION

The closest monetary substitute for actual performance in accordance with the contract is the minimum cost of obtaining equivalent performance. The question arises as to whether there are or should be any restrictions upon the availability of this measure. In principle it might be argued that at least when equivalent performance is possible, so this amount can be quantified, there should not be because, following breach, the entitlement to the best substitute for performance always exists. That is, it might be argued that when specific performance is not sought or unavailable for some other

[559] *Force India* (n 160) [487].

[560] ibid [433] (emphasis added).

[561] *Regus* (n 557) [30].

reason, this measure always should be available given that it is the closest monetary equivalent to such an order. English law has not taken this position. Just as the entitlement to specific performance is restricted, so is the entitlement to obtain its monetary equivalent. In essence, this is because sometimes, on balance, this measure is not always the best substitute for performance.

1. Restriction on the Ground of 'Reasonableness'

A contracting party who fails to obtain the performance contracted for is entitled to the best substitute for performance in the circumstances. All else being equal, the best substitute for performance is the minimum cost of obtaining equivalent performance. However, all else is rarely equal. Thus, at least when it remains possible for equivalent performance to be obtained, this general rule is subject to a restriction that the award be 'reasonable' in the circumstances. Although the principle potentially has wider application, claims of this type commonly arise in the construction context when repairs are required to make a defective performance comply with the contractual specifications. For example, in *East Ham Corporation v Bernard Sunley & Sons Ltd*,[562] in the context of a claim for a money award following the defective performance of a building contract, Lord Cohen stated that there 'is no doubt that wherever it is reasonable for the employer to insist upon reinstatement the courts will treat the cost of reinstatement as the measure of damage'.[563]

In certain contexts an innocent party's entitlement to the cost of ensuring performance following breach has been expressed in stronger terms. For instance, in

[562] *East Ham* (n 533).

[563] ibid 434.

Westminster (Duke) v Swinton,[564] it was said that *Joyner v Weeks* held that 'the cost of repairs was the measure of damages in all cases' of breach of a covenant to deliver up in good repair at the end of the lease.[565] However, as Megarry V-C observed in *Tito v Waddell (No 2)*,[566] Lord Esher MR's judgment in *Joyner* expressly refrained from holding this to be the case. His Lordship and Fry LJ stated that the cost of repair measure was 'the ordinary *prima facie* rule' but was subject to there being no circumstance that made it inapplicable.[567] The better view, therefore, is that the entitlement to the cost of performance is subject to a general restriction that this award be reasonable in the circumstances. The existence of this restriction was affirmed by the House of Lords in *Ruxley*, where it was applied to deny the cost of performance, and in *Panatown*,[568] where it did not affect the entitlement to a substantial award.

2. The Uncertain Meaning of 'Reasonableness' in this Context

The claim that awarding the cost of equivalent performance must be 'reasonable' in the circumstances requires further explanation. Despite numerous statements confirming the existence of this restriction, its meaning in this context is attended by some uncertainty. Part of the reason for this may be that it is rarely applied to defeat a claim. As Professor Coote has observed, there are only a very small number of reported cases where damages have not been awarded on this basis following the defective performance of a building contract.[569] Moreover, as Coote also notes, in two of these

[564] *Westminster (Duke) v Swinton* [1948] 1 KB 524.

[565] ibid 533.

[566] *Tito* (n 201) 329.

[567] *Joyner* (n 209) 43, 44, 47.

[568] *Panatown* (n 2) 568 (Lord Goff), 577 (Lord Browne-Wilkinson) 592 (Lord Millett).

[569] Coote, 'Contract Damages, *Ruxley*, and the Performance Interest' (n 5) 558.

cases there were unexplained concessions by counsel regarding the appropriate measure of damages,[570] and in a third case the possibility of awarding the cost of repairs was never even raised.[571] In this regard, *Ruxley* is exceptional and the decision to deny the cost of performance there is best explained by the case's 'quite exceptional' facts.[572]

In consequence of its rare application, there is little direct authority to assist in formulating the meaning of reasonableness in this context. The authority that does exist for a general 'reasonableness' restriction rests largely on obiter dicta comments in cases where the cost of obtaining equivalent performance is actually awarded.[573] Since awarding this measure is normally found to be reasonable, the precise meaning of this restriction has remained unclear. Traditionally much significance has been placed on the innocent party's intention to repair but in more recent cases the significance of intention has been doubted. This development is supported because it is consistent with recognising the fundamental distinction between substitutionary and compensatory awards.

a. The Traditional Focus on Intention

In determining the reasonableness of awarding the cost of equivalent performance, traditionally English cases traditionally have placed much significance on whether the court believes the innocent party actually intends to cure the breach. The reason for this emphasis appears to be a concern that the innocent party ought not to obtain a windfall profit. Such a concern is understandable if one assumes the conventional understanding of contract damages, according to which their purpose is

[570] *Newton Abbot Development Ltd v Stockman Bros* (1931) 47 TLR 616 and *Perry* (n 35).

[571] *Applegate v Moss* [1971] 1 QB 406 (CA).

[572] *Tabcorp* (n 544) [18].

[573] For example, in *East Ham* (n 533).

simply to compensate for loss. On such a view, to award a contracting party the amount required to obtain performance in the absence of evidence that he will do so appears to offend the compensatory principle.

An early example of this reasoning appeared in *Wigsell v Schools for the Indigent Blind*, [574] where the defendant breached its obligation to the vendor of adjoining land to build a wall. The surrounding context made it clear that the object of requiring the wall was to protect the vendor's land from the inmates of an asylum the defendant proposed to build but this proposal had been abandoned. In refusing to award the cost of erecting the wall, the Court stated that erecting the wall would be a waste of money since the vendor probably would never think about incurring such expenditure now.

Concern regarding the claimant's intention to cure also was evident in *Tito v Waddell (No 2)*.[575] The defendant breached its contractual undertaking to the claimants, who were the former inhabitants of a Pacific island, to replant the island after they had finished mining it for phosphate. Between contract formation and the claim for breach the island was bombed extensively during World War II. In consequence, the cost of replanting it was in the order of millions of pounds and the islanders had moved to another island 1,500 miles away, where they were living at the time of the action. The former inhabitants' claim for the cost of restoring the island to its previous state was denied on the basis that there was no evidence of any intention to replant and relocate. Megarry V-C stated that:

> 'if the plaintiff has suffered little or no monetary loss in the reduction in value of his land, and he has no intention of applying any damages towards carrying out

[574] *Wigsell v Schools for the Indigent Blind* (1882) 8 QBD 357.

[575] *Tito* (n 201).

> the cost of the work contracted for, or its equivalent, I cannot see why he should recover the cost of doing work which will never be done.'[576]

The decision to confine the claimants to the 'difference in value' measure in *Tito* is open to question. Although the cost of replanting increased significantly as a result of the bombing, the defendant's failure to replant was a deliberate breach of contract committed in order to save the expense of performing their side of the bargain. Although an award of the cost of equivalent performance might have been unreasonable on these facts, the Islanders should have been awarded a reasonable approximation of the price they would have accepted to release the defendant from performance. Nevertheless, the decision demonstrates well the emphasis that has been placed on the claimant's intention to cure the breach. As is typical in judicial discussions of this issue, the question of determining the appropriate sum to award was viewed through the prism of *loss*. Megarry V-C stated that:

> 'it is fundamental to all questions of damages that they are to compensate the plaintiff for his loss or injury by putting him as nearly as possible in the same position as he would have been in had he not suffered the wrong... the essential question is what his loss is'.[577]

This focus on loss explains why his Lordship placed so much emphasis on the claimants' intention to cure. If a party's intention to obtain equivalent performance can be demonstrated on the balance of probabilities, he can be said to have suffered a loss. Oliver J's judgment in *Radford* appears to provide further support for this understanding of the reasonableness restriction. The claimant sold a plot of land to the defendant. One

[576] ibid 332.

[577] ibid.

of the terms of the sale was that the defendant would erect a wall on the plot so as to divide it from the claimant's land. The defendant failed to erect this wall and the claimant brought an action seeking the cost of doing so on his own land. The defendant argued that damages should be limited to the difference in value between the land with and without the wall, on the basis that a prefabricated fence would do just as well as the wall agreed upon.

Oliver J rejected the defendant's argument, holding that in this case the claimant was entitled to the cost of erecting the wall. His Lordship stated that an important consideration in making this determination was whether repairing the defective performance was 'a reasonable thing for the plaintiff to do' in the circumstances.[578] In determining whether the claimant's proposed actions were reasonable, Oliver J followed Megarry V-C's lead in *Tito* in focussing almost exclusively on the claimant's intention to repair. He regarded it as very important that the claimant genuinely intended to erect the wall that the breaching party had failed to build, stating that to provide the award in the absence of such an intention would give the claimant an 'uncovenanted profit'.[579]

This might appear to provide further support for the view that, in determining reasonableness, the claimant's intention to repair is determinative. However, the claimant in *Radford* was not seeking the cost of performance itself, since the contract required that the wall be built on the defendant's land, but the amount of money required to erect a similar wall on his own land. Thus, as Lord Goff noted in *Panatown*, the issue of reasonableness that arose in *Radford* 'was not the same issue as that raised in Lord Cohen's statement of principle in *East Ham*'.[580] As Oliver J himself noted, the issue was

[578] *Radford* (n 540) 1283.

[579] ibid 1270.

[580] *Panatown* (n 2) 550.

'really one of mitigation'.[581] The confusion is understandable given the common terminology used in both contexts. Nevertheless, as Lord Lloyd noted in *Ruxley*, expressing agreement with Dillon LJ in the Court of Appeal, 'mitigation is not the only area in which the concept of reasonableness has an impact on the law of damages'.[582]

b. The Alternative View: Intention is not Determinative

The view that reasonableness is principally about intention is not the only one possible. In *Panatown*, Lord Clyde recognised the existence of what he termed the 'more radical formulation' of the principle expressed by Lord Griffiths in *Linden Gardens*, though he did not endorse it.[583] According to this understanding, it is not necessary that the claimant intend to cure in order to obtain an award measured by reference to cost of ensuring equivalent performance. Notably, the Australian High Court earlier adopted this view in the leading authority of *Bellgrove v Eldridge*.[584] The possibility that Miss Eldridge might retain the sum awarded and not undertake the rectification work required to repair her house's defective foundations was considered 'quite immaterial' in deciding that the award was reasonable.[585]

The significance of the claimant's intended use of an award of the cost of obtaining performance was clarified when *Ruxley* reached the House of Lords. The House made it clear that 'reasonableness' is an objective criterion, since there is no

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[581] *Radford* (n 540) 1284.

[582] *Ruxley* (n 2) 369.

[583] This is what was termed 'broad ground' in the discussion of *Linden Gardens* in Chapter Two. See 59 and following above.

[584] *Bellgrove* (n 546).

[585] ibid 620 (Dixon CJ, Webb and Taylor JJ).

suggestion that the claimant should himself be the arbiter of what is reasonable.[586] The consequence of this is that, although the claimant's intention to cure may be a useful indicator of whether awarding the cost of repairs is 'reasonable', there is no necessary connection between an intention to cure and an entitlement to the cost of repairs. Further support for this approach was expressed by Lord Goff and Lord Millett in *Panatown*,[587] though Lord Clyde and Lord Jauncey took the contrary view. Some ambiguity arises because Lord Browne-Wilkinson did not conclude this point either way, though his Lordship appeared to favour the approach adopted by Lord Goff and Lord Millett. This particular interpretation of *Panatown* was endorsed by Stadlen J in *Force India*, who observed that:

> 'The decision in *Panatown* is not authority for the proposition that it is a precondition of recovering damages for failure to supply services to the claimant in breach of contract that the claimant must have purchased, or at least expressed an intention to purchase, elsewhere the services wrongly withheld.'[588]

In *Panatown*, Lord Clyde noted that this was also the view taken by Steyn LJ in *Darlington*.[589] After expressing agreement with the broad principle outlined by Lord Griffiths in *Linden Gardens*, Steyn LJ suggested that this principle was subject to the qualification that it is not a precondition to the recovery of substantial damages in construction or sales contracts that the plaintiff actually proposes to undertake the necessary repairs. As his Lordship noted, 'it is no concern of the law what the plaintiff proposes to do with his damages... In this field English law adopts an objective

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[586] *Ruxley* (n 2) 358.

[587] *Panatown* (n 2) 547 (Lord Goff), 591 (Lord Millett).

[588] *Force India* (n 160) [484].

[589] *Panatown* (n 2) 533.

approach'.[590] Steyn LJ noted that on this point he was in agreement with the observations of Kerr LJ in *Dean v Ainley*,[591] and Staughton LJ in the Court of Appeal in *Ruxley*.[592]

Stadlen J's statement of principle was endorsed again at first instance in *De Beers Ltd v Atos Origin IT Services UK Ltd*.[593] There, the claim was one for damages for breach of contract following Atos's failure to provide De Beers with the software system it had contractually undertaken to provide. In finding that in principle De Beers was entitled to the cost of building the replacement system, Mr Justice Edwards-Stuart stated that:

> 'If there is substantial non-delivery of those services, as there was in this case at the date of termination, then DB is entitled to recover the cost of purchasing elsewhere the services not provided, unless it would be unreasonable of it to do so. Provided that it would be reasonable for a person in the position of DB to purchase those services elsewhere, it does not matter whether or not DB has an actual intention of doing so or has not made up its mind whether or not to do so'.[594]

3. Against a Focus on Intention

To the extent that intention was previously decisive in a claim for the cost of obtaining equivalent performance, this is no longer the case. The authorities discussed above demonstrate that an understanding of reasonableness that views the innocent

[590] *Darlington* (n 143) 80.

[591] *Dean* (n 204) 1737.

[592] *Ruxley* (CA) (n 76).

[593] *De Beers Ltd v Atos Origin IT Services UK Ltd* [2010] EWHC 3276 (TCC).

[594] ibid [345].

party's intention to repair the breach as wholly, or largely, irrelevant has received strong judicial endorsement. This approach is also the better one in principle. The fundamental reason for this is that only this approach properly recognises that the object of awarding the cost of equivalent performance is to substitute for performance rather than to compensate for loss. To make an award of the cost of performance conditional upon the victim of breach's actually using this sum to obtain the agreed performance wrongly focuses on the deterioration in the innocent party's factual position rather than on the content of that party's contractual right. It is also, as Rares J observed in the Full Federal Court in *Tabcorp*, inconsistent with the objective approach to contractual interpretation.[595]

To make the availability of an award of the cost of equivalent performance wholly dependent on the innocent party's intention to repair conflates the distinction between compensation for loss and substitution for performance. A related advantage of the approach advocated here is that it allows for consistency between construction and sale contracts. It will be recalled that the appropriate measure of damages in the latter context is the difference in value between the goods contracted for and the goods provided where there is an available market for both.[596] It was argued above that a principled explanation of this measure is that this is the minimum cost of ensuring equivalent performance but this measure will not be displaced by showing that the innocent party has no intention to cure the breach by purchasing goods conforming to the original bargain, or even that obtaining equivalent performance is no longer possible.

The view of intention endorsed here is also consistent with the approach adopted in contracts for the provision of services more generally. That the absence of an intention to cure generally does not preclude an award of the minimum cost of

[595] *Bowen Investments Pty Ltd v Tabcorp Holdings Ltd* [2008] FCAFC 38 (FCA) [51].

[596] See 223 above.

equivalent performance in services cases was confirmed in *White Arrow*.[597] There, it will be recalled, the claimant contracted with the breaching party for the provision of an enhanced delivery service to the claimant's customers but instead received only the standard level of service. Sir Thomas Bingham MR dismissed the claimant's appeal on the basis that no difference in the value of the services provided and those contracted for had been established. However, his Lordship endorsed the general principle that the measure of damages in such cases is the value of the services not provided and that it is not a necessary bar to recovery of damages assessed by reference to the cost of obtaining those services elsewhere that the claimant did not, or could not, obtain such services.

The inclusion of the 'could not' here is significant because equivalent performance is often not possible when the wrong level of service has been provided, suggesting that this is a case where the alternative measure of performance should be awarded. This is true. It is simply that the two measures of performance correspond in such a case. This is because the nearest equivalent to performance in such a case is the difference in market value between the two levels of service, which corresponds to a reasonable approximation of the price of release from performance. This observation demonstrates that the two performance measures are really just two specific applications of the same principle, which is that the innocent party should be entitled to the nearest equivalent to performance in the circumstances.

The view that a claimant's intention to repair a defectively performed construction contract should not determine whether awarding the cost of equivalent performance is reasonable is therefore both the better one in principle and fits better with the law of contract damages generally. In addition, there are policy considerations supporting this approach. First, and most importantly, a focus on intention is liable to

[597] *White Arrow* (n 29).

produce commercial uncertainty.[598] Secondly, it creates the possibility for abuse by dishonest claimants. The difficulty in accurately determining a party's intentions are well known. Moreover, a party's intentions may change after the trial and it will be very difficult to determine whether such changes have occurred in good faith. Thirdly, an excessive focus on intention seems likely to prejudice those of lesser means since they are more likely to spend any money award on other things for which they have a stronger preference than on perfecting an imperfectly rendered performance. In response it may be said that this is true of damages awards generally. While this is correct, the argument here is not that such awards should not be available at all but simply that the claimant's future intentions do not provide a secure foundation for determining their availability.

One option that has been suggested in this context is that of making a cost of cure award conditional upon the claimant's actually using the sum awarded to obtain performance.[599] This is an approach that the common law could have taken but has not. English law generally does not impose conditions on its monetary awards.[600] There are good reasons for taking this approach. First, imposing such conditions imposes an additional burden on the court of supervising the claimant's actions post-trial. In this regard, it is well known that the need for supervision is one important basis upon which the availability of specific performance is limited.[601] Secondly, just as a claimant is free to spend any damages awarded as compensation for loss as he pleases, he should also be free to spend any monetary substitute for performance how he chooses. Finally, as O'Sullivan notes, such an approach creates an incentive for the innocent party to claim

[598] This was observed by Rares J in *Bowen* (n 595) [86].

[599] See Webb, 'Performance and Compensation' (n 5) 61.

[600] *James v Hutton and Cook Ltd* [1950] 1 KB 9 (CA) 15; *Darlington* (n 143) 80 (Lord Steyn).

[601] *Argyll Stores* (n 369).

an intention to repair when he has none and then 'hold out' for a favourable settlement.[602]

In response to the suggestion that the claimant should be free to spend the sum awarded as he pleases, it might be argued that the position is different when the object of the award is not to compensate for loss but to substitute for performance. However, an award of the cost of equivalent performance remains an award substituting for performance even when no condition that it be spent on obtaining performance is imposed. The object of such an award is still to provide an appropriate substitute for performance, even if equivalent performance is not eventually obtained by the innocent party. Just as compensatory damages make good the loss, whatever the money actually be spent on, an award of the cost of equivalent performance makes good the failure to perform, whether the money be spent on obtaining performance or not. It may be that the imposition of such a condition would make the award a *better* substitute for performance, all things considered. On this basis, it may be argued that this kind of award should be added to the armoury of judicial remedies but English law has not taken this position.[603] In *Ruxley* Forsyth's undertaking to actually use any money awarded to build a pool adhering to the contractual specification was not sufficient to convince the court that such an award was warranted. This does not necessarily preclude the possibility of the law developing to allow for the imposition of such conditions in future cases, since the decision in *Ruxley* might be justified either on the basis that the appellate courts did not wish to disturb the trial judge's finding of fact or because the award was determined to be unreasonable on any view. Regardless of this, it is clear that such conditional awards are not currently available in English law.

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[602] J O'Sullivan, 'Loss and Gain at Greater Depth: the Implications of the Ruxley Decision' in F Rose (ed) *Failure of Contracts - Contractual, Restitutionary and Proprietary Consequences* (Hart 1997) 1, 11.

[603] This kind of award is recognised in some civilian systems.

4. Conclusion on Reasonableness

All this leaves open the question of what 'reasonableness' means in this context. This is an extremely difficult question. Various suggestions have been postulated but none has won clear support. In *Ruxley* much emphasis was placed upon the concept of disproportionality, though it is not clear that their Lordships were in agreement as to precisely what values are to be compared in this context.[604] A comparison of the cost of obtaining equivalent performance to the benefit to be obtained from doing so appears to be the best interpretation of what disproportionality means in this context.[605] There is certainly some explanatory power in this idea. For instance, many of the earlier cases focussing on intention might be re-interpreted on this basis.[606] However, the greatest problem with this suggestion is uncertainty.[607] The same may be said of the related concept of 'economic waste' employed in the United States,[608] which the High Court of Australia observed may preclude recovery in too broad a range of cases.[609]

Whilst noting the difficulty in stating clearly the meaning of reasonableness in this context, Professor Tettenborn suggests that 'a number of principles can be stated with some confidence'.[610] The first principle he identifies is that an award of the cost of equivalent performance (which he terms 'cost of cure' damages) is easier to recover in

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[604] For discussion see O'Sullivan, 'Loss and Gain at Greater Depth' (n 602) 10.

[605] This is the view taken in E Peel, 'Loss and Gain at Greater Depth: the Implications of the Ruxley Decision - A Comment' in F Rose (ed) *Failure of Contracts - Contractual, Restitutionary and Proprietary Consequences* (Hart 1997) 27, 31.

[606] For example, *Wigsell* (n 574); *Tito* (n 201).

[607] O'Sullivan, 'Loss and Gain at Greater Depth' (n 602) 10.

[608] Corbin, *Contracts* (West Publishing Co 1964), Ch 60, § 1089.

[609] *Bellgrove* (n 546) [6].

[610] A Tettenborn, *The Law of Damages* (2nd edn LexisNexis 2003) [19.97].

non-commercial cases where it is more likely that the innocent party has a legitimate reason to insist on performance *in specie*. In commercial cases, by contrast, the innocent party's interest in performance is more likely to be purely financial.[611] The second principle Tettenborn identifies is the one pointed out by Lord Jauncey in *Ruxley* that a claimant may be more generously treated where the defendant has 'entirely failed to fulfil his contractual objective' than where the claimant is simply seeking to rectify a defective performance.[612] Tettenborn also suggests that an intention to procure equivalent performance is necessary to obtain a 'cost of cure' award.[613] However, this contention is disputed here on the basis of the authorities and arguments of principle outlined above.

Whether a preferable formulation of the 'reasonableness' restriction is possible is a question that lies beyond the scope of this thesis. Overall, it seems unlikely that a single criterion will be sufficient to explain all the cases, particularly given the traditional focus on loss. Significantly, however, while the innocent party's intention to repair should not be decisive, it does not follow that it is completely irrelevant.[614] There may be some scope for intention to have a subsidiary role in assessing reasonableness, even if only as an evidential guide as to whether performance is disproportionate, wasteful, or whatever other criterion is determined to be the most useful in guiding the court's discretion.[615] The fundamental point is that the reasonableness of awarding the cost of equivalent performance should be determined objectively by reference to whether there

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611 As Tettenborn observes, this accords with the decision not to award the cost of equivalent performance in *Channel Island Ferries Ltd v Cenargo Navigation Ltd, The Rozel* [1994] Lloyd's Rep 161 (CA) and *Sealace Shipping Co Ltd v Oceanvoice Ltd, The Alecos M* [1991] 1 Lloyd's Rep 120 (CA), which both involved the breach of a commercial contract entered into by the innocent party with a view to profit-making. Tettenborn contrasts these decisions with *Radford* (n 540) where the cost of cure was awarded in the context of a non-commercial contract.

612 *Ruxley* (n 2) 361. See Tettenborn, *The Law of Damages* (n 610) [19.98].

613 See Tettenborn, *The Law of Damages* (n 610) [19.99].

614 This is the view taken in McKendrick, 'Breach of Contract and the Meaning of Loss' (n 32) 50.

615 This concurs with Lord Millett's view in *Panatown* (n 2) 592.

are countervailing considerations of sufficient strength to override the innocent party's entitlement to performance in the relevant circumstances.

II. AWARDS OF THE PRICE OF RELEASE FROM PERFORMANCE

A performance money award aims to provide the victim of a breach of contract with an appropriate monetary substitute for performance. All else being equal this is the minimum cost of obtaining equivalent performance, which is either the amount required to repair the defective performance directly or, where there is an available market for both the goods or services received and contracted for, the difference between these two amounts. Sometimes English law restricts the availability of the former on the basis that it is unreasonable in the circumstances but this does not preclude the possibility of substituting for performance through some alternative measure. Section II.A argues that this alternative measure should be the sum a reasonable person in the innocent party's position would have accepted to release the breaching party from performance and that there is significant support for this measure in the case law. Section II.B argues that the entitlement to this alternative measure should not be restricted, though English law sometimes does so. It is suggested that the principal reason for this is the dominance of the orthodox, purely loss-based understanding of contract damages.

A. QUANTIFICATION

This section explains how awards of the price of release from performance are quantified. It first outlines the justification for this measure and then demonstrates its application in the case law in a variety of contexts.

1. Justification

A performance award aims to provide the innocent party with the most appropriate substitute for performance in the circumstances. *Prima facie* this is the minimum cost of obtaining equivalent performance. Sometimes, however, neither specific performance nor its monetary equivalent is an appropriate substitute for performance. As just explained, this will be the case either when equivalent performance is no longer possible, meaning there is no basis for quantifying its cost, or when, on balance, it is not reasonable for the innocent party to insist upon obtaining equivalent performance in the circumstances. Nevertheless, in such cases the same fundamental principle should apply to determine the appropriate measure of any sum awarded. That is, the award should give the innocent party the best substitute performance in the circumstances.

This thesis contends that, when specific performance is unavailable and the cost of equivalent performance is unreasonable, the next-best substitute for performance is the amount a reasonable person in the innocent party's position would have accepted to release the other party from performance. The rationale for this measure is that breach effectively involves the unauthorised expropriation of one party's contractual right by the other so it is appropriate that the breaching party be required to pay the innocent party a reasonable 'price' for a forced sale of this right. This 'price' should be valued objectively because a subjective valuation is both practically impossible and inconsistent with the objective approach English contract law generally takes. Any concerns with taking a purely objective valuation can be ameliorated by allowing for certain relevant personal attributes of the claimant to be bestowed upon the reasonable person if proved on the balance of probabilities.

It might be objected that an approximation of the reasonable price of release is not really a substitute for *performance* since it does not enable the innocent party to obtain equivalent performance from elsewhere. This is certainly true. However, the very availability of this measure is premised on the fact that obtaining equivalent performance is either impossible or unreasonable. Therefore, although the reasonable price of release does not enable the innocent party to obtain a true substitute for performance, it does provide this party with a true substitute for the *right* to performance since it gives this party the objective market value of that right at the date it was compulsorily acquired. In view of the fact that a true substitute for performance is impossible or unreasonable, it is contended that such an award constitutes the next-best thing that the law can do in the circumstances.

2. Examples

The relevant question, therefore, is how much a reasonable person in the claimant's position would have accepted to release the breaching party from the obligation to perform at the date of breach. Again, the breaching party also will be liable to compensate the innocent party for any additional loss suffered in consequence of this failure to perform, subject, of course, to the restrictive doctrines that operate to limit a party's entitlement to compensation. In what follows, some significant support for this alternative measure of performance in the case law is demonstrated.

a. Breach of a Restrictive Covenant

The decision in *Wrotham Park* was discussed in Chapter Two.[616] It was argued that the sum awarded in this case cannot be explained as an instance of compensation for

[616] See 68 above.

financial loss. The claimant conceded that the value of the land was not reduced by the defendant's building and evidence supported the conclusion that the claimant never would have agreed to release the defendant from the covenant in any hypothetical bargaining scenario. The claimant was thus financially no worse off as a result of the breach. To the extent that any loss was suffered, it was non-pecuniary. The inability to explain *Wrotham Park* damages satisfactorily as an example of compensation for financial loss is supported by a leading proponent of the conventional understanding of contract damages.[617] According to Burrows, the best interpretation of *Wrotham Park* is that the award was based upon the gain made by the defendants through breach.[618] However, since only 5% of their profits were stripped, this analysis leaves open the question of why this particular measure of gain was chosen.

This thesis contends that the best explanation of *Wrotham Park* is that Brightman J attempted to provide the claimant with the best substitute for performance in circumstances where both a restorative injunction and an award of the cost of equivalent performance were inappropriate. In relation to the coercive order, this was because the houses had already been built and it would have constituted an unjustifiable waste of valuable public housing to sanction their removal. The denial of the cost of equivalent performance also might be justified on such grounds. However, it can also be explained by the fact that it was not possible for the claimants to undo the breach because the houses were built on their neighbours' land and therefore it was beyond their control to remove them. In these circumstances the appropriate substitute for performance is an award that reasonably approximates the price of release.

[617] Burrows, 'Wrotham Park Damages' (n 169).

[618] ibid.

Whether Brightman J's valuation of this measure was correct is certainly open to debate. The appropriate test is what a reasonable person in the claimant's position would have accepted to release the defendant from performance. Again, this raises the question of the extent to which the claimant's own personal proclivities are relevant since the evidence in *Wrotham Park* suggested that the claimant never would have agreed to release the defendant from performance. It is suggested here that when a particular characteristic of the claimant can be proved on the balance of probabilities, it can be attributed to the reasonable person. However, this does not mean that all such characteristics should be so attributed. There may be a need for certain limits on this principle to make it workable. If so, the fact that the claimant never would have agreed to release is a prime candidate for exclusion given that to do otherwise would render this method of substitution unworkable.

b. Breach of an Exclusivity Agreement

A more recent example of a case involving a breach rendering equivalent performance impossible is the Privy Council's decision in *Pell Frischmann*, which was considered in Chapter Two. The discussion there demonstrated that the case cannot be analysed as an example of compensation for financial loss. One possible explanation is that the award was based upon BVE's gain from breach. BVE wanted to enter into a contract with NIOC and it achieved its desired object without buying out the claimant's rights as it should have done. This analysis is possible but an alternative analysis is that a sum of money was awarded in substitution for the innocent party's right to performance that was compulsorily acquired through breach. Given that performance of the contract was no longer possible, the appropriate measure for this award was a reasonable approximation of the price of release.

This analysis is consistent with the amount awarded and with the Privy Council's insistence that the award should be valued as the reasonable price to release BVE from its duty to perform. It also explains why the award was valued at 28 July 2007, when performance was no longer possible, and why the Privy Council insisted that the issues in measuring these damages ought not to be confused with the 'wider issue of whether the court is awarding compensatory or restitutionary damages'. [619] It also fits with Lord Walker's comments that the *Wrotham Park* damages awarded in *Pell Frischmann* were effectively substitutive of the right to an injunction (as described in *Jaggard v Sawyer*)[620] and therefore disconnected from events occurring after the date of the *Wrotham Park* style 'hypothetical bargain'.

c. Breach of a Confidentiality Agreement

The facts in *Vercoe v Rutland* were outlined in Chapter Two as well.[621] There, Sales J held that where damages are to be awarded on a *Wrotham Park* basis, what is required from the court is an assessment of a fair price for release or relaxation of the relevant negative covenant, having regard to three factors. The first is the likely parameters given by ordinary commercial considerations bearing on each of the parties. The second is any additional factors particularly affecting the just balance to be struck between the competing interests of the parties. Here, his Honour noted Brightman J's reference in *Wrotham Park* to the conduct of the beneficiary of the restrictive covenant as a factor tending to moderate the award of damages in its favour and the Privy Council's

[619] *Pell Frischmann* (n 189) [50].

[620] *Jaggard* (n 336).

[621] See 76 above.

reference in *Pell Frischmann* to the relevance of extraordinary and unexplained delay by the claimant as a factor that was relevant to assessment in that case.[622]

The third factor relevant to an assessment of the reasonable price of release is the Court's overriding obligation to ensure that an award of damages for breach of contract does not provide relief out of proportion to the real extent of the claimant's interest in proper performance, judged on an objective basis by reference to the situation that presents itself to the Court.[623] This final consideration emphasises the fundamental purpose of such an award as a way of providing a substitute for performance. Although circumstances may sometimes dictate that achieving the object of performance in accordance with the contract is no longer possible, that does not preclude the possibility of providing an appropriate money substitute for the claimant's primary contractual entitlement.

B. RESTRICTION

The previous discussion argued that, where an award of the minimum cost of obtaining equivalent performance is unreasonable, the innocent party remains entitled to a reasonable approximation of the price of release assessed at the date of breach. This measure constitutes the best substitute for performance in the circumstances. Section I.B of the chapter observed that it is usually reasonable for the innocent party to insist upon performance, so the most common basis for awarding the alternative performance measure will be that circumstances have made it impossible for the innocent party to obtain the substance of the performance bargained for. Section II.A of this chapter also demonstrated the existence of doctrinal support for this measure where it is no longer

[622] *Vercoe* (n 195) [292].

[623] ibid.

possible for the claimant to obtain the substance of his bargain. However, it is certainly not true that this measure is always awarded in cases of this kind.

1. The Current Position

An example of a case in which performance in accordance with the contract was no longer possible, and no money substitute for performance was awarded, is *Ford v White & Co*,[624] discussed in Chapter One. In that case the claimant bought a property that he intended to develop. In breach of contract, his solicitor failed to bring to his attention the existence of a covenant against development. The evidence showed that the property would have been worth an additional £1,250 had it not been for the covenant but the claimant had paid no more than what the property was actually worth. It was obviously no longer possible for the negligent solicitor to comply with his obligation to inform the claimant of the existence of the restrictive covenant prior to purchase. Thus, neither specific performance nor an award of the cost of equivalent performance was possible. Moreover, if the solicitors had in fact complied with this obligation, the claimant would not have purchased the property and therefore would have been in exactly the same *financial* position the claimant was now in. This meant that the claimant had suffered no financial loss.

On this basis the court correctly held that he was not entitled to the £1,250 claimed as financial loss. However, on the account proposed here, he should have been entitled to a reasonable approximation of the price of releasing the defendant from performance. Given that the entire purpose of the contract was to gain reliable information as to whether the planned development was possible, it seems likely that a reasonable person in the claimant's position would accept nothing less than a full refund

[624] *Ford* (n 26).

of the solicitors fees as the price of release from performance. This analysis would produce the same result as a claim for a total failure of consideration.

No such award was provided in *Ford v White* and the question arises as to why. One possible explanation is that just as English law restricts the entitlement to the *prima facie* performance measure when it is unreasonable for the innocent party to insist upon performance, it also restricts the entitlement to the alternative performance measure in some circumstances. However, it is not obvious why it would ever be unreasonable to make such an award, at least where the breach has not caused the innocent party any financial loss that can be claimed as compensation instead. If a claimant has a right to performance, there is no reason for not awarding a reasonable approximation of the value of the right compulsorily acquired by the defendant through breach. *Ford v White* itself demonstrates this point. On the account proposed here, the claimant should have been entitled to recover the value of the advice contracted for but, as observed already, this amount was not awarded. Another possible explanation for this result is simply that such an award was not claimed. Although this is no doubt a large part of the reason for the decision the question again arises as to why.

The principal reason for this is likely to have been the dominance of the conventional understanding of contract damages according to which such awards are understood as concerned exclusively with compensating for loss. Thus, the more fundamental explanation for the decision in *Ford v White* is that it simply reflects the failure to appreciate the basic distinction this thesis proposes. The availability of *Wrotham Park* awards has generally been limited to cases where the claimant was seeking some kind of injunctive relief, damages in lieu of an injunction or the claim was based on a breach of restrictive covenant or the invasion of a property right held by the claimant.

Significantly, however, in *Force India* Stadlen J held that a *Wrotham Park* claim is not precluded by the absence of these commonly occurring scenarios.[625]

The famous American case of *City of New Orleans v Firemen's Charitable Association*,[626] is another example of a case where the price of release should have been awarded but was not. The defendant contracted to provide the claimant with a fire fighting service and was paid the contract price. After the contract expired, the claimant discovered that the defendant had not provided the stipulated number of firemen or horses or the promised length of hosepipe. The consequence of breach was that the defendant had saved itself significant expense but had not caused the claimant any loss since it had not failed to put out any fires. The claimant only recovered nominal damages. The court was led astray by its preoccupation with discovering a loss. An award substituting for performance should have been awarded on these facts. Since equivalent performance was no longer possible, the appropriate measure was a reasonable approximation of the price of release. In the absence of further evidence, the difference in market value between the services contract for and those supplied provides the obvious basis for assessing this amount.

2. Future Direction

To clarify, it is suggested that the failure to award the alternative performance measure in certain cases is attributable to three factors. The first and most important is the dominance of the conventional understanding of contract damages. This mistake has prevented courts from appreciating the possibility of awarding a monetary substitute for performance, irrespective of any financial loss suffered. It has also led to the second

[625] *Force India* (n 160) [503].

[626] *City of New Orleans v Firemen's Charitable Association* 9 So 486 (1891 SC Lou).

problem, which is that such awards are not always claimed, as in *Ford v White*. A final possible reason that such awards have not always been provided could be the difficulties involved in quantifying a monetary substitute for performance. Although sometimes significantly complicated by past or future uncertainty,[627] quantifying a financial loss is generally a relatively straightforward exercise. By contrast, the appropriate monetary quantification of the value of performance is less obvious.

Nevertheless, the very possibility of obtaining damages for non-pecuniary loss demonstrates that difficulties in quantification are an insufficient reason for failing to provide a monetary substitute for performance. Although this exercise may be more difficult than the quantification of financial loss, and for this reason more prone to inaccuracy, the law must uphold a contracting party's duty to do the next-best thing to performance following breach. The inevitable inaccuracies involved in awarding damages for non-pecuniary losses do not prevent the law from attempting to compensate such losses, so they should not prevent the law from also striving to provide an appropriate substitute for performance either.

To the extent that the common law currently does restrict the entitlement to the alternative performance measure where the *prima facie* measure is unreasonable, this thesis contends that such restriction is unjustifiable. Although it may certainly be unreasonable to award a party the cost of performance in some circumstances, it is difficult to envisage situations when awarding a reasonable approximation of the price of release ever will be. This is the very least a claimant should be entitled to when her right to performance is compulsorily expropriated by the defendant.

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[627] For discussion see M Bridge, 'Expectation Damages and Uncertain Future Losses' in J Beatson and D Friedmann (eds), *Good Faith and Fault in Contract Law* (OUP 1991) 427.

In summary, although restricting the availability of the secondary measure of performance is difficult to justify, currently English law sometimes does so. In cases where consequential loss is also suffered this discrepancy might not appear particularly problematic given the claimant's entitlement to a substantial award regardless. However, in cases like *Wrotham Park* and *Ford v White*, where the claimant suffers no financial loss, this anomaly becomes more obvious because it deprives the claimant of a substantive remedy. Although an award was provided in the former case, none was provided in the latter. This might be explained on the basis that such an award was not claimed. However, the more fundamental explanation for this is the dominance of the conventional understanding of contract damages, and the difficulty in accurately valuing the right to performance.

CONCLUSION

This chapter has explained the quantification and restriction of money awards substituting for performance. The normative basis for such an award is the claimant's legal right to contractual performance. In the absence of any additional considerations, the closest substitute for actual performance is specific performance. However, when the balance of relevant considerations does not support a coercive order, or the innocent party would prefer a money substitute for performance, English should and does make this option available. In making such an award the object is to provide the claimant with the most appropriate substitute for performance in the circumstances.

Two distinct measures of performance were identified and explained in this chapter. The first was an award of the cost of obtaining performance equivalent to that agreed upon by the parties. The second was a reasonable approximation of the amount the innocent party would have accepted to release the breaching party from performance.

It was argued that the former is *prima facie* the most appropriate money substitute for performance because it provides the innocent party with the means to obtain a substitute for the agreed performance. However, when this award is unquantifiable because performance is no longer possible or it is unreasonable for the innocent party to insist upon performance, the latter measure should be awarded instead on the basis that through breach the defendant has compulsorily acquired the claimant's primary right. Doctrinal support for these claims was also advanced.

Finally, it was noted that English law also does not always award the alternative measure in cases where the *prima facie* measure is either inappropriate or unreasonable. Although this is understandable given the dominance of the purely loss-based understanding of contract damages and the difficulty in accurately valuing the right to performance, it was suggested that the justification for imposing such a restriction is weak. This is particularly apparent in cases where the claimant also suffers no loss in consequence of breach. Thus, although the hesitancy to do so may be understandable given the strongly instantiated conventional view, the law should move towards awarding this alternative performance measure in cases where the *prima facie* measure is either unquantifiable or unreasonable.

The model advocated in this chapter is controversial. At present, English law is still fixated upon identifying the existence of a loss before awarding money to victims of contractual breach. Nevertheless, this chapter demonstrates that the law is moving closer to the bifurcated model advocated in this thesis. This approach must be distinguished from the understanding of contract damages recently advocated by Stevens.[628] The challenge posed by Stevens is examined in the next chapter, with the clearest instance of judicial support for his general approach, Lord Hoffmann's agreement-centred

[628] Stevens, 'Damages and the Right to Performance' (n 3).

conception of contractual remoteness, providing the departure point for the argument there advanced.

CHAPTER SIX – MONEY AWARDS COMPENSATING FOR LOSS

INTRODUCTION

On the account of contract damages advanced so far there are two distinct kinds of money awards that aim to uphold the expectation principle. Chapter Five outlined the appropriate quantification and restriction of awards substituting for performance. The current chapter focuses on money awards compensating for loss. These awards uphold the secondary right of repair that arises upon breach. Unlike awards substituting for performance, the existence of awards compensating for loss is generally accepted.[629] The prevailing orthodoxy is that, exceptional circumstances aside, in English law the overriding purpose of *all* money awards following breach (except nominal and gain-based awards) is to compensate for loss. This thesis demonstrates that this picture oversimplifies reality.

The account proposed here may seem like a radical challenge to the prevailing orthodoxy but its controversial nature should not be exaggerated. In recent times the orthodox notion that the breach of a primary legal right generates a secondary right to repair has been challenged. In opposition to this scepticism, section I.A defends the orthodox view that the breach of a primary legal duty generates a secondary duty of repair. A specific version of this general challenge advanced in the contractual context argues that awards of contract damages are not based on a secondary right of repair but simply give effect to the contracting parties' underlying agreement. Section I.B responds

[629] This is the orthodox understanding of damages awards for breach of contract. See *Securicor* (n 360) 848 (Lord Diplock).

to this specific challenge by defending the conventional understanding of compensatory awards. In particular, it argues that the scope of such awards is limited by reference to external rules of law upholding certain policies in the relevant contractual context.

Section II more fully explains the distinction between substitutionary and compensatory awards within the account this thesis advances. It first highlights the differences between this account and the influential rights-based account of contract damages recently proposed by Stevens. Although there are some important similarities between the approach advocated by Stevens and that proposed here, there are also critical differences, with Stevens's account essentially amounting to a version of the agreement-centred approach discredited in section I. The latter part of section II draws on the distinction between substitutionary and compensatory awards to explain some difficult cases. In particular, explanations of some problematic awards for breach of a contract of sale and three major recent authorities are provided.

I. UNDERSTANDING COMPENSATORY MONEY AWARDS FOR BREACH OF CONTRACT

The conventional understanding of contract damages is that such awards give effect to a secondary right of repair that arises upon breach. Given this, the focus so far has been on demonstrating the need to recognise the existence of money awards substituting for performance and explaining their operation in English law. However, a more radical challenge to the orthodox view questions the very existence of a secondary right to repair, suggesting that all damages awards for breach simply enforce the primary right to performance. A notable version of this challenge has been championed by Lord Hoffmann, who appears to claim that the scope of damages awards for breach of contract should be determined wholly by reference to the parties' underlying agreement.

In view of this more radical challenge to the orthodox understanding of contract damages, the focus of this thesis now shifts to defending the existence of money awards upholding the secondary right to repair. This defence begins by defending the existence of a secondary right to repair generated by breach of the primary right to performance.

A. Defending the Existence of a Secondary Right of Repair

The orthodox understanding of one contracting party's entitlement to compensation for loss following the other's breach is that it is simply a particular instantiation of the more general legal right to repair that arises upon the violation of any primary legal right. The view outlined here does not challenge the existence of such a right but carves out a more limited role for it in explaining the law of contract damages than is conventionally assumed. However, the existence of a secondary right of repair arising upon the violation of a primary legal right has been challenged. This section briefly outlines this challenge and provides a limited defence of the secondary right. In conjunction with the theoretical account of the distinction between the primary right to performance and the secondary right to repair that was outlined above in Chapter Four, this defence provides solid grounds for the account this thesis proposes.

1. The Controversial Status of the Right to Repair

The breach of a primary legal duty is a civil wrong.[630] Two examples of civil wrongs are the common law tort of conversion and the equitable wrong of breach of confidence. The first involves the breach of the duty not to interfere with property owned by another, and the second involves the breach of the duty not to convey confidential information to a third party. To note this structural similarity is not to

[630] Birks, 'The Concept of a Civil Wrong' (n 108).

suggest that distinctions between the two primary duties should not be relevant to choosing the appropriate response to a breach of the duty. A breach of contract is also a civil wrong as it involves the breach of the primary legal duty to perform a contractual undertaking. At least for common law wrongs, the conventional view is that breach of a primary legal duty generates a secondary legal duty to repair certain damage caused in consequence.[631]

A persistent puzzle for private law theorists has been explaining the basis for this secondary legal duty. One popular type of answer locates the secondary duty in the idea of corrective justice. Such theories usually claim that this secondary legal duty is based on a corresponding moral duty of repair,[632] though this may not be a necessary feature of corrective justice theories. The basis for this supposed moral duty is contentious,[633] and its existence has been questioned. The main challenge has come from proponents of the economic analysis of law, who claim that the duty to pay damages is not a moral duty but one imposed by the law in order to promote certain goals such as economic efficiency or wealth maximisation.[634]

The existence of a secondary moral duty of repair has been challenged on non-consequentialist grounds as well. For example, Professor Zipursky has argued that a defendant's liability to pay compensation for loss upon the commission of a tort is not grounded in any moral duty arising upon the violation of a primary right but rather is

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631 In the contractual context see *Securicor* (n 360) 848 (Lord Diplock).

632 The classic account in the law of torts is Weinrib, *The Idea of Private Law* (n 17). For a corrective justice account of contract law, see Benson, 'The Unity of Contract Law' (n 439).

633 In the tort context compare Weinrib, J Coleman, *Risks and Wrongs* (OUP 1992), and S Perry, 'Responsibility for Outcomes, Risk and the Law of Torts' in G Postema (ed) *Philosophy and the Law of Torts* (CUP 2001).

634 See R Posner, *Economic Analysis of Law* (7th edn Aspen 2007). See 93 for Posner's discussion of 'contract rights and remedies'.

imposed by the court via a principle of civil recourse.[635] That is to say, upon breach of a primary legal duty no secondary duty to repair harm caused arises but a court may nevertheless impose liability upon a wrongdoer to vindicate or protect the claimant's primary right.

It is therefore clear that both the nature and the very existence of a secondary legal duty that arises upon breach of a primary legal duty are contested. Since there is not space to engage properly with the significant body of academic literature on this topic here, this very brief overview of this challenge must suffice. A comprehensive defence of the secondary right to repair may require its own doctoral thesis. Nevertheless, there are certainly aspects of legal doctrine that call into question the claim that the breach of a primary legal duty generates a secondary legal duty of repair that are worthy of further consideration here. Some of these are now considered and the challenge they pose to the existence of the secondary right considered.

2. In Defence of the Right to Repair

One possible reason for scepticism regarding the existence of a general secondary duty to repair harm arising upon the breach of a primary legal duty is that the duty to pay *damages* only arises upon the making of a court-order. This is demonstrated by the fact that a claimant can only obtain compensation for loss suffered due to a defendant's failure to pay damages once there is a court-order that the defendant must pay a particular amount. This might suggest that any secondary duty to repair only arises upon the making of a court-order rather than upon the occurrence of breach. The problem with this claim is that it fails to acknowledge the possibility of a *general* reparative duty arising upon breach, which is then given effect by a court order to pay a specific sum of

[635] See B Zipursky, 'Civil Recourse, Not Corrective Justice' (2003) 91 Georgetown LJ 695, 719.

money as compensatory damages. It is not inconsistent with the existence of a secondary duty of repair that it is only given specific content by a court-ordered duty to pay a particular quantum of damages. A breaching party cannot be expected to know its specific liability until there is a court-order specifying the amount owed as compensation.

The problem with this objection, in other words, is that it assumes an unrealistic level of specificity for the secondary duty. The secondary duty arising upon breach of a primary duty is a general duty to repair harm. It is not a specific duty to pay a particular sum of money. On this understanding, the abstract secondary duty to repair that arises upon breach is only given specific content by a court-order that the breaching party pay compensation for loss. The gap between the abstract duty to repair harm and the specific court-ordered duty to pay compensation for loss is demonstrated by the award of damages for non-pecuniary loss. Here, compensation is awarded not because it accurately annuls the harm suffered but simply because it is all that can be done in the circumstances by way of reparation for this harm. The abstract duty to repair generated by the breach of a primary duty is only instantiated by a more specific duty to pay a particular monetary sum once a court-order is made quantifying the breaching party's liability. In this sense, a court-order functions as a declaration of the specific content of the secondary duty to repair. The doctrine of merger also means that it extinguishes the underlying obligation and replaces it with a new one.

A related objection that might be raised against the suggestion that the breach of a primary duty generates a secondary duty of repair claims that the payment of damages prior to a determination of liability is no defence to a claim for damages. It is not clear that this is the true doctrinal position. In *Edmunds v Lloyds Italico & l'Ancora Compagnia di*

Assicurazione e Riassicurazione SpA,[636] which might be thought to be authority for this proposition, the payment that was tendered was not accepted as discharging the secondary obligation because it did not include the interest payable on the sum due rather than because it was paid prior to a court-order for the payment of damages. In fact, the general position is that settlement of an action is a defence to a claim for compensatory damages. To this, it might be objected that the payment must be provided *in settlement* of the action to discharge liability. Again the response to this objection is that it assumes an unrealistic level of specificity for the secondary duty. This objection assumes that the duty that arises upon breach of the primary duty is a duty to pay a particular quantum of damages rather than a more general duty to repair harm caused by breach. Just as the payment of the cost of equivalent performance will not prevent a court from ordering specific performance if this is the more appropriate substitute for performance, an attempt to repair harm caused by breach through the payment of money will not prevent a court from awarding damages as compensation for loss.

This section has sought to defend the conventional view that the breach of a primary legal duty generates a secondary legal duty of repair. The defence provided was not comprehensive because defending the *general* existence of a secondary right to repair upon the breach of any primary legal right is beyond the scope of this thesis. Rather, in addition to showing that some awards for breach of contract substitute for performance, this thesis need only show that there are also some awards that compensate for loss. Although this thesis argues that the most coherent basis for these awards is a secondary right to repair arising upon breach, it is possible that there is some other basis for compensatory awards. For the purposes of this thesis, the important point is that, in accordance with the orthodox understanding of contract damages, some awards do not

[636] *Edmunds v Lloyds Italico & l'Ancora Compagnia di Assicurazione e Riassicurazione SpA* [1986] 1 WLR 492 (CA).

simply substitute for performance but compensate for loss. The next section defends this claim.

B. THE RESTRICTIONS ON COMPENSATION FOR BREACH OF CONTRACT ARE NOT AGREEMENT-BASED

So far the need for the new account proposed in this thesis has been defended on the ground that the orthodox account is doctrinally inaccurate, as well as conceptually and linguistically inadequate. In establishing the doctrinal objection, it was explained that it is easy to confuse an award substituting for performance with one compensating for loss. Two reasons for this were offered. The first is that the conceptual nature of 'loss' creates ambiguity as to its meaning, allowing the term to be used to describe phenomena better understood as distinct. This, for instance, has led to the occasional characterisation of breach itself as a loss. The second is that there are many cases in which an award substituting for performance also has the *effect* of compensating for loss. This means that, even without distorting the meaning of loss, it is often possible to characterise substitutionary awards as compensatory. Nevertheless, the preceding chapters have shown that some cases cannot be so explained which demonstrates the need for the distinction this thesis proposes.

Such recognition, however, raises the question of whether *all* contract damages awards can be explained as simply giving effect to the parties' underlying agreement. This appears to be the understanding of contract damages recently championed by Lord Hoffmann and others. In essence, this challenge constitutes a version of the theoretical challenge to the secondary right of repair just outlined that applies specifically to the contractual context. This section refutes this challenge by defending the orthodox view that the restrictions imposed upon the recovery of compensatory damages for breach of

contract are best explained as promoting various policy considerations rather than being sourced in the parties' underlying agreement. Before this claim is defended, it is first necessary to define more precisely the *prima facie* content of the secondary right to repair that arises upon breach.

1. Two Preliminary Restrictions on the Scope of the Secondary Right

The secondary duty to repair certain losses suffered in consequence of breach of a primary legal duty contains two implicit restrictions. The first is that the victim must demonstrate that the loss for which he seeks reparation was actually caused by breach. This requires that two facts be true before the claimant can recover compensation from a defendant. The first is that, on the balance of probabilities, the claimant would not have suffered the loss for which it seeks compensation 'but for' the defendant's breach.[637] The second is that there was no unforeseeable intervening act between the defendant's breach and the claimant's loss that broke the chain of causation.[638]

The second implicit limitation on the scope of the secondary right is a principle against double recovery. Once the possibility of an award substituting for performance is recognised, the entitlement created by the scope of the secondary right to repair certain negative consequences of breach must be reduced to avoid the innocent party's recovering for any loss that has already been compensated indirectly through a substitutionary award. This is possible because the failure to receive performance may leave the innocent party factually worse off by reference to the position he would have occupied had the contract been performed or it may not, depending on the facts of the case at hand.

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[637] *Barnett v Chelsea Hospital* [1969] 1 QB 428.

[638] *The Silver Sky* [1981] 2 Lloyd's Rep 95.

The principle against double recovery can be explained further as follows. Committing a legal wrong gives rise to a legal duty to repair the legally recognised harm caused to the victim. Exceptional circumstances aside,[639] there is no justification for extending the content of that duty beyond the obligation to repair actual harm caused to the innocent party by breach. Another way to understand this point is that compensation for loss is provided to *complement* a money substitute for performance in exactly the same way that such an award can complement an order for specific performance. For this reason, this award must be compatible with an award substituting for performance and should be limited appropriately to prevent duplication. Therefore, recoverable loss must be restricted to ensure double recovery is avoided.

On this basis, the causation principle and the principle against double recovery are best understood not as restrictions on the scope of the secondary right but as principles that define its prima facie content. The causation principle ensures that compensation is only available for loss suffered because of non-performance, rather than because of some other event. The principle against double recovery is mandated by the requirement that an award of compensation not put a party into a position that is better than he would have been in had the wrong not occurred since compensation is only available to repair deterioration in a party's factual position. In combination, these two limiting principles thus define the *prima facie* scope of the secondary right to repair.

Nevertheless, on the account advocated here, there are at least three other restrictions upon the scope of a party's *prima facie* obligation to repair the harm caused by breach. The first is the contractual remoteness principle. The second is the mitigation doctrine. The third is the principle encapsulated by the limitations imposed on the

[639] For example, the award in *Blake* (n 2) is a non-compensatory damages award for breach of contract that cannot be explained as an award substituting for performance but nevertheless might be justified on some other basis, such as the desirability of deterring certain egregious breaches of contract.

recovery of non-pecuniary loss. These three restrictions are now examined. It is argued that none can be explained wholly by reference to the parties' underlying agreement, which demonstrates the need for the fundamental distinction this thesis proposes between substitutionary and compensatory awards.

2. The Contractual Remoteness Principle

The orthodox understanding of the restrictions imposed on the scope of the duty to compensate for loss following a breach of contract, such as those based on remoteness or mitigation, is that these doctrines give effect to various policies the law seeks to uphold in the relevant contractual context. This understanding of contractual remoteness was challenged recently in *The Achilleas*, which appears to suggest that this principle simply gives effect to the parties' underlying agreement.

a. The Agreement-Centred Understanding of Contractual Remoteness

It is well understood that a contracting party cannot recover for loss deemed 'too remote' a consequence of breach. The conventional understanding of this principle is based on *Hadley v Baxendale*, where Alderson B famously stated that:

> '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'.[640]

This statement has been reinterpreted and restated in numerous cases since *Hadley* was first decided. During that time the test usually has been viewed as separable into two distinct 'limbs'. On the traditional understanding of the rule, the first limb covers those losses that are likely to arise naturally upon the relevant contractual breach. By contrast, it is conventionally understood that the purpose of the second limb is to cover losses that, although falling outside the usual course of events, nevertheless may be supposed to have been in the parties' contemplation at the time of contract formation, given any special knowledge that the contract breaker possessed concerning the potential consequences of a particular kind of breach for the innocent party.

There is now good authority to suggest that, even on the conventional understanding of contractual remoteness, the two limbs are not analytically distinct.[641] Moreover, it was recently suggested that the effect of subsequent reinterpretation and restatements of the rule, probably the most notable of which was that given by Lord Reid in *The Heron II*,[642] is that it could now be expressed in the following terms:

> 'a type or kind of loss is not too remote a consequence of a breach of contract if, at the time of contracting (and on the assumption that the parties actually foresaw the breach in question), it was within their reasonable contemplation as a not unlikely result of that breach'.[643]

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640 *Hadley v Baxendale* (1854) 9 Exch 341, 354.

641 *Jackson v Royal Bank of Scotland* [2005] UKHL 3; [2005] 1 WLR 377, [48] (Lord Walker).

642 *Koufos v C Czarnikow Ltd* [1969] 1 AC 350 (HL).

643 Beale (ed), *Chitty on Contract* (n 9) [26-054]. This sentence was quoted with approval by Smith-Stuart LJ in *Brown v KMR Services Ltd* [1995] 4 All ER 598 (CA) 621.

Regardless of whether the two limbs should be seen as analytically distinct or as part of a single unified doctrine, the orthodox understanding of contractual remoteness is that it is an external rule imposed by law upon a defendant's obligation to pay compensation in order to place reasonable limits on a contract-breaker's liability.[644] However, this understanding of the principle was recently subject to a significant challenge in *The Achilleas*.[645] The dispute arose after a delay in redelivering a time-chartered vessel. A substantial fall in the market forced the owners of that vessel to accept a significantly reduced rate for a follow-on charter. The owners sued to recover the difference between the original rate of hire and the reduced rate over the full duration of the follow-on period.

In the Court of Appeal, Rix LJ delivered the leading judgment. His Lordship was of the view that a refixing of the rate was certainly 'not unlikely' and 'highly probable' so that this loss was covered by the 'first limb' in *Hadley v Baxendale*.[646] In other words, the loss resulting from the refixing was recoverable not because of any special circumstances made known to the charterers at the time of contract formation but because a lost fixture was what any reasonable person in the charterers' position would have contemplated as arising 'naturally' or 'in the usual course of things' from the relevant breach.

In an appeal to the House of Lords, the charterers sought to rely on what they alleged to be a common understanding in the shipping industry that damages for late redelivery under a time charter were limited to the difference between the market and charter rates of hire during the period of overrun. In support of this contention, the charterers pointed to a number of judicial statements, for example Lord Mustill's dictum

[644] Peel (ed), *Treitel* (n 9) 1044.

[645] *The Achilleas* (n 2).

[646] *Transfield Shipping Inc of Panama v Mercator Shipping Inc of Monrovia* [2006] EWHC 3030 (Comm) [96].

in *The Gregos*,[647] that liability for the difference between the market and contract rates for the full follow-on period would *not* have been the common intention of reasonable contracting parties. Overturning a unanimous Court of Appeal, the House of Lords, also unanimously, allowed the charterers' appeal.

Beneath this unanimity, however, their Lordships' reasoning reveals two fundamentally different understandings of the theoretical basis for the principles of contractual remoteness. Lord Rodger, with whom Baroness Hale agreed, followed the Court of Appeal in adopting the conventional understanding of contractual remoteness. The only difference between their approach and that of the Court of Appeal was in the application of the rules to the particular facts at hand. Both Lord Rodger and Baroness Hale were of the view that the loss claimed by the owners was not within the contemplation of the charterers at the time of entry into the contract because 'this loss could not have been reasonably foreseen as being likely to arise out of the delay in question'.[648]

However, as the current editor of *Treitel* has observed, this conclusion appears to be at odds with authority since, according to Lord Rodger, it was not so much the lost fixture that had to have been contemplated, but the *financial consequences* that had occurred as a result of that loss on the facts.[649] This runs counter to the commonly accepted view that for a breach of contract, as in the tort of negligence, it is only necessary that the parties reasonably contemplate the 'type' of loss that might flow from the breach and not the 'extent' of that loss for such loss to be recoverable.[650] As a result, it is submitted that

[647] *Torvald Klaveness A/S v Arni Maritime Corporation* [1994] 1 WLR 1465 (HL).

[648] *The Achilleas* (n 2) [60].

[649] E Peel, 'Remoteness Revisited' (2009) 125 LQR 6.

[650] ibid 8.

Peel is correct to conclude that the result reached by the Court of Appeal is a preferable application of the orthodox understanding of contractual remoteness.[651]

More significant for present purposes, however, is the theoretical basis for contractual remoteness endorsed by Lord Hoffmann and Lord Hope in *The Achilleas*. In contrast to the approach of Lord Rodger and Baroness Hale, both Law Lords allowed the charterers' appeal on the ground that they had not assumed responsibility for the type or kind of loss being claimed. The former held that 'one must first decide whether the loss for which compensation is sought is of a 'kind' or 'type' for which the contract-breaker ought fairly to be taken to have assumed responsibility',[652] while the latter stated that the question is 'whether the loss was a type of loss for which the [contract-breaker] can reasonably be assumed to have assumed responsibility'.[653] The primary reason for this conclusion was that a party cannot be expected to assume responsibility for an unquantifiable risk.[654] Their Lordships thus adopted a fundamentally different conception of the *basis* for the contractual remoteness principle.

Lord Hoffmann's argument for adopting this conception of contractual remoteness started from the premise that all contractual liability is voluntary. His Lordship stated that it 'seems to me logical to found liability for damages upon the intention of the parties (objectively ascertained) because all contractual liability is voluntarily undertaken'.[655] Lord Hope agreed. Significantly, however, Lord Hoffmann also adverted to the 'understanding' in the shipping industry that liability for late

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[651] ibid.

[652] *The Achilleas* (n 2) [15].

[653] ibid [32].

[654] ibid [23] (Lord Hoffmann), [34] (Lord Hope).

[655] *The Achilleas* (n 2) [12].

redelivery was limited to the difference between the market and charter rates over the overrun period.[656] Given the existence of this understanding, circumstances indicated that the charterers had assumed responsibility only for the difference between the charter and market rates for the duration of the overrun period and were therefore only liable for this amount.

Although this thesis supports an approach to the quantification of contract damages that places significance upon the parties' underlying agreement, the account advocated here reserves this rationale for money awards substituting for performance. Restrictions imposed on money awards upholding the secondary right to repair cannot be wholly explained by reference to the underlying agreement. Recourse to extrinsic policy considerations is necessary.[657] Of course the parties may alter the content of this secondary obligation through their contract but in the absence of such agreement, any restrictions imposed on a breaching party's secondary obligation are necessarily extrinsic to their agreement.[658] However, on Lord Hoffmann's account of contractual remoteness there appears to be no distinction between substitutionary and compensatory money awards since the question of which losses are recoverable is governed by an interpretation of the parties' underlying agreement.

The final speech in *The Achilleas* was delivered by Lord Walker. His Lordship's understanding of contractual remoteness is more difficult to classify because he professed agreement with both the agreement-centred approach and the understanding

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[656] ibid [7].

[657] See A Robertson, 'The Basis of the Remoteness Rule in Contract' (2008) 28 JLS 172.

[658] Lord Hoffmann's emphasis in *The Achilleas* upon the existence of the general understanding in the shipping industry that a breaching charterer's liability for delay in redelivery is limited to the period of delay provides one possible way to reconcile his approach with the conventional understanding of contractual remoteness. The basis for reconciliation is that the understanding just averted to may have been so widespread as to allow for the implication of a term by custom into the contract that liability be so restricted. See P Wee, 'Contractual interpretation and remoteness' [2010] LMCLQ 150.

adopted by Lord Rodger. There is not space here for a detailed analysis of Lord Walker's speech but it certainly contains sections that suggest his true support lies with the former approach.[659] Such a proposition must be qualified by recognising that his Lordship also seems to have thought that focussing on the parties' common intention is what the law has always done and therefore that the assumption of responsibility approach does not constitute a radical departure from orthodoxy. Nevertheless, it is at least arguable that an agreement-centred approach achieved a bare majority in the case.[660]

The 'assumption of responsibility' approach received a qualified endorsement in *Supershield Ltd v Siemens Building Technologies FE Ltd*.[661] Siemens had sub-contracted Supershield to install a sprinkler system in a London office building. The water storage tank for the sprinkler system was located in the basement of the building. A flood was caused when a float valve that filled the tank failed in the open position. The trial judge held that this constituted a breach of the sub-contract by Supershield. The water from the tank overflowed into a bunded area that contained a 600 mm high wall designed to retain any overflowing water. However, the protective drains in the tank room floor within this area were blocked or partially blocked by packaging, insulating or other material on the tank room floor. Water then overflowed the bund and reached electrical equipment in the basement, which sustained substantial damage.

The specific issue on appeal was whether Siemens acted reasonably in deciding to settle the claims brought against it by members higher up the contractual chain on the basis of the loss caused by Supershield's breach. In finding that it had, Toulson LJ had to respond to the argument that the overflow of the tank was too remote a consequence

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[659] For example *The Achilleas* (n 2) [68].

[660] This is the interpretation supported in Wee, 'Contractual interpretation and remoteness' (n 658).

[661] *Supershield Ltd v Siemens Building Technologies FE Ltd* [2010] EWCA Civ 7.

of breach for Siemens to have been liable because the blockage of the drains was outside the scope of reasonable foreseeability. He did so by applying the 'scope of responsibility' approach.[662] Significantly, however, his Lordship reiterated that the *Hadley* principle remains a standard rule whilst recognising that there may be cases where the court, on examining the contract and the commercial background, decides that the standard approach would not reflect the expectation or intention reasonably to be imputed to the parties.[663] Thus, it is not that the scope of liability is always determined by the parties' agreement but that the parties' agreement must always control the *Hadley* test. The next section argues that when the agreement is silent (as it frequently will be) and the foreseeability test must be used to determine the boundaries of liability, policy considerations inevitably influence the result.

b. Defending the Conventional Approach to Contractual Remoteness

Lord Hoffmann appears to have drawn some support for his approach in *The Achilleas* from the agreement-centred understanding of contractual remoteness advanced by Kramer.[664] Contrary to the conventional approach, Kramer argues that remoteness is based fundamentally on the parties' agreement rather than upon the fairness of restriction based on reasonable foresight. His principal claim is that although contract law's rules of remoteness are normally described in terms of what was 'reasonably foreseeable at the time of contracting', in reality the law allocates responsibility for the

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[662] The principle was thus employed to allow recovery here rather than to disallow it as occurred in *The Achilleas* and in the earlier case of *South Australia Asset Management Corporation v York Montague Ltd* [1997] AC 191 (HL), where Lord Hoffmann employed the scope of liability concept in the context of claim for negligent valuation.

[663] *Supershield* (n 661) [43].

[664] A Kramer, 'An Agreement-Centred Approach to Remoteness and Contract Damages' in N Cohen and E McKendrick (eds), *Comparative Remedies for Breach of Contract* (Hart 2005) 249; referred to by Lord Hoffmann in *The Achilleas* (n 2) [11].

consequences of breach by reference to the intentions of the parties at the time of formation.[665]

According to Kramer, the foreseeability principle is not a strict rule at all but rather a useful *guide* to the correct result since in most cases it leads to the same conclusion as an inquiry into what responsibilities the parties actually undertook to each other. Despite such support for Lord Hoffmann's agreement-centred analysis,[666] the majority of academic commentary has been critical of this approach. Peel, for instance, has criticised Lord Hoffmann's speech in *The Achilleas* strongly, arguing that the remoteness restriction is an external rule of law based on policy rather than one determined wholly by reference to the parties' intentions.[667]

Professor Robertson is with Peel in opposition to the agreement-centred approach. Robertson argues that 'the remoteness rule is not an agreement-based rule, concerned with identifying an implicit allocation of risk made by the contracting parties, but a gap-filling device concerned with ensuring a contract breaker is not subjected to an unreasonable burden'.[668] In addition, Robertson has claimed that the agreement-centred conception of contractual remoteness is artificial because there is seldom any helpful evidence about the extent of the risks the particular parties would have thought they were accepting at the time of contract formation.[669]

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[665] ibid.

[666] This is not to suggest that Kramer and Lord Hoffmann are in complete agreement on the details of their approach. As explained below, it would appear that Lord Hoffmann's views diverge less from orthodoxy than might at first appear.

[667] See Peel, 'Remoteness Revisited' (n 649).

[668] Robertson, 'The Basis of the Remoteness Rule in Contract' (n 657).

[669] ibid 178.

Tettenborn is similarly critical of the agreement-centred approach, arguing that, in the absence of supporting evidence, there is nothing to suggest that the parties' intentions with respect to liability for breach in a particular case will correspond to what they reasonable foresaw at the time of contract formation.[670] Given this, Tettenborn suggests that the most plausible basis for the agreement-centred account is essentially one that views the principle as a risk allocation device. Tettenborn acknowledges that there is much force in this justification but concludes that ultimately it is unsatisfactory as a comprehensive explanation because the purpose of many contracts will be to allocate the risk of only *some*, but not all, potential losses.[671]

This obviously leaves unresolved the true justification for contractual remoteness. A complete answer to this question is beyond the scope of the current thesis. However, the tentative claim put forward here is that, as Tettenborn himself argues, no single principle can provide a complete explanation. The doctrine reflects a number of different policy concerns the law seeks to uphold in the relevant contractual context. Amongst these policies are the desirability of ensuring that liability is proportionate to the value of the underlying contract,[672] facilitating informed contractual planning,[673] as well as possibly not wishing to discourage contracting where it is likely to be valuable. At a deeper level, the first of these policies might be justified by some conception of fairness and the latter two by the desirability of promoting personal autonomy or economic efficiency, depending on one's philosophical outlook.

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[670] A Tettenborn, 'Hadley v. Baxendale Foreseeability: a Principle Beyond its Sell-by Date' (2007) 23 JCL 120.

[671] ibid.

[672] This is a possible explanation for *The Achilleas* itself.

[673] This is a possible explanation for the *Hadley v Baxendale* principle.

In support of this orthodoxy one might point to the flexible way that courts have utilised the purported distinction between loss of an unforeseeable 'kind', which is irrecoverable, and loss of a foreseeable kind that is unforeseeable in 'extent', which is recoverable, at least in theory. While a distinction between two kinds of economic harm was invoked to deny liability for lost profits on special contracts in *Victoria Laundry (Windsor) v Newman Industries*,[674] no distinction between physical injury and death was recognised in *Parsons (Livestock) Ltd v Uttley Ingham & Co Ltd*.[675] The breach of contract in *Parsons* meant that oats in a hopper became mouldy. This caused the pigs who ate them to develop E. coli, which lead to their death. Recovery was allowed on the basis that, though death itself might not have been reasonably foreseeable, the physical injury to the pigs that led to their death was foreseeable. This meant that recovery for loss flowing directly from the physical injury (i.e. the cost to the farmer of the death of the pigs) was recoverable since it is only the kind and not the extent of injury that must be foreseen. Notably, recovery for more remote lost profits the farmers would have been able to make by rearing and selling more pigs was denied.[676] It appears difficult to explain the stricter application of the distinction between the 'type' and 'extent' of loss in cases concerned with pure economic loss than in cases involving physical injury other than by reference to a desire to give effect to certain policies considered important in the relevant contractual context.

The potential for this distinction to be moulded to achieve the desired result is further demonstrated by the judgments of Lord Rodger and Baroness Hale in *The Achilleas* itself. As Peel points out, the economic loss suffered by the owners there was

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[674] *Victoria Laundry (Windsor) v Newman Industries* [1949] 2 KB 528.

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

[676] For discussion see Peel (ed), *Treitel* (n 9) 1046-48.

clearly of a foreseeable type.[677] However, on the basis that the extent of this economic loss was unforeseeable, their Lordships effectively created a distinction between two different kinds of economic loss. The first was economic loss likely to occur in the usual course of things. The second was economic loss outside the ordinary course of events and therefore unforeseeable. Such a decision makes a mockery of the purported distinction between the 'type' and 'extent' of loss.

For the reasons Robertson, Tettenborn and Peel identify, this thesis contends that the agreement-centred understanding of contractual remoteness is unsupportable. In essence, the fundamental problem with this approach is that it assumes a level of agreement that contracting parties typically do not reach, even on an implicit, rather than explicit, understanding of the agreement. Of course it may be true that in particular cases the primary obligation undertaken by a party is to perform *or* provide a certain level of compensation for non-performance. It may even be that this is the norm in commercial charterparties.[678] However, this principle cannot be expanded into a more general rule, since it does not accord with the understanding of contractual remoteness in the leading authorities and is based on a fictional approach to the way contracting actually works in practice.

Finally, Lord Hoffmann's extrajudicial defence of his approach in *The Achilleas* should be mentioned.[679] In essence, he argues that the principle limiting recovery in that case should be understood as operating in addition to, rather than instead of, the *Hadley v Baxendale* foreseeability principle. According to Hoffmann, there are some situations,

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[677] Peel, 'Remoteness Revisited' (n 649).

[678] Thus, it could be argued that *The Achilleas* is best explained by its particular facts.

[679] L Hoffmann, 'The Achilleas: custom and practice or foreseeability?' (2010) 14 Edinburgh Law Review 47.

particularly cases not concerned with asymmetry of information problem that arose in *Hadley*, where 'reasonable foreseeability' of damage is simply an insufficient constraint upon liability because the loss suffered was plainly foreseeable, even if outside the scope of the risk assumed by the parties.[680] In these cases, he argues, the restriction on the scope of liability for consequential loss must be based on the parties' underlying agreement.

If the 'assumption of responsibility' principle possibly recognised by a majority in *The Achilleas* is understood in this limited way, as a further constraint on recovery, it is defensible.[681] There are certainly cases where the loss suffered by the victim of breach is out of all proportion to the value of the initial contract. When this loss is clearly foreseeable, some other basis for limiting liability must be found. This can be done either by reference to a policy of proportionality or by finding an implicit restriction upon over-extensive liability in the contract itself. The understanding of compensatory damages advanced here does not exclude the possibility that recovery may be restricted by the agreement. It merely contends that often the parties' agreement will not provide an answer to whether liability was assumed. In such cases the limits of liability must be determined by considerations of policy.

3. The Mitigation Principle

Debate surrounding the basis for the contractual remoteness principle is representative of a more general uncertainty concerning the basis for the various restrictions English law imposes on the recovery of compensation for loss following

[680] ibid 51.

[681] However, it is also contended that this more limited interpretation is not obvious from the speeches of Lord Hoffmann and Lord Hope in *The Achilleas* itself.

breach. In addition to remoteness, these restrictions include those imposed by the doctrine of mitigation and limitations on the recovery of non-pecuniary loss. Although it is certainly not clear that Lord Hoffmann himself would explain these other restrictions as agreement-centred, this conception remains a theoretical possibility. The proposition defended here is that it is not a persuasive one.

It is true that the parties' underlying agreement is always relevant to the content of the secondary obligation to compensate for losses caused by breach. Moreover, in some cases it may fully determine the scope of this obligation, such as where the parties have agreed a liquidated damages clause. Nevertheless, the parties' underlying agreement does not always provide a comprehensive explanation of the various restrictions imposed on the recovery of compensation for loss. In defining the limits of liability courts have regard to various policy objectives the law seeks to promote in the relevant context.

a. Defining the Content of the Mitigation Principle

The precise meaning and scope of the mitigation principle is unclear. Conventionally, it is understood as comprised of three distinct rules. First, a claimant cannot recover for loss that could have been avoided through reasonable action. In applying this principle, the law does not make overly onerous demands of the claimant.[682] Secondly, a claimant can recover for loss incurred in reasonable attempts to avoid loss.[683] Thirdly, a claimant cannot recover for loss in fact avoided.[684] In this thesis, a reference to this principle should be understood as including only the first two rules. In contrast to the prevailing orthodoxy, it is contended that the third rule is not an aspect of any

[682] Peel (ed), *Treitel* (n 9) 1059, citing *Pilkington v Wood* [1953] Ch 770.

[683] *Banco de Portugal v Waterlow & Sons Ltd* [1932] AC 452 (HL).

[684] McGregor, *McGregor on Damages* (n 9) [7-004]-[7-006].

broader mitigation principle and, as has been shown,[685] is not a rule to which English law rigidly adheres.

The conventional view that this rule is part of the mitigation doctrine is simply a by-product of the conventional understanding of contract damages.[686] Although a claimant should not be able to recover *compensation* for loss not actually suffered, the fact that a loss has been avoided through the occurrence of a post-breach event does not necessarily prevent substantial recovery through an award substituting for performance. As MacLauchlan has demonstrated, the relevant authorities in this area are very difficult to reconcile with the conventional account.[687] The principal reason for this is the tendency to conflate the two kinds of money awards this thesis identifies.

A variety of different justifications for the mitigation principle have been proposed.[688] The most common appears to be that a claimant's loss is not in fact *caused* by the defendant but by the claimant's failure to act reasonably.[689] This, for instance, was the understanding of mitigation adopted by Robert Goff J in *The Elena D'Amico*.[690] On this understanding, the mitigation principle is simply another aspect of the causation principle outlined above. Another significant judicial endorsement of this view is Viscount Haldane's statement in *British Westinghouse* that a party's entitlement to damages for a breach of contract is qualified by a rule:

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685 For example, see 83 above.

686 For example, H McGregor, 'Mitigation in the Assessment of Damages' in Cunnington and Saidov (eds), *Contract Damages: Domestic and International Perspectives* (Hart 2008) 329, 336.

687 McLauchlan, 'Expectation Damages: Avoided Loss, Offsetting Gains and Subsequent Events' (n 223).

688 See M Bridge, 'Mitigation of Damages in Contract and the Meaning of Avoidable Loss' (1989) 105 LQR 398.

689 This is the explanation favoured by Burrows, *Remedies* (n 9) 122.

690 *Koch Marine* (n 252) 88. This passage was also expressly approved by Lord Walker in *Lagden v O'Connor* [2004] 1 AC 1067 (HL), [99].

'which imposes on the plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damages which is *due* to his neglect to take such steps'.[691]

As many have noted,[692] strictly speaking, there is no Hohfeldian *duty* to mitigate since the defendant does not have a corresponding *right* to mitigation. That aside, Viscount Haldane's comment clearly contains some practical truth. Nevertheless, it is submitted that such an explanation is incomplete since it provides no guidance as to the meaning of 'reasonable' in this context. Clearly, considerations other than 'but for' causation are relevant in determining whether responsibility for loss should be attributed to the defendant. Fully exploring these considerations is beyond the scope of this thesis. It is merely argued that the meaning of 'reasonable' in this context cannot be determined wholly by reference to the parties' underlying agreement.

b. The Mitigation Principle is not based on the Parties' Agreement

To claim that the contractual mitigation principle gives effect to the parties' underlying agreement amounts to saying that when two parties enter into a contract the primary obligation each undertakes is to perform *or* to compensate for losses caused by breach that were unavoidable through reasonable action by the other party. This analysis is artificial in the same way that agreement-centred reasoning is artificial in relation to contractual remoteness. Contracting parties do not always turn their minds to the possible consequences of breach, which is precisely why default rules are required to determine who should bear the loss suffered in consequence.

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[691] *British Westinghouse* (n 21) 689 (emphasis added).

[692] For example, McKendrick, *Contract Law: Text, Cases and Materials* (n 384) 908; Smith, *Contract Theory* (n 6) 428.

It is true that contracting parties may insert a clause incorporating the mitigation principle into their agreement or contract in the knowledge that this principle operates as a background rule. Moreover, it might even be the case that the latter is true for most sophisticated commercial parties. However, to go further and suggest that the mitigation principle, *in general*, does nothing more than give effect to the parties' underlying agreement is incorrect. The truth of this is demonstrated by the fact that the mitigation principle applying in the contractual context is identical to that which applies in the law of torts, where there is generally no underlying agreement.

This state of affairs is to be contrasted with the rules of remoteness, which are different for tort and contract. While in tort the relevant remoteness test is applied at the date the wrong is committed, the 'reasonable contemplation' test in contract is applied at the date of contract formation. Thus, while it might be arguable that the contractual remoteness principle is based on the parties' underlying agreement, it is simply impossible to make a similar claim in relation to mitigation since for both torts and contracts the reasonableness of the claimant's actions is judged at, or soon after, the date of breach. In consequence, it is contended that even more clearly than the remoteness principle, the mitigation principle reflects English law's concern to uphold various policies considered important in the relevant context.

Without meaning to preclude other possibilities, it is likely that these policies include the undesirability of sanctioning economic waste, and a concern to promote appropriate levels of personal responsibility. A further possibility suggested by Bridge is the desirability of clear and simple rules.[693] This suggestion seems to have been made principally in order to account for the over-compensation that exists in many of the sale of goods cases outlined in Chapter Two. However, it is contended that these authorities

[693] Bridge, 'Mitigation of Damages in Contract' (n 688).

are best explained not by the desirability of having clear and simple rules, but as examples of awards substituting for performance.

c. Mitigation is not an Aspect of Remoteness

Stephen Smith has suggested that the mitigation principle is simply an aspect of a broader principle of remoteness.[694] On this view, an agreement-centred understanding of mitigation might be defended differently if one adopts an agreement-centred account of contractual remoteness. Critically, however, Smith does not support the agreement-centred understanding of remoteness. Rather, he claims that contractual remoteness turns on 'a complex, multifaceted notion of responsibility'.[695] On the assumption that 'multi-faceted' responsibility determinations are sensitive to policy considerations, this is simply one particular version of the more general view endorsed here.

On a remoteness-based understanding of mitigation, loss consequent upon a failure to mitigate is irrecoverable because recovery is not reasonably contemplated by the parties at the time of contract formation. This understanding has some support in English case law.[696] Bridge has criticised it on the ground that 'it is not easy to say how it adds to, or improves upon, factual causation',[697] which, as explained already, provides no guidance as to the relevant meaning of 'reasonableness' in this context. Bridge also observes that remoteness is concerned with the hypothetical question of the foreseeable consequences of breach at the time of contract formation, while invariably mitigation is concerned with a factual assessment of the claimant's behaviour in the particular circumstances he was placed in at the time of *breach*.

694 Smith, *Contract Theory* (n 6) 428.

695 ibid 427.

696 See, for example, *Compania Naviera Maropan SIA v Bowaters Lloyd Pulp and Paper Mill Ltd (The Stork)* [1955] 2 QB 68 (CA) 98 (Singleton LJ); *Radford* (n 540) 1272 (Oliver J).

697 Bridge, 'Mitigation of Damages in Contract' (n 688) 403.

The above discussion leads to the conclusion that the mitigation principle is not simply an aspect of remoteness. This is so even if the contractual remoteness principle is understood as simply giving effect to the parties' underlying agreement. This is not to reject outright the suggestion that the mitigation and remoteness principles may share a common theoretical underpinning. Bridge himself postulates that a possible justification for both doctrines is that they promote forward-looking behaviour, preventing an excessive focus on the past. This is a possible explanation. However, whichever way this debate is resolved, the underlying point is that these limitations are not based wholly on the parties' underlying agreement.

4. Restrictions on the Recovery of Non-Pecuniary Loss

The final important restriction on awards upholding the secondary right to repair limits the recovery of compensation for non-pecuniary loss. Chapter One observed that historically, apart from some narrowly defined exceptions, recovery for breach of contract generally has been limited to proven deterioration in the claimant's *financial* position. In particular, damages for 'mental distress' have generally been denied. Recently there has been some relaxation of this restriction.[698] The 'very object of the contract' exception recognised by Bingham LJ in *Watts* was expanded in *Farley* so that it can now be said that such damages are recoverable for the breach of a term concerned with pleasure, relaxation and peace of mind, whenever it was known by both parties to be important in the context of the contract overall.

In addition, the second of Bingham LJ's exceptions in *Watts* recognises the possibility of damages for 'physical inconvenience and discomfort caused by the breach

[698] Indeed, the recovery of damages for mental distress may now be easier in an action for breach of contract than it is in an action for the tort of negligence.

and mental suffering directly related to that inconvenience and discomfort'.[699] Chapter One explained that, although the precise status of this exception is unclear after *Farley*, English law is generally moving towards recognising a broader conception of recoverable loss in the contractual context. An example of this is the holding in *Johnson v Unisys Ltd* that *Addis* now stands only for the proposition that 'an employee cannot recover damages for injured feelings, mental distress or damage to his reputation, arising out of the manner of his dismissal'.[700]

Despite this receding significance, the limited availability of damages for non-pecuniary loss nevertheless represents an important restriction on the scope of the secondary right to repair. Thus, the question arises as to whether this restriction simply gives effect to the parties' underlying agreement so that when damages are awarded it can be said that it simply upholds the innocent party's right to performance. The position defended here is that it cannot. Once again, the argument proceeds by demonstrating that the restrictions imposed on the recovery of such losses generally cannot be sourced directly in the contract and that, in addition, they cannot be explained adequately simply as an aspect of contractual remoteness, to the extent that an agreement-centred understanding of this principle is adopted.

a. The Restriction is not based on the Parties' Agreement

The claim that the restrictive approach to the recovery of damages for non-pecuniary loss in English contract law is based in the parties' underlying agreement is unsupportable. The essential reason for this is the same as that which thwarted the corresponding argument in the context of the contractual remoteness and mitigation

[699] *Watts* (n 35) 1444.

[700] *Unisys* (n 42) [44] (Lord Hoffmann) (emphasis added).

principles. In essence, such a suggestion imputes a level of agreement to the parties they do not always reach. The decided cases in this area lack the evidential foundation necessary to support the proposition that the court is simply construing the parties' intentions. Although there may be occasions where detailed agreement does occur, in general, contracting parties bargain for performance rather than for performance *or* a certain level of compensation for non-performance.

Of course, in many commercial transactions both parties enter the contract for financial gain and the recovery of damages for non-pecuniary loss may not be generally within their 'reasonable contemplation' at the time of contract formation. Nevertheless, as argued above, this is quite different from saying that the parties actually *agreed*, either expressly or impliedly, not to provide compensation for such loss. In any event, this suggestion raises the possibility that the restrictive approach might be explained as an application of the contractual remoteness principle but it is argued that, on closer inspection, this possibility is untenable.

b. The Restriction is not Simply an Aspect of Remoteness

The contractual remoteness principle also cannot adequately explain the current restrictions on the recovery of non-pecuniary loss in contract. The argument that it can is based upon the assumption that in normal commercial contracts parties contract for financial gain and do not contemplate the possible non-financial consequences of breach. This, it is said, explains both the general exclusion on the recovery of non-pecuniary loss and also the exception that applies whenever 'a major or important part of the contract was to give pleasure, relaxation and peace of mind'.[701] The Supreme Court of Canada has explained the *Addis* rule and the 'very object of the contract exception' as simple

[701] *Farley* (n 2) 849 (Lord Steyn).

applications of *Hadley v Baxendale* in *Fidler v Sun Life Assurance Co of Canada*,[702] and this view also has received some academic support.[703]

This explanation for the law's present shape has some intuitive appeal. In addition, it has the advantage of helping to explain why damages for certain forms of non-pecuniary loss were available for some torts before they were available for breaches of contract. Although in some contexts a tortfeasor clearly can 'reasonably foresee' that another person may suffer non-pecuniary loss in consequence of his tort, it is arguable that such loss is not contemplated by parties contracting for financial gain. Despite such support, this explanation for the various exceptions to the general rule was rejected by Bingham LJ in *Watts*, which was, until *Farley,* the leading authority in this area of the law.[704] This view was echoed in Australian context by McHugh J in *Baltic Shipping v Dillon*,[705] where his Honour stated that the remoteness explanation for the general rule excluding such damages:

> 'does not accord with everyday experience relating to the making of contracts. The parties to many contracts, *including many commercial contracts*, are fully aware, when they make them, that breach will result in disappointment and sometimes distress to the innocent party'.[706]

The failure of the remoteness explanation for the traditional reluctance to award damages for non-pecuniary loss raises the question of what policy considerations do

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[702] *Fidler v Sun Life Assurance Co of Canada* [2006] 2 SCR 3 (SCC). [45] (McLachlin CJC and Abella J on behalf of the court). For discussion see Harder, *Measuring Damages in the Law of Obligations* (n 424) 91.

[703] Hartshorne, 'Damages for Mental Distress after Farley v Skinner'.

[704] *Watts* (n 35) 1445 (Lord Bingham MR).

[705] *Baltic Shipping v Dillon* (1993) 176 CLR 344 (HCA).

[706] ibid [24] (emphasis added).

underpin the current law. The principal reasons traditionally advanced in support of the restriction include (i) the inherent difficultly in both proving the existence of non-pecuniary losses and in quantifying such loss accurately given that money and non-pecuniary damages are incommensurable,[707] (ii) that contract law is concerned primarily with commercial matters,[708] and (iii) arguments based on contract law's unique role in facilitating the market economy.[709] Examining the force of these possible explanations lies beyond the scope of this thesis, though it is tentatively suggested that all three are likely to have contributed to the law's present state. In consequence, to the extent that this restriction is justified,[710] it is best explained as an attempt to uphold the policies just identified, irrespective of whether these policies ultimately provide good reason to limit recovery.

II. UNDERSTANDING THE DISTINCTION BETWEEN SUBSTITUTIONARY AND COMPENSATORY AWARDS

On the understanding of contract damages proposed, there are two kinds of money awards available following a breach, reflecting the distinction between the primary right to performance and a secondary right to reparation. On both the conventional account and that advocated here, the scope of this secondary right is subject to restrictive doctrines that attempt to promote various policies considered important in the relevant contractual context. The purpose of section II of this chapter is to provide a fuller

[707] See, for example, *Farley v Skinner* [2000] PNLR 441 (CA) 454 (Mummery LJ).

[708] *Ruxley* (n 2) 353 (Lord Lloyd); *Gore Wood* (n 316) 49 (Lord Cooke).

[709] *Baltic* (n 705) 369 (Brennan J).

[710] This thesis leaves open the possibility that English law's restrictive approach to the recovery of damages for non-pecuniary loss may not be justifiable.

explanation of the distinction between substitutionary and compensatory awards. The discussion has two aims. The first is to differentiate the proposed account from the similar, but critically different, account recently advanced by Stevens. The second is to demonstrate the value of the proposed distinction by using it to explain some important English authorities that are difficult to reconcile with the orthodox account.

A. THE DISTINCTION IN THEORY

This section examines the controversial rights based conception of contract damages recently proposed by Stevens. According to Stevens, the usual purpose of awarding damages in response to any legal wrong, including a breach of contract, is to achieve the next-best thing to the wrong not having occurred. For the right to be vindicated, two distinct responses are necessary. The first is an award that values the infringement of the right at the date of breach. The second is an award of compensation for any additional, consequential loss suffered as a result of the wrong. Stevens's account might appear very similar to that advocated in this thesis. Whilst there are many important similarities between the two accounts, there are also some critical differences.

1. Professor Stevens's Substitutive Damages Thesis

According to Stevens, damages in the law of torts are awarded, in the first place, to achieve the next-best thing to the primary right not having been infringed in the first place.[711] For Stevens, this means that damages awards can serve two distinct functions. First, they may substitute for the value of the infringement to the primary right entailed by the tortfeasor's breach of his primary duty. Secondly, they may compensate the victim of a breach for loss suffered in consequence of the infringement. On Stevens's account

[711] See Stevens, *Torts and Rights* (n 3).

both of these functions serve the more abstract purpose of achieving the next-best outcome to the right not having been infringed in the first place. Critically, in contrast to the orthodox understanding of damages for civil wrongs, Stevens' account claims it is 'the infringement of rights, not the infliction of loss... [that] is the gist of the law of torts'.[712]

Although Stevens's thesis is principally one about the basis for damages in the law of *torts*, on his understanding of private law a tort is nothing more than the breach of a primary legal duty. His thesis therefore applies equally to awards of damages for a breach of contract as it does for damages awarded in response to more conventional torts such as trespass or defamation.[713] On Stevens's account of contract damages, the infringement of the primary right to performance gives rise to a new, secondary right to damages in accordance with Lord Diplock's dictum in *Photo Production v Securicor*.[714] Stevens identifies the same two objectives for contract damages as for torts, explaining the rationale for awarding such damages in essentially the same terms:

> 'damages awards are the law's attempt to reach the "next best" position to the wrong not having been committed. For breach of contract, this is the next best position to the performance having been rendered'.[715]

2. Distinguishing Stevens's Thesis from the Account Proposed here

Some aspects of Stevens's thesis are endorsed here, such as the existence of two distinct kinds of money award for breach of contract and the explanation of the various

[712] ibid 2.

[713] ibid 70.

[714] Stevens, 'Damages and the Right to Performance' (n 3) 172.

[715] ibid 174.

different responses to breach in terms of the desire to achieve next-best conformity to the original primary right. Nevertheless, there are two important distinctions between the two theses. First, Stevens appears to adopt an understanding of the secondary right to repair according to which its scope is determined by reference to the underlying agreement.[716] It was explained above that the parties' agreement is often insufficiently detailed to provide the necessary evidential foundation for a court to assess the appropriate amount of compensation for loss. In such circumstances, the decision as to where the limits of recovery lie is governed by policy considerations.

The second important difference between Stevens's thesis and the account proposed here concerns the appropriate *measure* for a money award substituting for performance. On the account presented here, the appropriate *prima facie* measure for such an award is the minimum cost of obtaining equivalent performance, when this amount can be quantified and obtaining equivalent performance is a reasonable course of action for the innocent party to pursue. By contrast, Stevens's central thesis is that the appropriate measure for this kind of money award is the difference in value between the performance provided and the performance contracted for at the date of breach. Edelman has argued convincingly that this is simply a measure of the innocent party's immediate financial loss at the date of breach.[717] However, because Stevens advocates this measure even when this immediate loss is reduced by subsequent events, Stevens's analysis constitutes a rival challenge to the orthodox understanding of contract damages than the one presented in this thesis.

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[716] See Stevens, *Torts and Rights* (n 3) 152. In a post to the Obligations Discussion Group on August 4, 2008, in the context of a discussion of *The Achilleas*, Stevens wrote: 'The secondary obligation to pay damages is based upon the primary obligation to perform. Inevitably, therefore, just as the primary right is sourced in the agreement, so is the obligation to pay damages. We don't forget about the parties' agreement when we get to the quantification of damages stage'.

[717] Edelman, 'The Meaning of Loss and Enrichment' (n 63) 219.

In practice, these two measures will sometimes correspond exactly, such as where there is an available market for both the performance agreed upon and that provided. However, often they will not, such as when either of these two conditions is not met, or when the cost of repairing the defect is cheaper than the difference in value. An example of their potential divergence occurs when the breach in question is the defective performance of a building contract. In such cases, Stevens regards a cost of reinstatement award as a measure of loss rather than a measure of performance. Stevens therefore believes these awards should be available only when the innocent party has already had the repairs done or has evinced a clear intention to undertake them in the future. This is to be contrasted with the understanding of such awards articulated in Chapter Five, which suggested that the availability of these awards is not contingent upon the innocent party's intention to obtain substitute performance. There it was noted that there is also significant support for this approach in the case law.

Thus, according to Stevens repair costs are a measure of loss and their only relevance to valuing the right to performance is as *evidence*.[718] Stevens's interpretation of *Joyner v Weeks*, for instance, is that the value of the landlord's right to repairs was quantified by reference to the difference in value between the repaired and unrepaired premises, capped by the cost of doing the repairs,[719] though this claim appears to contradict his statement three pages later that 'damages should... be capped at the difference in value between the work promised and the work performed'.[720] If the 'difference in value' and 'cost of cure' measures are not equal then Stevens's account provides no clear guidance as to which amount should be awarded in a situation such as

[718] Stevens, 'Damages and the Right to Performance' (n 3) 189.

[719] ibid 186.

[720] ibid 189.

that which arose in *Joyner*. By contrast, on the account proposed here the reason why the cost of the repairs was awarded in *Joyner* is because it was the appropriate substitute for performance in the circumstances.

B. THE DISTINCTION IN PRACTICE

This section outlines how the distinction operates in practice through an explanation of some of the major authorities discussed in Part I of the thesis. In particular, it is demonstrated that the account advocated here provides a coherent basis for explaining the problematic case law on sale contracts as well as *Ruxley*, *Panatown* and *The Golden Victory*. On this basis it argues that the proposed account provides the foundation for a more coherent understanding of the law. Such coherence is strengthened by the argument in Chapter Seven, which explains how the proposed account is consistent with English law's preference for monetary, rather than coercive, responses to breach.

1. Application in the Sale of Goods Context

a. Non-Delivery

The difficult English case law on sale contracts demonstrates well the critical distinction between money awards substituting for performance and money awards compensating for loss. First, recall that where a seller fails to deliver goods for which there is an available market the buyer's measure of damages is 'prima facie to be ascertained by the difference between the contract price and the market or current price of the goods' at the date of breach.[721] However, *Williams Bros v ET Agius Ltd* held that this so-called 'market rule' for damages assessment will not be displaced by

[721] Sale of Goods Act 1979, s 51(3).

demonstrating that, because of the existence of a sub-sale arrangement, on the particular facts such an award will put the buyer into a better position than it would have been in had the seller's breach not occurred.[722]

Chapter Two noted that a suggested justification for the 'market rule' lies in certain benefits it provides such as commercial certainty and simplicity of application.[723] Stevens has refuted this suggestion on the basis that while sub-sales are not taken into account when they reduce a buyer's loss, they may be taken into account when they increase it, provided the loss they cause is not 'too remote'.[724] This claim is supported by *Re (R & H) Hall*.[725] The difficult facts in that case were outlined in Chapter Two as well.[726] Essentially, the case involved a complicated sub-sale arrangement between various parties, where the seller's failure to deliver had the effect of increasing, rather than decreasing, the buyer's loss, as it had done in *Williams*. Despite this, the loss was found to be recoverable because the events triggering it were within the contemplation of the parties at the time of contract formation.

b. Defective Goods

On its face the landmark decision in *British Westinghouse* seems difficult to reconcile with the proposed account.[727] In 1902 London Underground (LU) entered into a £250,000 contract with British Westinghouse (BW) for the purchase of eight steam turbines for electricity generation. The turbines proved to be defective and required

[722] *Agius* (n 217). For discussion see 85 above.

[723] Bridge, 'The Market Rule of Damages Assessment' (n 219).

[724] Stevens, 'Damages and the Right to Performance' (n 3) 178.

[725] *Hall* (n 220).

[726] See 85 above and following.

[727] *British Westinghouse* (n 21).

more coal than they should have to run. In 1908, however, LU purchased and installed new turbines from Parsons at an estimated cost of £78,186. These machines were so efficient that even if the original turbines had complied with the contractual specifications it would still have been cheaper for the claimant to replace the original machines with the new ones as soon as the latter became available on the market.

In response to BW's claim for the unpaid contractual balance, LU counterclaimed damages for breach. The counterclaim originally consisted of two claims pleaded in the alternative. The first was for damages of upwards of £280,000 for losses LU estimated would be caused by this excessive coal consumption over the life of the machines. This aspect of the claim was abandoned informally at the arbitration hearing so no judgment was given as to whether it would have been recoverable.[728] The alternative claim was for loss of efficiency over the period where LU had continued to use the Westinghouse machines at sub-standard efficiency before replacing them (£42,000) and for the cost of the Parsons machines (£78,186). It was the entitlement to this second aspect of the alternative claim that was in dispute in the House of Lords.

On the basis that the claimant had bought the new turbines in consequence of breach, Lord Haldane held that the financial advantage gained by using them had to be set off against the cost of purchasing them. This financial advantage was so significant that it would have been in LU's interest to purchase the machines even if the original machines had complied with the contractual specifications.[729] In consequence, the claimant recovered none of its expenditure in purchasing the new machines. The cost of purchasing the additional coal during the six years before the machines were replaced,

[728] See [14] of the case stated by the arbitrator, recorded at 578. The author would like to acknowledge the helpful research of Andrew Dyson on this point.

[729] *British Westinghouse* (n 21) 691.

however, was indisputably a financial loss to the claimant that was not diminished by the purchase of the new machines. Therefore, it was recoverable.

The decision not to allow the claim for the cost of purchasing the new machines might appear inconsistent with the understanding of contract damages proposed in this thesis on the basis that, as a substitute for performance, LU should have been entitled to the cheaper of the cost of ensuring the agreed performance or the difference in market value between the machines contracted for and those provided.[730] Properly understood, however, LU's claim for the purchase of the Parsons machines was not one for substitute performance but a claim for consequential loss. This loss was not actually suffered because the financial savings made by purchasing the new machines were so significant that LU was put in a better position than it would have been even if there had been no breach by BW.

Put another way, there was no net cost involved in obtaining equivalent performance, which prevented LU from recovering the cost of repairs. An award of the reasonable price of release (which would have been the difference in market value between what was contracted for and what was received) was also precluded because, as Stevens has observed, LU could not recover both the difference in value between what it contracted for and what it received, *and* the expense suffered in making good the defective performance since 'recovering the former means that the latter loss is, to that extent not incurred'.[731] This makes sense when one recognises that any difference in market value between the machines contracted for and those provided was likely to have been attributable to their different levels of efficiency, which itself was the very cause of the consequential loss that resulted from the breach.

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[730] See 217 above.

[731] Stevens, 'Damages and the Right to Performance' (n 3) 181.

2. Disentangling *Ruxley*

Two features of the House of Lords' decision in *Ruxley* call for explanation. The first is the decision to refuse Forsyth the cost of rebuilding his pool in accordance with the contract specifications on the ground that such an award was unreasonable. The second is the basis for the £2,500 awarded. Both aspects of the decision are considered below.

a. 'Reasonableness' and the Denial of the Cost of Performance

Recall that the trial judge in *Ruxley* held that Forsyth did not intend to cure the defective performance provided to him by the contractor. On appeal he gave an undertaking to use any damages awarded on a cost of reinstatement basis to rebuild in accordance with the contract specifications. Thus, both the Court of Appeal and the House of Lords might have awarded Forsyth the full cost of reinstatement as compensation if this were thought to be a reasonable way for him to mitigate the actual loss he suffered because of breach. However, it would have been very difficult to justify such an award on the basis that the defective pool had not caused any financial diminution in Forsyth's position and the evidence suggested that the shallower depth had not affected his enjoyment of the pool to a significant extent. This can be contrasted with *Harbutt's* case where it was held that the claimant's actions in building and equipping a new factory after the defendant's breach had caused it to burn down were reasonable because such action was necessary to keep the business going.[732]

Therefore, a (compensatory) cost of reinstatement award in *Ruxley* could not be justified on the basis that rebuilding the pool was a reasonable act mitigating the actual

[732] See *Harbutt's* (n 206).

loss suffered. The important point, however, is that this was not the only basis upon which such an award could have been provided. Alternatively, this amount might have been awarded as a substitute for performance. In both Courts there are hints of recognition for this distinction but in neither was it fully appreciated. Counsel arguing the case for Forsyth in the House of Lords suggested it was necessary to demonstrate a probable intention to repair the defective performance in order to recover an award measured by reference to the cost of reinstatement.[733] However, strictly requiring such an intention assumes that the award is concerned with compensating for loss.[734] Lord Lloyd rejected this contention, holding that intention is not determinative of reasonableness. Nevertheless, his Lordship did not fully embrace the implication that the award is not fundamentally concerned with loss but with substituting for performance.

Significantly, however, Lord Lloyd did recognise the two different senses in which 'reasonableness' in used in the law of contract damages, refusing to accept that 'reasonableness is confined to the doctrine of mitigation', but instead stating that 'it has a wider impact'.[735] Tettenborn has observed that although the two different senses of reasonableness have 'a good deal in common... the two doctrines are not quite coextensive'.[736] For example, while the defendant bears the burden of proving that the claimant has failed to mitigate his loss, it has been held that the claimant must prove that the cost of equivalent performance is reasonable.[737] Other judges have appreciated the two different meanings of reasonableness as well. As noted in Chapter Five, Lord Goff

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[733] *Ruxley* (n 2) 356 (Lord Jauncey).

[734] This is not to preclude the possibility that intention may be relevant to an assessment of the reasonableness of the awarding the cost of equivalent performance. See discussion at 241 above.

[735] *Ruxley* (n 2) 370.

[736] Tettenborn, *The Law of Damages* (n 610) [19.95].

[737] *Pageler Ltd v Wang (UK) Ltd* (1999) ConLR 68.

demonstrated an awareness of the distinction in *Panatown*, when discussing Oliver J's judgment in *Radford v de Froberville*.[738] More recently, in *Linklaters Business Services v Sir Robert McAlpine Ltd, Sir Robert McAlpine (Holdings) Ltd*,[739] Aikenhead J made clear the existence of this distinction, noting the importance of distinguishing:

> 'between cases in which the remedial work... has actually been done and those in which it has not been. In the latter case the judge will be left with a decision based on the evidence as to what is the appropriate solution which will, all things being equal, reasonably put the claimant back into the position it would have been if there had been no material breaches of contract... Somewhat (albeit not entirely) different considerations apply when the remedial works have been done'.[740]

Unfortunately, however, the appreciation of this distinction has not lead to recognition of the more fundamental distinction between awards substituting for performance and awards compensating for loss. This failure to distinguish these awards in *Ruxley* was understandable given that the restrictions on each are expressed in terms of 'reasonableness' and the better view is probably that awarding the cost of rebuilding the pool was unreasonable in both senses on the particular facts. In the former case the question is whether the circumstances are such that it would be reasonable for the claimant to insist upon obtaining equivalent performance. It probably was not reasonable on any understanding of the restriction that places significant weight on the wastefulness of performance. By contrast, in the latter case the question is whether, looked at retrospectively, the innocent party acted reasonably in trying to minimise its

[738] See 230 above.

[739] *Linklaters Business Services v Sir Robert Mcalpine Limited, Sir Robert Mcalpine (Holdings) Limited* [2010] EWHC 2931 (TCC).

[740] ibid [125].

loss. The essential difference between the two is that one focuses on the reasonableness of insisting upon performance while the other focuses on the reasonableness of trying to minimise one's loss. Understandably, however, the common terminology and significant overlap in application has caused confusion.

The difference in opinion between the House of Lords and the Court of Appeal shows that the question of reasonableness in *Ruxley* itself was quite finely balanced. Like Lord Lloyd in the House of Lords, both Dillon LJ and Mann LJ in the Court of Appeal recognised the distinction between the two different meanings of reasonableness identified above. The latter stated that the case before them was 'not concerned with any failure to mitigate but rather with disappointment at the unfulfilled bargain'.[741] Significantly, he went on to conclude that since the only way Forsyth's interest in getting the pool he bargained for could be served was through the construction of a new pool, an award of the cost of doing so was not unreasonable here. This demonstrates how the two different 'reasonableness' tests might lead to different results, given that rebuilding the pool could not have been a reasonable act in *mitigation*.

Significantly, Mann LJ also expressed agreement with Kerr LJ's holding in *Dean v Ainley* that what a plaintiff intends to do, or does, with his damages is immaterial.[742] This is consistent with an implicit recognition of the fundamental distinction between substitutionary and compensatory awards. However, Mann LJ noted that there may 'be instances where the cost of rectifying a failed project is not reasonable, as, for example, where no personal preference is served or where there is no preference and the value of the estate is undiminished',[743] which demonstrates that considerations making an act

[741] *Ruxley* (CA) (n 76) 660.

[742] ibid.

[743] ibid.

unreasonable in mitigating loss often make that act unreasonable in substituting for performance as well. Despite the dominance of the conventional understanding of contract damages, the significant overlap between the two tests has not prevented the realisation that they are different. Nevertheless, it has meant that the more fundamental distinction between substitutionary and compensatory awards has not been properly appreciated. As Chapter Five demonstrated, it has also meant that too much significance has been placed on the claimant's intention to repair when assessing the reasonableness of awarding the cost of equivalent performance, though recently this trend has been reversed.

b. Rationalising the £2,500 Award

The second important question arising from *Ruxley* is whether it is possible to explain the £2,500 awarded to Forsyth by reference to the understanding of contract damages this thesis proposes. One possible explanation for this sum is simply that the trial judge's decision to award it was not challenged on appeal. This would provide a basis for marginalising its significance but is unsatisfying since both Lord Lloyd and Lord Mustill thought the award should not be disturbed and attempted to provide some explanation for it.

On the basis of the account proposed so far, there appear to be three potential bases for the £2,500 award. The first is that it was a subjective measure of compensation for the consequential non-pecuniary loss Forsyth suffered as a result of breach. This is how Lord Mustill appeared to understand the award.[744] The second is that it was an objective measure of this loss. This is how Lord Lloyd appears to have understood the

[744] See discussion at 39 above.

award.[745] The third possible explanation is that the award was a substitute for performance in circumstances when awarding the cost of equivalent performance was unreasonable. Although neither Law Lord explicitly explained the award in these terms, it seems possible to derive support for this understanding from both speeches. This might appear to be a stretch in the case of Lord Mustill,[746] given that he phrased his discussion in terms of a subjective loss of 'consumer surplus',[747] but his Lordship did appear to recognise that the award was in some sense a substitute for performance.[748] Lord Lloyd, on the other hand, specifically adverted to the possibility of awards that substitute for a deficiency in performance but left open the question of whether English law should recognise such awards.[749]

The major difficulty with the first two explanations is that, if the cost of rebuilding the pool had not been unreasonable on the facts, Forsyth should have been able to recover both this and the additional £2,500. In both the Court of Appeal and the House of Lords, however, the two measures were presented as alternatives, rather than as distinct awards that it was possible to cumulate. On this understanding, the failure to recognise the possibility of cumulating these two awards must be explained as a mistake caused by a failure to appreciate the central distinction between the two different kinds of money awards identified in this thesis.

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[745] Ibid and see *Ruxley* (n 2) 374.

[746] It is certainly inconsistent with Edelman's analysis. See Edelman, 'The Meaning of Loss and Enrichment' (n 63) 222.

[747] 'There are not two alternative measures of damage, at opposite poles, but only one; namely, the loss truly suffered by the promisee', *Ruxley* (n 2) 360.

[748] Lord Mustill appeared to view the £2,500 award as a third alternative when either the cost of cure or the difference in value measure are appropriate and accurate performance constitutes 'a personal, subjective and non-monetary gain', ibid.

[749] See 39 above.

The other explanation is that the award was a next-best substitute for performance in circumstances where it was unreasonable to award the full cost of obtaining equivalent performance. As explained in Chapter Five, the appropriate measure in such circumstances is a reasonable approximation of the price of release. This explanation is preferable because it explains why this award was an alternative to awarding the cost of reinstatement, rather than one that could be cumulated with it. Support for this explanation can also be derived from Lord Hobhouse's discussion of *Ruxley* in his dissenting speech in *Blake*, where his Lordship described the award as a substitute for performance.[750]

It was suggested in Chapter Five that this measure should always be assessed by reference to what a reasonable person in the claimant's position would have accepted to release the other party from performance. It is therefore an objective enquiry. This seems inconsistent with Lord Mustill's explanation of the award in *Ruxley* in terms of Forsyth's loss of consumer surplus, which is understood as a measure of *subjective* loss. However, it must be remembered that the relevant question here is what a reasonable person *in the claimant's position* would have accepted as the price of release.[751] The more one recognises the particular claimant's relevant idiosyncrasies in making this assessment, the more closely an objective test and the approach advocated by Lord Mustill in *Ruxley* converge. Where exactly the boundaries should lie in deciding how much weight to give to the sensibilities of the particular claimant is a difficult question beyond the scope of this thesis.

[750] *Blake* (n 2) 298.

[751] This is essentially the approach advocated in Harris, Ogus and Phillips, 'Contract Remedies and the Consumer Surplus' (n 89) 585.

3. Explaining *Panatown*

If Lord Browne-Wilkinson's speech is interpreted as supporting the approach taken by Lord Goff and Lord Millett,[752] the decision in *Panatown* also supports the existence of the distinction between substitutionary and compensatory awards proposed here. It may be recalled that the performance supplied by McAlpine was both defective and late in being completed. Both Lord Goff and Lord Millett held that in the circumstances Panatown was entitled to recover the cost of curing the defective performance simply because they had not received the performance contracted for. This is an application of Lord Griffiths's broad ground of recovery in *Linden Gardens*. Importantly, in *Panatown* Lord Goff and Lord Millett held that this entitlement was not affected by whether Panatown was likely to actually cure the breach.

In addition, both their Lordships held that Panatown was entitled to substantial damages for the delay in performance by McAlpine. According to Lord Goff, the employer had 'a contractual right to the performance by the contractor of his obligation as to time, as much as he has to his performance of the work to the contractual specification'.[753] Thus, both Lord Goff and Lord Millett would have awarded Panatown the cost of repairing the defective building work supplied by McAlpine *and* the market value of the right to timely performance. In the words of Lord Goff, this latter right can be:

> 'measured objectively in financial terms with reference to the anticipated profitability of the development; and this can provide an appropriate yardstick for measuring the estimated damages for delay in the performance for which the

[752] This was the interpretation favoured by Stadlen J in *Force India* (n 160) [484].

[753] *Panatown* (n 2) 554.

employer has contracted, even where the development was to be carried out on a site belonging to another person'.[754]

The approach taken by Lord Goff and Lord Millett in *Panatown* is therefore consistent with the account proposed here. However, one consequence of this approach revealed by *Panatown* is that, in a three-party case, where the person benefitting from contractual performance is not the promisee, the latter will not be able to claim for any further losses suffered by the third party beneficiary in consequence of breach. Given that an award both for the right to accurate performance of the building work and for the right to have such performance by the time specified in the contract was provided in *Panatown*, it may be thought unimportant that an award for any further losses suffered by Unex could not have been provided without the 'duty of care' deed. If a contracting party wants to ensure that it can recover for any loss suffered by a third party beneficiary it can always provide for this in the contract.

This was the construction of the contract adopted by Lord Brown-Wilkinson in *Panatown* itself. As Stevens observes,[755] whether his Lordship was right to refuse to allow a claim on the broad ground in *Panatown* depends upon the correct construction of the main contract. If what was bargained for was a building *or* a claim for damages by UIPL rather than just a building, Lord Brown-Wilkinson's decision to deny Panatown's claim for substantial damages at common law on these facts would be correct, because the right to claim under the deed would exclude the ability to recover on any other basis. However, the more plausible construction of the parties' contract, suggests Stevens, is that the duty of care deed was included for the benefit of subsequent purchasers of the

[754] ibid.

[755] Stevens, 'Damages and the Right to Performance' (n 3) 189.

premises rather than to give UIPL a claim for damages in its own right.[756] On this construction the claim for the cost of performance in *Panatown* ought to have succeeded. The view of Stadlen J in *Force India* was that it did, despite the ambiguity surrounding Lord Browne-Wilkinson's speech.

4. *The Golden Victory*

It might be suggested that *The Golden Victory* could be analysed along the following lines. The charterer's early redelivery of the ship to the owner was a repudiatory breach giving the owner the option to terminate the contract. The owner's election to accept the repudiation by accepting redelivery of the ship brought the contract to an end rendering future performance of the charterer's contractual obligations impossible. This meant that the cost of equivalent performance was the difference between the market and contract rates of hire over the remainder of the charter period. On this basis, the result reached by the minority rather than the majority should be supported, since the minority awarded the owner the difference in value between the contract and market rates of hire at, or soon after, the date of termination.

To analyse *The Golden Victory* in this way would be a mistake. The award provided there was not for performance but for loss consequent on breach. The suggestion that the owner was entitled to a substantial award based on a contractual right to payments from the charterer is inconsistent with the dependent nature of the primary obligations undertaken. If A undertakes to pay B £100 for every week she uses B's car under a ten week hire contract, the obligation to pay is dependent on the provision of the car each week. Similarly, the charterer's obligation to pay the contractually agreed

[756] This analysis is supported by I Wallace, 'Third Party Damage: No Legal Black Hole?' (1999) 115 LQR 394; see also *Panatown* (n 2) 593 (Lord Millett).

instalments was dependent upon the owner continuing to make the ship available. This meant that once the owner accepted the charterer's repudiation, by taking redelivery of the ship, the charterer had no further obligation to continue making payments in performance of the contract.[757] However, the charterer's breach did generate a secondary duty to repair any harm caused in consequence.

Given that the charterer's primary obligation to continue paying instalments was discharged upon the owner's acceptance of the repudiatory breach, the owner had no right to further payments. Therefore, the owner was limited to a compensatory claim for loss suffered in consequence of breach. The normal rule for assessing the loss of a party in the owner's position is the difference between the contract and market rates of hire at the date of termination as this represents the best approximation of the innocent party's immediate financial loss at the time the possibility of future performance ceased. However, it is clear that English law does not adhere rigidly to quantifying loss at this date when there is evidence that this sum does not represent the loss truly suffered by the innocent party.[758]

As matters turned out in *The Golden Victory*, the Iraq War commenced fourteen months after the charterer's repudiation was accepted by the owner. Applying orthodox causation principles, this meant that any further losses suffered by the owner after this date were attributable to the outbreak of war rather than the charterer's redelivery, which the owner's damages should have been limited to reflect. However, just as certain policy considerations may justify limiting the scope of a party's duty to compensate for loss caused by breach, conceivably other policy considerations might justify assessing

[757] Note that in some situations a party is unable to refuse the other's repudiation and insist upon actual performance but this was not the case in *The Golden Victory* (n 2). For an example see *Clea Shipping v Bulk Oil International (No 2)* [1984] 1 All ER 129.

[758] *Johnson* (n 495) 401. This principle was applied in the context of a statutory claim for compensation in *Bwllfa* (n 256).

compensatory damages at the date of breach in certain cases, even if this results in overcompensation.[759] The problem with this approach, of course, is that it contravenes the principle that compensatory awards always reflect the actual loss suffered by the innocent party.

As Chapter Two explained, the policy considerations that supported assessing the owner's loss at the date of breach in *The Golden Victory* were particularly strong. On this basis it might be suggested that each of the two approaches taken in the House of Lords can be reconciled with the account proposed in this thesis. Ultimately, the preferable approach will depend upon whether one considers the policy values identified by Lord Bingham as strong enough to ignore the later reduction of the owner's loss in this particular context. Given the particular importance of certainty in this very commercial area of English law, Lord Bingham's conclusion that they were sufficiently strong might be defensible. However, the majority's approach is more easily reconciled with the proposed account given that the claim in *The Golden Victory* was a compensatory claim for loss.

CONCLUSION

The orthodox account of contract damages is that they compensate the innocent party for loss. On the alternative view proposed here, in addition to providing compensation for loss, it is possible for money awards following breach to substitute for performance. Section I defended the independent existence of a secondary legal right to repair. First, in section I.A the claim that breach generates a secondary duty in the wrongdoer to repair certain consequences of the wrong was defended. Chapter Four argued that following breach the reasons underpinning the original primary duty to

[759] In making such an argument an analogy might be drawn with the decision in *Harbutt's* (n 206).

perform press for next-best conformity. Part of this rational remainder is a new obligation to repair the foreseeable consequences of one's wrongful actions. This view was defended against some doctrinal aspects of English law that might appear inconsistent with the proposed account.

Section I.B defended the distinctiveness of compensatory awards from awards substituting for performance by rejecting the agreement-centred account of contract damages some have proposed in recent times. In its most extreme version this account claims that all awards following breach simply give effect to the primary right created by the contract. The content of this right is therefore to performance *or* to a certain level of compensation for non-performance impliedly agreed by the parties at the time of contract formation. By contrast, the account advanced here contends that not all money awards following breach simply enforce the underlying agreement because often the parties cannot truly be said to have reached agreement on relevant matters. Rather, the limits imposed by the doctrines of remoteness and mitigation and the restrictions imposed on recovery for non-pecuniary loss give effect to certain polices the law considers worthy of protection in the relevant contractual context. Thus, despite the more limited role for compensatory awards in the account proposed here, this thesis still defends their basic existence.

The purpose of section II was to more fully explain the operation of the distinction between substitutionary and compensatory money awards. Section II.A did this at a theoretical level by distinguishing the proposed account from the similar, but critically different, rights-based account of contract damages recently proposed by Stevens. Section II.B aimed to demonstrate how the distinction works in practice through an explanation of some of the major authorities difficult to reconcile with the conventional approach. In particular, it was demonstrated how the proposed account

provides a basis for explaining some of the difficult case law on sale contracts as well as the important recent decisions in *Ruxley*, *Panatown* and *The Golden Victory*.

CHAPTER SEVEN – DEFENDING ENGLISH LAW'S PREFERENCE FOR MONETARY SUBSTITUTES FOR PERFORMANCE

INTRODUCTION

Part I of this thesis demonstrated the inadequacy of the conventional understanding of contract damages. The preceding chapters in Part II have outlined a new account. This final chapter of the thesis completes the presentation of the new account by explaining the place of specific performance within this account. More specifically, it explains how the limited availability of coercive performance-oriented responses to breach in English law is consistent with the emphasis given to substituting for performance in the new account. The argument advanced occurs in two stages.

Section I demonstrates that on the understanding of contractual obligation outlined in Chapter Four, coercive orders and awards for the cost of equivalent performance constitute roughly equivalent substitutes for performance. Three principal claims are advanced. First, on the basis of contact law's *instrumental* function it is argued that a response that recognises a contracting party's underlying right to performance is normatively superior to any other response to breach. Secondly, the normative superiority of specific performance as a response to breach is challenged. In essence, it is argued that, like an appropriate money award, an order for specific performance is also a substitute for actual performance. Thirdly, invoking contract law's *intrinsic* function, it is

argued that substituting for performance with a money award of the cost of equivalent performance usually constitutes a roughly equivalent substitute for performance as an order for specific performance.

Section II defends English law's preference for awarding money awards over ordering specific performance. This defence rests on the existence of a number of moral and institutional considerations that support this approach. The most important moral consideration supporting a general preference for monetary substitutes is the breaching party's interest in personal liberty. A related moral reason that supports this remedial preference, which can be understood as an aspect of the law's broader interest in promoting the personal autonomy of the contracting parties, is that it can assist breaching parties to minimise the consequences of mistaken decisions and move on with their lives. The institutional considerations supporting English law's remedial preference for monetary substitutes include that the use of money substitutes helps strike an appropriate balance between deterring breach and facilitating contract formation, and that money awards help minimise the abuse of legal entitlements and the cost of legal disputes.

I. COMPARING DIRECT AND INDIRECT PERFORMANCE RESPONSES IN ENGLISH LAW

For the purpose of this thesis, let a response be 'performance-oriented' if it seeks to provide a substitute for performance. Speaking broadly, there are two categories of performance-oriented response. In the first category are all the orders compelling a breaching party's performance. This category includes a decree of specific performance, injunctions prohibiting or compelling breach and the order for the payment of a debt. These orders will be referred to as direct performance responses. The second category

of performance-oriented responses is comprised of the two different kinds of money award that substitute for performance. These awards will be referred to as indirect performance responses. The cost of equivalent performance provides a party with the means to obtain an equivalent to the contractually agreed performance. The alternative measure, awarded when this measure is unreasonable, approximates the amount a reasonable person in the non-breaching party's position would have accepted to release the other party from their duty to perform.

This section argues that the understanding of contractual obligation outlined in Chapter Four creates a very strong presumption in favour of responding to breach with a performance-oriented response. To be clear, it is not claimed that the account of contract damages proposed in this thesis depends upon adopting this particular understanding of contractual obligation. It may be that other theories of contract law are also consistent with this account.[760] Alternatively, it might be that acceptance of the proposed account does not depend upon adopting any particular understanding of the basis for contractual obligation. Even if this view is taken, however, the arguments made in this chapter give the proposed account greater force. These arguments thereby strengthen the central thesis of this work.

A. THE NATURAL SUPERIORITY OF A PERFORMANCE-ORIENTED RESPONSE

Chapter Four outlined a particular conception of contract law according to which its dominant purpose is to enhance personal autonomy by protecting and promoting the valuable practice of undertaking voluntary obligations to others. This section contends

[760] For example, the power-conferring theory of contractual obligation advanced by Coote may be consistent with the proposed account. See B Coote, 'The Essence of Contract - Part 1' (1988) 1 JCL 91 and B Coote, 'The Essence of Contract - Part 2' (1988) 1 JCL 183.

that on this understanding of contractual obligation an infringement of the primary right to performance entails a performance-oriented response because only this kind of response properly respects the value of personal autonomy that ultimately underpins the right created by contract formation. In essence, the argument endorses a particular version of the view that the underlying *reason* for the existence of a right to contractual performance is a relevant, and perhaps the most important, consideration in determining the appropriate response to breach.

1. The Relevance of Contract Law's *Instrumental* Value

Failure to perform one's contractual obligations constitutes the breach of a legal duty. This thesis has argued that the appropriate response to a breach of a primary legal duty is to provide the next-best thing to conformity with the original duty. An important part of next-best conformity is a duty to repair certain harms caused by breach but this aspect must be distinguished from its other aspect, which is to provide the innocent party with an appropriate substitute for performance. The basis for these duties and correlative rights is that the reasons that justified the original primary right to performance still persist and press for next-best conformity following breach. In consequence, identifying what constitutes the appropriate substitute for performance in the relevant contractual context must be informed, at least partly, by the justification underpinning the primary right.

Acceptance of this claim entails that, at least leaving exceptional circumstances aside, substituting for performance should be part of the law's response to breach. To explain further, recall that the instrumental value of contracting, as with promising, is that it enables parties engaging in the practice to commit irrevocably to a future course of conduct. It is submitted that only a performance-oriented response properly respects

this voluntary choice, because full respect for personal autonomy requires that voluntary obligations be recognised as binding. If people are to have full authorship of their lives, they must be able to commit irrevocably to a future course of conduct. Thus, full realisation of the personal autonomy upon which contract law is based requires that parties' voluntary undertakings bind them either to perform as agreed or, at the very least, to provide a substitute that recognises their voluntarily chosen commitment.

Once this is acknowledged, a performance-oriented response presents itself as the best way of achieving next-best conformity to the original right to performance since only it gives due significance to this autonomously chosen future commitment rather than to some other contingent event, such as the loss suffered by the innocent party in consequence of breach. Obviously, this still leaves unanswered the question of how to choose between a direct and indirect performance-oriented response. Before this problem is tackled, it is necessary to deal briefly with a potential objection to the suggestion that the justification for contractual obligations might be relevant to selecting the appropriate response to breach.

2. Defending the Link between Right and Response in Contract Law

Although it may appear uncontroversial to suggest that the justification for binding contractual obligations is relevant to deciding the appropriate response to breach, the existence of such a link has been contested. Professor Craswell, for instance, has argued that theories of contractual obligation based on the value of 'individual autonomy' have nothing at all to say about the appropriate response to breach.[761] When this argument was first made, Craswell's specific target was Fried's *Contract as Promise*.

[761] R Craswell, 'Contract Law, Default Rules, and the Philosophy of Promising' (1989) 88 Michigan Law Review 489.

However, Craswell has since reiterated his original claim in response to the theories of contractual obligation proposed by Markovits,[762] Kraus,[763] and Kimel.[764]

Given that the understanding of contractual obligation endorsed here appears to be precisely the kind of theory towards which Craswell's attack is directed, it is necessary to respond to this objection. Craswell's specific target is the default rule according to which an award of 'expectation damages', as conventionally understood, is the appropriate response to breach. In rejecting the view that theories based on 'individual autonomy' select this measure as the appropriate default response, he argued in his 1989 article that although individual autonomy may require that people be able to undertake obligations that make non-optional a course of conduct that would otherwise be optional:

> 'almost any remedy... makes the proposed course of conduct non-optional to some degree... [so that] there is surely nothing in the idea of individual autonomy that requires the exact degree of non-optionality provided by the expectation measure'.[765]

Two points can be made in response to his objection. The first is that it is doubtful whether it even applies to the argument advanced here because the minimalist conception of autonomy upon which Craswell's argument depends differs markedly from the perfectionist conception of personal autonomy upon which Raz and Kimel's

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[762] D Markovits, 'Contract and Collaboration' (2004) 113 YLJ 1417.

[763] J Kraus, 'Philosophy of Contract Law' in J Coleman and S Shapiro (eds), *The Oxford Handbook of Jurisprudence & Philosophy of Law* (OUP 2002) 687.

[764] See R Craswell, Expectation Damages and Contract Theory Revisited (August 16, 2006). Stanford Public Law Working Paper No. 925980; Stanford Law and Economics Olin Working Paper No. 325. Available at SSRN: http://ssrn.com/abstract=925980.

[765] Craswell, 'Contract Law, Default Rules, and the Philosophy of Promising', (n 761) 518.

arguments are based.[766] In essence, Craswell appears to use 'individual autonomy' in the sense that Fried used the term in *Contract as Promise* simply to mean individual 'freedom' or 'liberty', which is unsurprising given that Fried is his main target. However, according to Raz and Kimel, to equate personal autonomy with individual liberty is to adopt an impoverished conception of the former. Raz's conception of personal autonomy was explained in Chapter Four.[767] For Raz, freedom is not valuable in and of itself but only when used in pursuit of the good. As he explains, freedom is valuable:

> 'because it is, and to the extent that it is, a concomitant of the ideal of autonomous persons creating their own lives through progressive choices from a multiplicity of valuable options'.[768]

The consequence of all this is that Craswell's critique does not pose a serious threat to the argument advanced here in defence of the natural superiority of a performance-oriented response to breach. However, even if one rejects the particular understanding of contractual obligation advanced here, an alternative response to Craswell is available that defeats his argument on its own terms. In essence, Craswell's argument ignores the 'natural continuity'[769] between acknowledging the binding force of an obligation and responding to the breach of that obligation in a way that recognises the content of that duty. A response that reflects the content of the underlying duty makes non-optional the agreed course of conduct *exactly* as opposed to other responses, such as say reliance damages, 'which makes non-optional a completely different course of

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[766] See Bridgeman, 'Liberalism and Freedom from the Promise Theory of Contract' (n 475).

[767] See 183 above.

[768] Raz, *The Morality of Freedom* (n 425) 265.

[769] Kimel, *From Promise to Contract* (n 375) 94.

conduct'.[770] For this reason, it is contended that a justification for contractual obligation based on 'individual autonomy' does create a presumption in favour of a performance-oriented response to breach. This is not to rule out the possibility that one may disagree about what precisely is required to overcome this presumption.

B. THE APPROXIMATE EQUIVALENCE OF DIRECT AND INDIRECT PERFORMANCE RESPONSES

The preceding discussion demonstrated the presumptive superiority of a performance-oriented response to breach. This leaves open the question of how to choose between direct and indirect performance responses. Answering this question occupies the remainder of the chapter. The argument advanced is that, on the understanding of contractual obligation endorsed, there is generally very little to separate the two different kinds of performance-oriented response in terms of how well they substitute for performance following breach. Building on this claim, section II of the chapter argues that the choice between these two kinds of response must be governed by secondary considerations, which tend to favour the use of monetary substitutes over coercive responses. However, first the approximate equivalence is demonstrated. Two arguments are made. The first emphasises the substitutionary nature of specific performance. The second defends the legitimacy of awarding monetary substitutes for performance on the account of contractual obligation advanced.

1. Specific Performance as a Substitute for Actual Performance

It might be thought that specific performance provides the claimant with actual performance of the contract. However, like money awards substituting for performance,

[770] ibid.

specific performance is a substitute for actual performance. First, as already observed, the notion that specific performance always provides the innocent party with the exact performance bargained for is clearly mistaken. The 'performance' that follows such an order is not exactly what was agreed upon. Most obviously, in the ordinary case of breach, the 'performance' received following an order to specifically perform will be late. In addition, a specific performance order often alters the terms of performance by giving them greater specificity, and attaches new sanctions for non-performance.

The performance supplied in compliance with an order for specific performance is therefore not the same in all respects as performance in accordance with the original contract. In addition, there is the possibility of anticipatory breach. Where this occurs, a claimant can in principle obtain an injunction compelling the breaching party to perform her obligations precisely in accordance with the contract, including its relevant time provisions. *Hasham v Zenab* demonstrates the possibility of commencing an action for specific performance prior to the date performance is due.[771] Of course, any resulting order can only require that performance occur by the date specified in the contract. When such an order is properly complied with, the claimant appears to get exactly what was agreed upon. However, even in these circumstances, this is not quite true, given the additional sanctions that accompany non-compliance. Moreover, although the non-breaching party might receive the goods or services desired by the due date, the process by which they were obtained was not what was bargained for. Rather, what was bargained for was performance without the need for an additional court-order to obtain it.

This same can be said against those who contest the validity of the claim made in relation to specific performance in cases where the contract contains absolutely no time

[771] *Hasham* (n 359).

provisions whatsoever. In addition to new sanctions for non-performance, the fact that the claimant has had to go to go to court and seek an order to obtain performance means that such performance is not exactly what was bargained for. One might object that on this interpretation a court-ordered response can never be anything but a substitute for the original right. But this is exactly the point. Once the court becomes involved, the innocent party is destined to receive a substitute for performance. This claim is strengthened by the understanding of legal remedies outlined in Chapter Three. Although direct performance responses seek to replicate an underlying substantive right to performance, the right created by such an order is nevertheless a new right that substitutes for the original entitlement.

2. The Relevance of Contract Law's *Intrinsic* Value

It is trite to note that a contracting party's right to performance is strictly speaking a right to performance *from* the other contracting party. On this basis it might be argued that the *prima facie* measure of performance, which provides the claimant with the wherewithal to obtain performance from elsewhere, cannot be a legitimate way to uphold the primary right because it is premised upon the assumption that the claimant will obtain performance from elsewhere. A preliminary response to this objection is that it misunderstands the conceptual account of contractual rights outlined in Chapter Four. On this account, the reasons justifying the existence of the right to performance persist and press for next-best conformity following breach. The question really facing the court, therefore, is what constitutes the appropriate substitute for performance in the relevant circumstances.

Nevertheless, this response still leaves open the question of why a direct performance response is not always, at least presumptively, a preferable substitute for

performance to a money award. The answer lies in an appreciation of the distinct intrinsic value that the institution of contract law promotes. Chapter Four argued that on the particular understanding of contractual obligation this thesis endorses, part of the justification for the existence of a legally enforceable duty to perform is that this arrangement facilitates co-ordination for mutual benefit under conditions of personal detachment. Thus, an important part of the justification for the institution of contracting is that the existence of contract law allows parties to achieve a particular end-result without the need for any pre-existing bonds of interpersonal trust.

This means that while the justification for promissory obligation depends partly on the additional bond-creating function that undertaking and performing promises has, the justification for *contractual* obligation in no way depends upon the potential to create such bonds. The value of contractual obligation is grounded in considerations that do not depend on who actually provides the claimant with the performance bargained for. The consequence of this is that in most cases the cost of obtaining equivalent performance is just as good a substitute for performance as specific performance. In some cases it may even be preferable because it frees the innocent party from any further contact with the party in breach. The relationship between these parties may have deteriorated to such an extent that the former wants no further contact with the latter and would rather source the performance required from elsewhere. Moreover, even if the relationship has not so deteriorated, money awards are still more in line with the intrinsic value of detachment than coercive orders.

To be clear, it is not disputed that specific performance is a closer substitute for actual performance than the cost of equivalent performance. That it is ever ordered also demonstrates that courts sometimes reach the conclusion that on balance it is a better substitute for performance in the relevant circumstances. However, for the reasons just

outlined, even though Kimel is right that, normatively speaking, specific performance is the default response from which deviation requires justification,[772] not very much is required to shift the balance in favour of a monetary substitute. Since both performance-oriented responses substitute for actual performance in accordance with the contract, deciding which is called for in the circumstances depends upon an assessment of other relevant considerations. The next section argues that the balance of these secondary considerations tends to favour the use of money substitutes.

Finally, an important objection that might be raised against the argument just outlined is that it does not provide a defence of awards of the price of release since it is only awards of the cost of equivalent performance that are roughly equivalent to orders for specific performance. This is not a strong objection because the two situations in which the price of release might be awarded are when it is unreasonable for the innocent party to insist upon obtaining substitute performance and when the cost of equivalent performance cannot be quantified because the breach is irreversible. In both these cases, specific performance is also ruled out for the same reasons that an award of the cost of equivalent performance is inappropriate, which means that the price of release is the only real substitute for performance available.

II. CHOOSING BETWEEN PERFORMANCE-ORIENTED RESPONSES

The preceding discussion sought to establish three important propositions. First, the most natural and appropriate response to an infringement of a primary contractual right is one recognising that this right is to *performance* because of the understanding of the normative basis for contractual rights this thesis supports. Secondly, the presumptive superiority of specific performance as the preferable performance-oriented response to

[772] Kimel, *From Promise to Contract* (n 375) 90.

breach is not as strong as might be thought on the basis that such an order, like an appropriate money award, is best understood as a substitute for actual performance. Finally, it was argued that, on the understanding of contractual obligation endorsed here, specific performance and the cost of equivalent performance are roughly equivalent substitutes for performance.

This final claim raises the question of how the choice between these two kinds of performance-oriented response should be made. This section defends English law's general preference for awarding money in response to breach. In particular, three considerations supporting this preference are identified, though it is not argued that they are exhaustive. First, a money award normally constitutes a lesser interference with the defendant's personal liberty at minimal, if any, cost to the claimant. Secondly, the widespread availability of specific performance would cause institutional harm to the law of contract. Thirdly, the ability to substitute money for performance may assist individuals to minimise the consequences of mistaken decisions and is therefore a valuable way in which the law can contribute to individual well-being, thereby enhancing personal autonomy.

A. THE HARM PRINCIPLE AND THE PROMOTION OF PERSONAL LIBERTY

The most important consideration underpinning English law's response to a breach of contract is its desire to minimise restrictions on personal liberty. According to Mill's classic formulation of the harm principle the only legitimate basis for infringing personal liberty is preventing harm to others. As such, it merely set a necessary condition for the restriction of liberty, giving no guidance as to what measures should be taken when this condition was satisfied. An alternative version of the harm principle proposed by Raz and supported by Kimel provides that whenever a particular harm

could be prevented effectively in more than one way, one must choose the measure that constitutes the least interference with personal liberty.[773] Significantly, Raz defines 'harm' broadly here to include not only the loss of factual benefits held but also the deprivation of entitlements.[774]

So understood, it is not difficult to see how this version of the harm principle, combined with an appreciation of the value of personal liberty, provides a powerful reason in favour of responding to breach with a monetary substitute for performance rather with a coercive order. The reason for the general rule prohibiting specific performance for personal service contracts[775] is the value English law places on protecting personal liberty. For example, injunctions and specific performance are commonly refused to prevent, or respond to, breach of standard employment contracts.[776] Personal service contracts obviously represent one end of the contractual spectrum as far as the protection of personal liberty is concerned but this objective is also central to explaining English law's tendency to favour money substitutes more generally. As Kimel has observed:

> 'Given that specific performance is a more intrusive remedy than money – at any rate, that enforced performance amounts to a greater interference with personal freedom compared to allowing the party in breach *to choose* between performance and compensation for non-performance – such a simple presumption suffices to recommend the latter in all those cases where the innocent party (and hence,

[773] See Raz, *The Morality of Freedom* (n 425) 414.

[774] ibid.

[775] *Johnson v Shrewsbury and Birmingham Railway* (1853) 3 DM & G 358.

[776] *Page One Records Ltd v Britton* [1968] 1 WLR 157; *The Scaptrade* [1983] 2 AC 694 (HL).

plausibly, the practice of contract) would not in any way be worse-off as a result'.[777]

Kimel's discussion assumes the traditional purely compensatory understanding of 'expectation damages'. It is therefore unsurprising that he presents the dichotomy as a choice between performance and 'compensation for non-performance'. However, the point can be made even more forcefully on the understanding of contract damages advanced here. In essence, the critical point is that allowing a contracting party to 'choose' between performing and providing an appropriate monetary substitute for performance strongly protects one party's liberty at relatively minimal, if any, cost to the other. One might object to this argument on the basis that the case for granting this presumption is not obvious when it is remembered that the breaching party's obligation to perform was assumed voluntarily in the first place.[778] However, as Kimel observes, although in morality a party's freedom to choose between performing a promise or providing a monetary equivalent 'is far from evident… the question here is not the nature of the moral obligation' but 'the considerations of personal freedom in the legal imposition of (remedial) obligations'.[779]

A related objection that might be made against this argument is that although *theoretically* the choice only arises once a party is in breach, its practical effect is to allow a party to choose whether or not to perform prior to breach.[780] The most obvious response to this objection is that the choice whether to perform or pay money is not always available because specific performance is sometimes ordered. To this response,

[777] Kimel, *From Promise to Contract* (n 375) 102 (emphasis in original).

[778] McKendrick, *Contract Law: Text, Cases and Materials* (n 384) 960.

[779] Kimel, *From Promise to Contract* (n 375).

[780] ibid.

one might reply that, even if specific performance is ordered sometimes, there are still many situations where, particularly with the assistance of legal advice beforehand, a party can be fairly sure, if not certain, that his liability will only extend to paying money.

This is a stronger objection but it can be overcome too. First, even if the party makes the choice to discharge his obligations by paying money rather than performing, the extent of this liability often will be unquantifiable at the date of breach. Secondly, and more significantly, even if the choice to perform or pay money prior to breach is available *in practice*, it is not available in a normative sense. By choosing to breach and pay money rather than perform, the party commits a wrong that the law recognises and marks with a response. A substantial money award substituting for performance as well as compensatory damages for loss may be awarded. Although it may not be possible or desirable, all things considered, to compel substitute performance, the entitlement to performance can, and should, be recognised alternatively.

Another way to express this point is to say that the law does not recognise these two options as equally valuable but, by itself, this inequality of value is insufficient to justify legal intervention to compel performance prior to breach. One reason for this is that the state has limited resources to spend on resolving legal disputes. Another is that, where possible, it is generally desirable for the state to allow people to make their own decisions. Not only does this help protect personal liberty, it also encourages individual responsibility, an important aspect of the personal autonomy that ultimately justifies binding contractual obligations. Given all this, it makes sense for courts generally to wait until breach before becoming involved in a contractual dispute. Anticipatory breach is obviously an exception to this principle but it can be justified on the basis that it is in the interests of both the parties' and society for early intervention to minimise the negative consequences of a future breach when its occurrence has become certain.

All this means that more is needed to justify compelling a party to perform than simply the fact that the party has made the less valuable choice of choosing to incur a financial liability rather than perform. Moreover, despite specific performance and its monetary equivalent constituting roughly equivalent ways of substituting for performance, there may be other considerations that tip the balance in favour of awarding a monetary substitute for performance. The defendant's personal liberty is the most important but the remainder of the chapter explains how the imperative to minimise harm more generally identifies certain other considerations that help explain the way English law responds to instances of contractual breach.

B. MINIMISING INSTITUTIONAL HARM TO THE LAW OF CONTRACT

The previous section explained how the desirability of protecting and promoting personal liberty supports English law's remedial preference for awarding money over compelling substitute performance. This section explains how this preference also helps to minimise potential harm to the institution of contract law more generally, as well as possibly extending the range of situations in which its benefits can be realised. A salient feature of the benefits identified in this section is that they apply equally to corporations and natural persons. The significance of this should not be underestimated given the statistical frequency of contracts entered into by one of more corporations in modern society.

1. Protecting and Promoting the Practice of Contracting

According to Raz, it may be legitimate for the law to encourage valid moral goals.[781] This is consistent with the understanding of the nature and purpose of contract

[781] Raz, 'Promises in Morality and Law'(n 430) 937. Obviously, simply adopting this claim sidesteps a substantial jurisprudential debate, consideration of which is beyond the scope of this thesis.

law endorsed in Chapter Four. It was suggested that the dominant purpose of contract law is, and should be, to protect and promote the practice of voluntary undertaking by facilitating the co-ordination of joint pursuits in the absence of the interpersonal trust normally required for successful voluntary undertakings. It has been argued that on this understanding of contract law it is legitimate to uphold the right to performance through an appropriate money award. Here it is contended further that this understanding also provides positive reason to award money substitutes for performance rather than compelling performance.

If it is legitimate for the law to encourage valid moral goals, one valid goal may be the deterrence of certain instances of contractual breach. The assumption underlying this suggestion is that the performance of certain contractual undertakings is morally valuable. The moral value inherent in the performance of contractual obligations may be less clear than that in the performance of voluntary obligations that are not legally enforceable. Nevertheless, such value does exist because contract law enhances personal autonomy by providing an alternative mechanism for the realisation of the instrumental value provided by the undertaking of voluntary obligations. Given this, the potential to deter certain breaches of contract may be a relevant consideration in determining the specific content of the rules governing the appropriate response to breach. This claim is consistent with the view that the purpose of contract law is to protect the institution of voluntary undertaking since the practice is clearly weakened by the widespread occurrence of breach. Indeed, this observation creates an even stronger reason to think that deterring breach may be a valid goal for the law to pursue since such a policy actually facilitates harm prevention rather than the attainment of a gain; the latter generally being considered a more controversial basis upon which to invoke the coercive power of the state.

The suggestion that deterring breach may be a legitimate goal to pursue in shaping contract law's remedial regime might appear to support the greater availability of specific performance. However, two considerations actually suggest the opposite. First, it is important to appreciate the emphasis in Raz's claim. Whilst his conception of the harm principle supports the law '*encouraging*' valid moral goals, it 'by and large denies the legitimacy of *imposing* duties on individuals in order to force them to behave morally'.[782] In consequence, without additional support, the direct enforcement of duties to perform cannot be justified under such a principle. By contrast, this principle does support providing money substitutes for performance. A monetary substitute for performance does not 'impose' performance in the way that specific performance does but still recognises the existence of the innocent party's primary entitlement to performance. Part of the effect of awarding a monetary substitute for performance is expressive: the law sends the message that the formation of a contract creates a legal duty to perform without actually forcing the breaching party to perform. Although nominal damages also convey this message, the strength of this message is weakened by the fact that such awards are typically small in amount.

This conclusion is also supported by a second consideration relating to contract law's role in *promoting* the valuable practice of voluntary undertaking. This promotion function means that contract law should be designed to encourage the formation of contracts where this would be valuable. While a presumption of favour of specific performance might deter the breach of contracts that already exist, fear of being compelled to perform following breach may deter parties from entering into contracts in the first place. In other words, the widespread availability of specific performance might

[782] ibid 937 (emphasis added). For the endorsement of a similar understanding of the relationship between law and morality in the context of contractual remedies see S Shiffrin, 'The Divergence of Contract and Promise' (2007) 120 HLR 708.

prevent the creation of contracts that might otherwise have been formed had the remedial consequences of breach been less severe. As already mentioned, parties are likely to be more hesitant to enter contracts if doing so means not just making a commitment to perform based on present knowledge but also making a commitment to perform even upon the occurrence of future events that significantly alter the position one was in at the time of contract formation.

2. Preventing the Abuse of Legal Rights

Professor Schwartz has argued forcefully in favour of making specific performance the default response to breach on the basis that the aim of responding to breach is to ensure that the innocent party is left no worse off and damages assessed by reference to the expectation measure are undercompensatory more often than is commonly supposed. According to Schwarz, a request for specific performance 'is itself good evidence that damages would be inadequate; and courts should delegate to promisees the decision of which remedy best satisfies the compensation goal',[783] since the parties to the contract, rather than the court, are in the best position to determine which remedial devices best serve their interests. This claim has been refuted by Professor Waddams on the basis that given an unfettered liberty to request specific performance a claimant will exercise this liberty not whenever damages are inadequate but when requesting specific performance is financially advantageous.[784]

The routine availability of specific performance, in other words, would create the opportunity for an innocent party to abuse her legal entitlements by effectively extorting money from the party in breach, where the cost of obtaining performance greatly

[783]A Schwartz, 'The Case for Specific Performance' (1979) 89 YLJ 271, 277.

[784] S Waddams, 'The Choice of Remedy for Breach' in J Beatson and D Friedmann (eds), *Good Faith and Fault in Contract Law* (OUP 1991) 471.

exceeds the benefit that the claimant will derive from performance, or simply when specific performance would be very burdensome to the defendant. This is to be discouraged since part of the reason for involving courts following a breach of contract is to curb the desire for private vengeance. This objection to the widespread availability of specific performance also could be made in relation to the availability of an award of the cost of equivalent performance. Making this measure available in all cases where equivalent performance is possible might lead to abuse by claimants with little interest in performance. This is consistent with the need to ensure such awards remain subject to the 'reasonableness' restriction outlined in Chapter Five.

3. Reducing the Costs of Disputes

There is a further institutional benefit that comes from the current preference for monetary substitutes for performance. Waddams has made the point that the absence of a general entitlement to obtain specific performance has the effect of reducing the overall costs of a dispute following breach. Minimising such costs is not only in the interests of the contracting parties but is beneficial to society overall. Part of the reason for this is that, from the court's perspective, a money award is usually the more easily administrable response, though this is not the only dimension of cost-minimisation. Waddams illustrates this point through the example of a dispute over the sale of commercial goods, where it is very costly to keep the goods tied up pending resolution of the dispute.[785] In addition, he observes that:

> 'It is usually costly to prolong the relationship between hostile parties. A money remedy has the advantage of cutting the parties free from each other's affairs, a result that is generally advantageous in case of a dispute. Compelling the parties

[785] ibid 478.

> to work together when they have lost confidence in each other is costly both to the community and to the two parties jointly. Moreover, a right to specific performance often means that one party has a strong interest in decisions made by the other... There is merit in "crystallizing" the parties' rights, leaving each party free to pursue her or his own interest pending the resolution of the dispute'.[786]

C. MINIMISING THE CONSEQUENCES OF MISTAKEN DECISIONS

The previous section explained how English law's remedial preference for awarding money over compelling substitute performance minimises institutional harm to the law of contract. An assumption underpinning the argument there was that it is legitimate for the law to promote certain moral goals. Again invoking this assumption, it is contended that another reason why this approach is preferable is its potential to assist people to move on with their lives in the aftermath of mistaken decisions. In the course of arguing that contract law is concerned with the protection of reliance rather than 'expectation', Professor Atiyah wrote that:

> 'Even the liberal theorist who rests on the moral obligatoriness of a promise may have twinges of anxiety over cases where the party has genuinely changed his mind and regrets the promise because he regrets the value judgment that led him to make it.'[787]

Although this thesis rejects Atiyah's argument in favour of measuring money awards for breach by reference to the reliance losses incurred by the innocent party as a

[786] ibid 479.

[787] Atiyah, *Essays on Contract* Essay 6: 'The Liberal Theory of Contract' (n 370) 121, 123.

result of entry into the contract,[788] it recognises the important truth contained in this observation. Specifically, it argues that the desirability of minimising 'regret' has implications for the choice between direct and indirect performance responses. To explain this it is useful to have recourse to some arguments made by Professor Kronman in the context of attempting to justify contract law's prohibition against self-enslavement and its various corollaries.[789]

1. Disappointment and Regret

Kronman introduces a distinction between two concepts, which he labels 'disappointment' and 'regret'. For Kronman, disappointment is the emotion a contracting party feels upon realising that a contractual obligation was undertaken on the basis of mistaken factual assumptions about the world. Kronman claims that disappointment is therefore the natural response to errors of *prediction* rather than errors of rationality. Regret, by contrast, says Kronman, is the emotion a party feels when, despite the fact that his factual assumptions about the world were correct, he nevertheless wishes that he had not made a particular contract. Regret, therefore, is a response to errors of rationality and Kronman suggests that it will be the party's natural response when the party wishes he had not made the decision primarily 'because his goals have changed'.[790] Kronman suggests that:

[788] ibid: Essay 2: 'Contracts, Promises and the Law of Obligations' (n 370) 10.

[789] A Kronman, 'Paternalism and the Law of Contract' (1983) 92 YLJ 763.

[790] ibid 780.

> 'the important difference between regret and disappointment… [is that while] disappointment does not by itself undermine a person's confidence in the rationality of his own choices; regret can and often does'.[791]

Whether Kronman is correct to give the concepts he identifies the labels disappointment and regret is open to debate but is of no consequence for present purposes. His terminology is replicated here simply in order to minimise the potential for any confusion. What matters is that the distinction Kronman identifies between errors of prediction and rationality exists. Kronman goes on to claim that the prohibition against contracts of self-enslavement 'is best explained… by the special threat they pose to the party's integrity or self-respect.' He explains the nature of this threat by reference to the distinction just introduced. Kronman is surely correct to suggest that regret, as he defines it, 'can be especially demoralizing', because:

> 'Although there are countless ways in which a person's aspirations may be defeated by the senselessness of the world, if he himself is somehow responsible for the defeat… (it) weakens a person's confidence in his ability to make lasting commitments and guard the things he cares for, and this, in turn strikes at his self-respect'.[792]

Given this danger, it is submitted that the ability to substitute money for performance may be very valuable in enabling a party to depersonalise his relationship with a contractual counterparty. This is obviously consistent with understanding part of the justification for contractual rights as consisting in their ability to facilitate personal detachment. Moreover, if the money awarded actually upholds the latter's entitlement to performance in some way, this enables the breaching party to depersonalise his

[791] ibid.

[792] ibid 782.

relationship in a way that still maintains his commitment to his original undertaking, albeit in a more oblique form. This ability to depersonalise a relationship can, in turn, help that party put the mistaken decision behind him and move on with his life. As Kronman puts it, if a contracting party:

> 'is barred from substituting money for the specific performance of his obligations… his feelings of regret are likely to be intensified, particularly when performance entails some ongoing personal cooperation with the other party or subjection to his personal supervision. If the breaching party must continue to… abide by the terms of the cooperative arrangement he now regrets, he will almost certainly find it more difficult to distance himself from the goals or values which motivated his original decision. He is likely, as a result, to feel more directly tied to goals he has repudiated and to be more painfully reminded of their continuing influence in his life… the right to depersonalize a contractual relationship is an aid to forgetfulness, which – within proper limits – is a condition of moral health'.[793]

These comments are strongly endorsed here. Moreover, they may have broader application than Kronman suggests because even if a party's decision to enter a contract proves to be mistaken only on the basis of a misprediction, it is possible that she may still feel strongly negative emotions towards the contract and its performance. These emotions may have just as serious an effect on a person's integrity or self-respect as the experience of 'regret' accompanying mistakes of rationality. Therefore, even if such feelings are qualitatively different from 'regret', there seems to be no reason to think that the ability to substitute money for performance will not be valuable to someone experiencing them as well.

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[793] ibid.

2. Recognising Differences between People

Different people have different reactions to making decisions that the passing of time shows to have been misguided. For some, such decisions may be no great cause for disappointment or regret. They can accept their mistake quite easily and move on with their lives. For others, an earlier error might be far harder to overcome. For some people, a bad decision may affect them to an extent that seriously affects their mental health. Of course, in between these two extremes there exist any number of more moderate reactions that may tend towards either end of the spectrum. Obviously the degree of disappointment or regret experienced will depend on other factors as well, such as the significance of the decision in the context of the person's life overall.

A mistaken decision to enter a long-term commercial contract with substantial financial ramifications is likely to cause most people at least some disappointment or regret. However, the precise effect of this decision is likely to depend, amongst other things, on the particular person's constitution. As regards this consideration, the ability to substitute money for performance has the potential to assist people who struggle to leave a significant mistake in the past. Another potential variable in the equation is the importance that person places on achieving financial success. Some people may view financial success as vitally important. This may be because their sense of self-worth is inextricably tied to it or simply because they place a premium on a high degree of financial security. Other people may place significant value on commercial success but only because it provides the means to achieving other goals they value more highly. For others, financial success may be of very little significance.

Clearly, the significance of a mistaken commercial decision also will be affected by the decision-maker's financial position at the time it was made. Someone in a position

of relative economic security should be affected less than someone who has risked their future financial prosperity upon the success of a particular venture. It is worth reiterating, however, that for someone in the latter position the ability to pick up the pieces, put this mistake behind them and move forward may depend heavily on their personal constitution. For some, it may be all but impossible to recover from a financially ruinous decision. For others, perhaps possessing stronger resolve, a catastrophic financial mistake may be less of an obstacle to future prosperity or happiness.

3. Responding to Possible Objections

Some may question the extent to which the law should be concerned with such matters. Tailoring responses in individual cases based on considerations such as these is obviously a task fraught with practical difficulties of proof and potentially disproportionate cost. It also raises the spectre of unequal treatment before the law. Despite such concerns, there is no reason that the law should not be aware of the considerations outlined above and, where feasible, adopt rules capable of consistent application that are sensitive to them. It is contended that the ability of a mistaken party to substitute an appropriate money substitute for performance is such a rule.

Alternatively, this suggestion might be attacked from the other direction on the basis that the considerations identified actually justify the imposition of weaker remedial measures than the indirect performance responses proposed in this thesis, such as say compensation for the innocent party's expenditure in reliance on the contract.[794] One may even draw support for such a claim from Kronman's own statement that:

[794] Although reliance damages are not always lower than 'expectation damages', they will usually be so.

> 'the money the party must pay represents the cost of his own decision, and the obligation to pay them is a continuing reminder of former goals he has since modified or abandoned. A reminder of this sort may intensify the party's regret and make it more difficult for him now to forget what seems like an irrational decision'.[795]

Nevertheless, it has been argued that, if money is to be awarded following a breach of contract, recognition of contract law's instrumental value entails a strong presumption in favour of a performance-oriented response. It is conceivable that occasionally there may be exceptional circumstances that justify a departure from this approach. However, this again raises practical problems of proof as well as the more fundamental problem of unequal treatment before the law. The purpose here is simply to demonstrate that the ability to substitute for performance with an equivalent money award may be of great benefit to some contracting parties. This is not to suggest that the law should endeavour to assess the particular benefit for a particular party in a specific case.

4. Summary

This section sought to demonstrate four propositions. First, a person may come to regret a decision to enter a contract and this may significantly affect his mental health. Secondly, the extent to which it does will depend upon a variety of factors, including a party's personal constitution, and whether the mistake was one of rationality or prediction. Thirdly, these effects are serious and the law, as the institution charged with dealing with the consequences of contractual breach, should be sensitive to them where this is consistent with the other values that contract law seeks to promote. Fourthly, it is

[795] Kronman, 'Paternalism' (n 789) 783.

doubtful whether accurately determining the impact of a particular mistake on a specific party is something that it is either legitimate or possible for the law to do. In view of all this, the law's preference for awarding money over compelling performance serves a valuable function. In situations where the breaching party seriously regrets a decision to contract, it provides this party with the greatest possible array of options to minimise the consequences of a mistaken decision consistent with recognising the other party's entitlement to performance.

CONCLUSION

This chapter explained how the existence of a legal right to performance is consistent with English law's preference for responding to breach with an appropriate money award rather than compelling performance. Section I made two principal arguments. First, in view of contract law's instrumental function, the most natural and appropriate response to the infringement of a party's contractual right is one that that recognises that the content of this right is to performance. Secondly, in view of contract law's intrinsic function and the fact that specific performance is an order for substitute, rather than actual, performance, specific performance and an award of the cost of obtaining equivalent performance from another source are normally roughly equivalent substitutes for performance.

Section II defended English law's preference for responding to breach with an appropriate money substitute for performance rather than through a coercive order by reference to a number of secondary considerations. These considerations are both moral and institutional in nature. In the former category, the promotion of the valuable goal of personal liberty and the desirability of assisting people to minimise the consequences of mistaken decisions both favour a monetary response. Both of these considerations are

aspects of the valuable personal autonomy that ultimately justifies the existence of contractual obligations. In the latter category, money awards also help protect and promote the institution of contract law by striking an appropriate balance between deterring contractual breach and facilitating contract formation, as well as minimising transactions costs and the abuse of legal entitlements following breach.

CONCLUSION

I. SUMMARY OF THE ARGUMENT

It is accepted orthodoxy that in English law the purpose of awarding damages in response to a breach of contract is to compensate the victim for loss. The appropriate compensatory measure in this context has been a source of considerable academic debate but this debate has exercised little influence in the courts. It is generally accepted that the appropriate measure of loss in the contractual context is the position the innocent party would have occupied had the contract been performed. This is conventionally described as the 'expectation' measure of recovery. To the extent that alternative measures are used, such awards are viewed either as proxies for, or justifiable exceptions to, this measure.

This thesis has challenged the orthodox account and proposed an alternative understanding of money awards for breach of contract. Part I of the thesis outlined this challenge. Chapter One explained the orthodox understanding of contract damages and charted its development. It commenced by exploring the expectation principle's two distinct sources of indeterminacy. In general, the more fundamental indeterminacy, which concerns the underlying purpose of this principle, has been overlooked. Therefore, in outlining the orthodox account, Chapter One focussed on the principle's second source of indeterminacy, which concerns the scope of recovery for loss. It observed that traditionally the ambit of the expectation principle has been confined by contract law's narrow conception of loss. More recently, a broader understanding of loss has been adopted, enabling the recovery of damages for harm to various non-pecuniary interests.

Chapters Two and Three challenged the orthodox account on doctrinal, conceptual and terminological grounds. The doctrinal challenge was outlined in Chapter Two, which sought to catalogue the various instances where damages do not reflect the actual loss suffered by the victim of breach. Section I focussed on damages awards not purporting to compensate for loss. Such awards might be classified as isolated exceptions to the orthodox view, were it not for the numerous awards detailed in Section II of the chapter. These awards purport to be compensatory but manifestly fail to reflect the loss actually suffered by the innocent party in consequence of breach.

The challenges advanced in Chapter Three were conceptual and terminological. The conceptual challenge was based on the difficulties associated with understanding the expectation principle as a measure of loss. This measure of compensation presumes the prior existence of a right to performance. The existence of this right raises the possibility that substituting for performance might be the more fundamental purpose of responding to breach. It was also argued that the excessive focus on loss has skewed theoretical debates about contract damages, inhibiting true understanding. This chapter also demonstrated the ambiguous and inconsistent use of terminology in this area of the law and suggested that these terminological difficulties help explain the persistence of the orthodox account in the face of the doctrinal inaccuracy identified in Chapter Two. In place of this inadequate terminology, new definitions for relevant legal concepts were proposed.

Part II of the thesis advanced an alternative, bifurcated understanding of money awards for breach of contract in English law. It was argued that, in contrast to the prevailing orthodoxy, there are in fact two distinct kinds of money award potentially available to an innocent party following breach. These two awards reflect the existence of two distinct rights held by this party. The first is the primary right to performance,

which arises upon contract formation. The second is a secondary right to reparation for certain consequences of non-performance, which arises upon breach. The object of an award upholding the primary right is to substitute for performance. The object of an award upholding the secondary right to repair is to compensate for loss.

The foundations of this account were outlined in Chapter Four. Section I of the chapter defended the claim that the formation of a valid contract creates a legal right to performance on both doctrinal and theoretical grounds. The doctrinal defence was based on demonstrating the existence of various legal doctrines that assume the existence of such a right and by demonstrating the fallacy of the argument contesting the existence of such a right on the basis of the limited availability of specific performance. The right to performance also was defended theoretically on the basis that an institution that recognises the legal enforceability of certain voluntary undertakings makes valuable instrumental and intrinsic contributions to the realisation of personal autonomy.

Section II of the chapter outlined the significant support that exists in the case law for the distinction between substitutionary and compensatory money awards. In addition to outlining various clear examples of the former, it observed that the restrictions that operate on compensatory awards do not operate on substitutionary awards. Finally, a theoretical account for the proposed distinction between substitutionary and compensatory awards was outlined. According to this account, the reasons justifying the original primary right to performance persist following breach and press for next-best conformity. This requires that both an appropriate substitute for performance be provided and any harm caused by breach be rectified. These two distinct aspects of next-best conformity reflect the distinction between substitutionary and compensatory awards.

Chapter Five outlined the quantification and restriction of money awards substituting for performance. The object of a monetary substitute for performance is to provide the victim of breach with the most appropriate substitute for performance in the circumstances. It was argued that the *prima facie* measure for this award is the cost of obtaining equivalent performance. However, when substitute performance is no longer possible or certain considerations render it unreasonable for the innocent party to insist upon performance in the circumstances, the law should endeavour to provide an alternative substitute for performance. It was argued that the appropriate measure in these circumstances is a reasonable approximation of the price of release. Support in the case law for both of these measures was outlined.

Chapter Six focused on awards upholding the secondary right to repair that arises upon breach. First, it defended the very existence of such a right in general terms. However, the distinctiveness of compensatory awards for breach of contract from those substituting for performance was demonstrated principally by showing that the restrictions imposed on compensatory awards for breach of contract cannot be explained wholly by reference to the parties' underlying agreement. This means that compensatory awards do not simply give effect to the primary right to performance. In restricting the recovery of compensation for loss, English law takes account of policy considerations that are extrinsic to the parties' underlying agreement. The chapter concluded by demonstrating how the proposed distinction between substitutionary and compensatory awards can be used to explain some of the authorities that are difficult to reconcile with the orthodox account.

Chapter Seven sought to defend English law's remedial preference for money awards over specific performance as a response to breach. Section I argued that contract law's instrumental value, enabling future co-ordination for mutual gain, requires a

performance-oriented response to breach but that its intrinsic value, enabling such co-ordination in the absence of interpersonal trust, renders the law essentially neutral between awarding monetary substitutes for performance and compelling the breaching party to perform. The choice between these two responses, therefore, must be governed by other considerations. Section II identified a number of considerations that tend to favour the use of monetary substitutes over coercive orders. The most significant of these is the breaching party's interest in personal liberty. A related benefit in using monetary substitutes is their potential to minimise the consequences of mistaken decisions. Taking such concerns into consideration is consistent with understanding the ultimate value of contract law as subsisting in its contribution to the realisation of personal autonomy. Further considerations supporting English law's remedial preference for monetary substitutes include that they help strike an appropriate balance between deterring breach and facilitating contract formation, and that it helps minimise the abuse of legal entitlements and the cost of legal disputes.

II. PRINCIPAL CONCLUSIONS

The major purpose of this thesis was to demonstrate the existence, and explain the operation, of two distinct kinds of money awards for breach of contract in English law. On the orthodox account of contract damages, all awards are concerned to compensate the victim of a breach for loss suffered in consequence. The precise basis for compensatory awards is a matter of some controversy, though the conventional understanding is that they give effect to a secondary right of repair that arises upon breach. In addition to defending the conventional understanding of such awards, this thesis also sought to demonstrate that English law provides money awards that substitute for performance. In view of this, it has been argued that the orthodox understanding of contract damages cannot be maintained.

In addition to this objective, the thesis had various important subsidiary aims. The first subsidiary aim was to clarify and reclassify much of the ambiguous terminology that pervades legal discussions of contract damages. As Chapter Three observed, there are three different senses in which the word 'loss' is used in the law at present and the confusion this creates is only exacerbated by the similar uncertainty that surrounds the meaning of other important, related concepts such as 'harm', 'damage' and 'injury'. Stable definitions were proposed for the use of these terms in the contractual context. Most significantly, it was suggested that 'loss' is a term that should be used to refer only to factual deteriorations in a contracting party's position. On this definition, any harm entailed merely by the mere infringement of a right is not a loss.

Chapter Three also observed that the ambiguity that surrounds the meaning of these terms also occurs in relation to other important legal concepts employed in this part of the law, such as 'damages', 'compensation' and 'remedy'. Again, stable definitions for these terms were proposed. It was suggested that damages means nothing more than a money award for a wrong and that, although legitimate alternative conceptions exist, for the sake of conceptual clarity 'compensation' is a term that should be reserved for the process by which money is awarded to the victim of a wrong in order to rectify a deterioration in that person's factual position (i.e. a loss). In response to the unstable meaning of 'remedy', Zakrzewski's suggestion that a remedy is best defined as the rights arising from judicial commands responding to an actual or threatened infringement of a substantive right was endorsed. In this context, the useful distinction between replicative and transformative remedies, as well as the limitations of this distinction, was noted. Finally, a new terminology for money awards substituting for performance was proposed.

The second subsidiary aim of the thesis was to outline a coherent performance-oriented account of the responses available for breach of contract more generally. On

the proposed account, the object of a court-ordered response to breach, including anticipatory breach, is to achieve the closest thing to conformity with the original primary right to performance. Chapter Four explained that achieving next-best conformity requires that two distinct objectives be achieved. The first is that the innocent party receives an appropriate substitute for performance. The second is that any further harmful consequences of breach are repaired. While English law always achieves this second objective by awarding compensation for loss, there are a variety of different ways of substituting for performance. The appropriate substitute depends on the balance of relevant considerations. The closest substitute for performance is an order prohibiting breach or compelling performance on the date at which performance is due. The next closest substitute is an order compelling substitute performance at a time after it was originally due. This includes most instances of specific performance and the order following a successful action for the agreed sum.

Controversially, however, this thesis also argued that in addition to these direct enforcement responses, English law also provides indirect, monetary substitutes for performance. Chief amongst these monetary substitutes is an award of the cost of obtaining an equivalent for the agreed performance. However, at least in cases concerned with the defective performance of a contract for the provision of services, English law restricts the availability of such awards to situations where it is reasonable for the innocent party to insist upon equivalent performance in the circumstances. In such cases, and in certain situations where equivalent performance is now impossible, this thesis argued that English law should award the innocent party an alternative substitute for performance measured by reference to a reasonable approximation of the price of release. Although also a substitute for performance, this kind of award is significantly

further away from the ideal of actual performance than the performance-oriented responses further along the remedial continuum.

On the view proposed here, therefore, the overriding purpose of any response to breach is to achieve next-best conformity with actual performance of the contract. This is attained directly by coercive orders, or indirectly by monetary substitutes for performance. More indirect still is the collateral protection afforded by awards of compensation for loss. At the highest level of theory, compensatory awards are ultimately directed towards the same objective as monetary substitutes for performance because the secondary right to repair, which forms the basis for such awards, is itself only justified by reference to the prior existence of the primary right. In consequence, the essential principle underpinning the argument advanced here is that substituting for performance, rather than compensating for loss, is the fundamental normative principle underpinning English law's response to instances of contractual breach. It is simply that substitutionary and compensatory awards pursue this objective in distinct ways. While substitutionary awards provide the innocent party with a substitute for actual performance, compensatory awards are concerned to rectify the negative consequences of non-performance.

This important subsidiary objective of outlining a coherent performance-oriented account of the responses available for breach of contract may itself have further implications. One notable implication is that it may reduce the perceived need for gain-based responses to certain instances of breach. As Peel has noted, 'the clamour for restitutionary damages is based on the perceived inadequacies of compensatory damages'.[796] However, once the fallacy of the hegemony of compensation is excised from the law, many of the perceived inadequacies of contract damages also dissipate. It

[796] Peel, 'Loss and Gain at Greater Depth - A Comment' (n 605) 29.

was noted in Chapter Two that the performance-oriented account advanced here may remove the need for the separate category of gain-based damages that Edelman terms 'restitutionary'.[797] However, Peel is using the term 'restitutionary' here in a broader sense to also include what Edelman terms 'disgorgement damages'. The legitimacy of such awards has been questioned.[798] To the extent that they are justifiable, the best explanation may lie in the desirability of deterring certain cynical or egregious breaches of contract.[799] Such a view might be consistent with the emphasis on performance advocated in this thesis. Nevertheless, additional work is needed to justify a response that goes beyond a mere substitute for performance and a greater appreciation of the possibility for substitutionary responses might reduce any perceived need for a gain-based award.

[797] Edelman, *Gain-based Damages* (n 177) 113. See 73 above and following.

[798] For example, D Campbell and D Harris, 'In defence of breach: a critique of restitution and the performance interest' (2000) 22 Legal Studies 208.

[799] Edelman, *Gain-based Damages* (n 177) 83-86.

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