Adequacy of Damages

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by

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Abstract

This thesis investigates the adequacy of damages rule. It has four aims. First, it elucidates a conceptual framework for specific remedies. Specific remedies are aimed at compelling the defendant to do what she has most reason to do. That is to conform with her primary obligation, or to restore the claimant to the position she would have been in had the defendant conformed to her obligation. However, compensatory damages are aimed at giving the claimant a substitute for the defendant doing that which she has most reason to do, by paying a sum of money that restores the claimant to the same position, as far as money can, that she would have been in had the defendant conformed to her obligation.

Second, it describes the distribution of, and justification for, the rule. That is, the court is not justified in making a specific order when: (a) damages would be as good as a specific order; and (b) the specific order would impose a greater constraint on the defendant's freedom. Third, it explains what it means for damages to be 'as good' as a specific order. That is, that damages would return the claimant to the position she would have been in had the defendant conformed to her primary duty, relative to her legitimate interests.

Fourth, it explains why English law should not reform the adequacy of damages rule such that a court should refuse to order equitable specific remedies when it would be 'just in all the circumstances' to confine the claimant to damages. That is because that reformulated rule provides no independent criterion against which the justness of such a decision should be assessed, and requires the court to balance incommensurable reasons, which allows judges' moral and political values to exert an outsized influence in deciding cases.

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1. Introduction

1.1 Object of enquiry

Laycock declared the death of the adequacy of damages rule (AODR).[1] Nevertheless, the rule survives in England,[2] Australia,[3] Canada[4] and several states of the US.[5] However, no sound justification has been forthcoming for the rule. Some judges and academics, chafing at the confines of what they see as being an unprincipled system of justice constraining the ability of judges to achieve 'better' outcomes in individual cases, continue to advocate for its replacement with a more flexible rule.[6] Others reticently justify the rule not on its own terms, but as an instrument to achieve unrelated ends.[7]

This thesis examines the following issues:

(a) Chapter 2 elucidates a conceptual framework for specific remedies. These are rulings that compel the defendant to do what she has most reason to do.

(b) Chapter 3 explains and justifies the AODR. Its justification is that when two or more remedies are as good at achieving the same remedial object, the court is not

[1] Douglas Laycock, *The Death of the Irreparable Injury Rule* (OUP 1991), 5.

[2] *Cooperative Insurance Society Ltd v Argyll Stores Ltd* [1998] AC 1.

[3] *Waterways Authority of NSW v Coal & Allied (Operations) Pty Ltd* [2007] NSWCA 276, [95].

[4] *Semelhago v Paramadevan* (1996) 136 DLR (4th) 1; *Southcourt Estates Inc v Toronto Catholic Society* [2012] SCC 51.

[5] Restatement (Second) of Contracts § 359 (1981).

[6] *Beswick v Beswick* [1968] AC 58, 90-91; *Evans Marshall & Co Ltd v Bertola SA* [1973] 1 WLR 349.

[7] Restatement (n 5); Andrew Burrows, *Remedies for Torts, Breach of Contract and Equitable Wrongs* (4th edn, OUP 2019), 412-414; Anthony T Kronman, 'Specific Performance' (1976) 45 U Chi LR 351.

justified in making that order which imposes a greater constraint on the defendant's freedom.

(c) Chapter 4 explains what it means for damages to be inadequate. That is, when it will not restore the claimant to the position that she would have been in, relative to her legitimate interests, had the defendant conformed to her obligation.

The method used in investigating these issues is doctrinal and theoretical. This thesis aims to develops an intelligible framework for the AODR, situating it in our moral lives. It explains that framework through drawing on moral and political philosophy, and recommends reform when doctrine cannot be justified. But it does not set out to entirely rewrite settled law, nor to reorganise existing doctrine to conform to novel values which are not instantiated within the English legal order.

1.2 Why this enquiry matters

There are three main reasons to examine the AODR. First, though specific orders raise important issues for legal practice, their theoretical and doctrinal framework is underdeveloped relative to other remedies. Sustained academic research into the AODR will assist in developing a more principled framework to guide judicial decision-making in this area of law.

Second, developing that framework assists in understanding the reasons for specific remedies. It locates specific remedies in our broader system of law and yields important insights into relations between specific and non-specific remedies. For example, it explains why Walker J in *Peaudouce* and Goff LJ in *Polaroid* were wrong to claim that

remote losses cannot make damages inadequate.[8] That is because, if the defendant caused and is responsible for that loss, that it would be 'unfair' for the defendant to be burdened with that loss is not a reason not to avoid that loss.[9]

Third, some specific remedies create public obligations that may have different content from the private obligations they enforce, involve a more serious invasion of freedom, and are supported by the State's power to impose penal sanctions, including imprisonment. That means that: (i) some justification is required for the State's use of its most coercive powers to enforce private jural relations; and (ii) it is important to elucidate the limited conditions under which it is legitimate for the State to exercise those powers to enforce private jural relations to guide judicial decision-making.

2. Conceptual framework

2.1 What is a remedy?

In this thesis, 'remedy' means a final judicial ruling aimed at enforcing or declaring a private right or obligation. That includes declarations, damages, orders for an agreed sum, specific performance, injunctions, orders for possession and specific delivery. It uses the phrase 'aimed at enforcing' to include 'transformative remedies', such as the remedial constructive trust, in jurisdictions that allow such orders. But it excludes procedural orders, executing orders, self-help remedies, and public law remedies, because such orders are informed by considerations which are different from those which inform private law remedies.

[8] *Polaroid Corp v Eastman Kodak Co* [1977] RPC 379, 397; *Peaudouce SA v Kimberly-Clark Ltd* [1996] FSR 680, 692.

[9] As discussed in Section 4.3.2.

2.2 What are specific remedies?

'Specific remedies' is a class of remedies often used by jurists but seldom defined. We should have some idea as to the attributes which are common to the instances of the class of specific remedies because, if nothing unified the class, there would be no reason to believe a coherent normative account could be given of that class.

It is often thought that specific remedies 'compel' the performance of an obligation, prevention of a wrong, or undoing of a wrong.[10] This could mean that:

(a) the *object* of the order is to compel the defendant to act or forbear from acting;

(b) the order commands the defendant to act or forbear from acting, *backed by the State's coercive power*; or

(c) a contravention of the order is enforced by *committal for contempt*.

(a) and (b) cannot be right because all remedies, except declarations, meet that description. Most orders are aimed at compelling the defendant to act or forbear from acting, which are enforced using coercive powers of the State, such as the seizure and sale of assets. (c) cannot be right because some specific orders, such as orders for the agreed sum, possession, or specific delivery, are not ordinarily enforced through contempt of court.

Another account is that '[s]pecific relief gives the plaintiff the original thing to which the plaintiff is or was entitled; substitutionary relief [e.g., damages] gives the plaintiff something other than its original entitlement.'[11] This view has been criticised by Lawson

[10] Although Burrows does not use the concept 'specific remedies' in organising his book, he categorises most instances of specific remedies in these functional classes: Burrows (n 7), 10.

[11] Colleen Murphy, 'Money as a 'Specific' Remedy' (2006) 58 Alabama LR 119, 119-120.

on the basis that some specific remedies are *also* substitutional because the obligee is ordered to do something different from what she was obliged to do (e.g., when she is ordered to undo a wrong), or to do it late, so the distinction collapses.[12]

Understanding specific remedies requires a return to the conceptual foundations of private law. A person ('C') has a right when they have interests recognised as a reason to impose an obligation on another ('D').[13] Should D breach her obligation, the reasons for that obligation do not dissolve; they subsist and require D to achieve next best conformance to the reasons for her obligation.[14] That which achieves next best conformance will be restoring C as near as possible to the position she would have been in had D conformed to her obligation. That will often not simply be paying damages. For example, if D takes C's wristwatch, that which is next best to not having taken it is to return it, not to pay C its value. That is because D had reason not to take the wristwatch at all, and if D had not taken it, C would have it. However, if C is a commercial trader, and valued this wristwatch only for economic reasons, damages may be as good at restoring the claimant to the position she would have been in had D conformed to her obligations.

It is in *this* sense that specific remedies are not a 'substitute' in the same sense as damages. It is true that D cannot go back in time and do what she should have done. But she has reasons to achieve next best conformance. This requires her, as far as practicable,

[12] Frederick Lawson, *Remedies of English Law* (2nd edn, Butterworths 1980), 14.

[13] Joseph Raz, 'On the Nature of Rights' (1984) 93 Mind 194; Joseph Raz, *The Morality of Freedom* (OUP 1986), 166.

[14] John Gardner, *From Personal Life to Private Law* (OUP 2018), 98-102; John Gardner, 'What is Tort Law For? Part 1: The Place of Corrective Justice' in John Gardner (ed) *Torts and Other Wrongs* (OUP 2019). See also: Joseph Raz, 'Personal and Practical Conflicts' in Peter Baumann and Monika Betzler (eds), *Practical Conflicts: New Philosophical Essays* (CUP 2004), 191; Robert Stevens, *Torts and Rights* (OUP 2007), 59; Arthur Ripstein, *Force and Freedom* (HUP 2009), 304; Ernest Weinrib, *The Idea of Private Law* (rev'd edn, OUP 2012), 135.

to put C in the position she would have been in had the wrong not been committed.[15] Specific remedies do this by requiring D to do the *very thing* that she must do now to achieve next best conformance (i.e., returning the wristwatch), within the ordinary constraints of a legal system. Non-specific remedies require her to do something different, a *substitute* for what she has most reason to do, such as paying money to restore C to the position she would have been in, as far as money can, had the defendant conformed to her obligation.

This might be thought to be overinclusive because it would include an order of damages in cases where all the defendant *can* do is pay damages. These cases are unusual. Suppose I ran down a pedestrian and broke her leg. I have reason to call an ambulance, remain with her until it arrives, and pay medical expenses in advance of them being incurred, not merely to pay damages. But I might fail to do that and, at judgment, can only compensate her for losses. That does not make damages a specific remedy. That is because, though the order might, in fact, compel me to do what I have most reason to do, that is not the purpose of the order. If the claim had been adjudicated at the moment I ran down the claimant, paying damages would not have been what I had most reason to do. But if it was adjudicated when I could only pay damages, it would be. This shows that damages are *not aimed* at achieving nearest possible conformance with the reasons for an obligation. That is what makes them a 'non-specific' remedy. However, all instances 'specific orders' *are aimed* at achieving nearest possible conformance with the reasons for an obligation at the time of judgment within the ordinary constraints of a system of legal justice.

[15] *Livingstone v Rawyards Coal* (1879-80) LR 5 App Cas 25, 39; *Robinson v Harman* (1849) 1 Exch 850, 855.

2.3 What is the relation between rights and specific remedies?

It is often said specific remedies 'replicate' rights.[16] Zakrzewski states that 'replicative orders' are 'restatements of substantive rights existing independently before' the court's order.[17] This implies that the structure and content of the obligation created by the order is the same as the right which justified the order. That cannot be right. First, many specific orders do not replicate the content of the primary duty.[18] So, an obligation not to withdraw support from land is not an obligation to restore support; an obligation not to interfere with chattels is not an obligation to return the chattel; and an obligation not to trespass on land is not an obligation to deliver up possession.

Second, the structure and mode of enforcement of some specific orders is very different from the right which is the reason for the order. Orders of specific performance and injunctions confer no new rights on the claimant, but impose a new public obligation enforced through penal sanctions.[19] But the private right which is the reason for the order is a bilateral jural relation between claimant and defendant, which is not enforced through penal sanctions, such as imprisonment or fines.

That specific remedies are 'replicative' means only that the defendant is ordered to do what she has most reason to do. That will be true whether the court is called on to restrain the defendant from trespassing on land in the future, where the content of the order is the same as the primary obligation, or to restore support to land, where it is not.

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[16] Stephen Smith, *Rights, Wrongs and Injustices* (OUP 2019), 9-10, 97-98.

[17] Rafael Zakrzewski, *Remedies Reclassified* (OUP 2005), 10, 78-79, 166.

[18] *Smethurst v Commissioner of Police* [2020] HCA 14, [255].

[19] *Phonographic Performance Ltd v Andrew Ellis* [2018] EWCA Civ 2812, [7].

It does not mean that the obligations created by the orders have similar juridical properties to the obligations which ground the orders.

However, specific orders may command the defendant to do some *variation* of what she has most reason to do. That is because the fact that a defendant has reason to ψ is a reason, but not always a decisive reason, to order that the defendant ψ.[20] That is because the claimant is inviting the court to impose on the defendant a novel public obligation enforced through penal sanctions.

For example, some specific orders made by the court are 'prophylactic': they restrain the defendant from doing what they would otherwise be free to do to ensure they conform to the command that they do what they have most reason to do.[21] Take the following orders:

(a) D must not assault or threaten C.

(b) D must not enter or remain within 250 yards of C's home address.

Command (a) is justified on the same ground as other specific remedies. Command (b) is aimed at ensuring D does what D has most reason to do when D would not do so without it.[22] It is justified when its restraint on D's freedom is no more than necessary to ensure the efficacy of command (a).

Other specific orders are 'determinative': they command the defendant to do more or less than what they have most reason to do to make the order certain. So, in *Kennaway*,

[20] John Gardner, 'What is Tort Law for? The Place for Distributive Justice' in John Gardner (ed), *Torts and Other Wrongs* (OUP 2019).

[21] Stevens, (n 14) 57-58.

[22] *Burris v Azdani* [1995] 1 WLR 1372, 1377-1380.

the Court restrained a motorboat club from interfering with a landowner's right to enjoy her land on terms that the club was entitled to hold certain racing events with less than a certain number of motorboats, but that no boat should be used that creates noise of more than 75 decibels.[23] This order does not replicate or make more precise the private obligation: the order could be breached without the defendant creating a nuisance, and a nuisance might be created without breaching the order.[24] It commands the defendant to do that which they have most reason to do, within the constraint that the State is not justified in making the defendant liable to penal sanctions unless she can know with sufficient certainty what behaviour is forbidden.[25]

3. Domain of the AODR

The foregoing analysis establishes that specific remedies and compensatory damages are different means of achieving the same remedial object: restoring the claimant as near as possible to the position she would have been in had the obligation been performed. However, some specific remedies will not be ordered when damages are adequate. This raises important questions as to why the availability of a specific order should depend on the inadequacy of damages, and why the rule qualifies some specific orders and not others. This Chapter addresses these questions.

[23] *Kennaway v Thomas* [1981] QB 88.

[24] *Customs and Excise Commissioners v Barclays Bank plc* [2007] 1 AC 181; *Phonographic* (n 19), [7]; *JSC BTA Bank v Ablyazov (No 14)* [2018] UKSC 19.

[25] *R v Rimmington* [2005] UKHL 63, [33].

3.1 When is the AODR not a condition precedent to ordering a specific remedy?

The AODR is not a condition precedent to some specific remedies. This means that even if damages would restore the claimant to the position that she would have been in had the obligation been performed, that would not be a sufficient reason to refuse the remedy.

3.1.1 Orders for possession

An order for possession is available against a defendant in unlawful possession or occupation of land.[26] The claimant is not required to establish that damages would be inadequate.[27]

3.1.2 Collapsing a trust

A beneficiary absolutely entitled to rights held on trust is entitled to an order that the trustee transfer those rights to the beneficiary.[28] She need not establish that equitable compensation would be inadequate.[29]

3.1.3 Specific performance of contracts to dispose interests in land

This Section argues for an inversion of the conventional view: that a purchaser of land is entitled to specific performance of a contract to sell land because she already has an equitable right to the title to that land, not that she acquires that right because the contract is specifically enforceable.

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[26] *Portland Managements Ltd v Harte* [1977] QB 306, 315-316; *Secretary of State for Environment v Meier* [2009] UKSC 11.

[27] *McPhail v Persons Unknown* [1973] Ch 447 (CA), 460; *Boyland & Sons Ltd v Rand* [2006] EWCA Civ 1860.

[28] *Saunders v Vautier* (1841) 1 Cr & Ph 240.

[29] *Pooley v Budd* (1851) 14 Beav 34.

3.1.3.1 Critique of the conventional view

Adderley held that no distinction is drawn between contracts to dispose interests in land and chattels because neither will be specifically enforced when damages are adequate.[30] However, damages are always considered inadequate for a purchaser of land in England. That is because land is 'physically unique', such that there are no substitutes.[31] This is no longer the law in Canada and New Zealand.[32]

The claim that land is 'physically unique' means that any parcel of land has attributes which is not instantiated in any other land. This is also true of most chattels. For example, books often have minor printing errors or accumulated wear which makes them different from all others, and coal has measurable variations in carbon composition. Rarely will two books, or tonnes of coal, be physically identical. But a sale of these articles would not be specifically enforced because damages would be considered adequate. That is because others books or tonnes of coal would be just as good for the claimant.

This demonstrates that one cannot reason from the premiss that 'ψ is unique' to the conclusion that 'there are no substitutes for ψ', unless 'substitute' means that 'there is a thing with attributes identical to ψ', which is a condition that will rarely be met. That ψ has unique attributes will only be a reason to conclude that there are no substitutes for ψ when they are reasons for which ψ is valued by the claimant.[33] And if they are not reasons for which ψ is valued by the claimant, they are not reasons to conclude that there are no substitutes for ψ. But even if they are reasons for which ψ is valued by the claimant, as

[30] *Adderley v Dixon* (1823) 1 Sim & St 605, 610.

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

[32] *Semelhago* (n 4); *Southcourt Estates* (n 4); *Loan Investment Corp of Australia Ltd v Bonner* [1969] UKPC 33. Cf *Pianta v National Finance & Trustees Ltd* [1964] HCA 61.

[33] Section 4.1.1.

discussed in Section 4.1.1, if those reasons are purely economic, damages will often still be adequate because they would restore the claimant to the position that she would have been in had the defendant conformed to her obligation.

So, when a claimant claims specific performance, she should generally be required to show that there is an attribute of the performance valued by the claimant for non-economic reasons for which there is no substitute. But no evidence is needed to establish this in claims for specific performance of contracts to dispose interests in land.[34] It might be thought that the fact that the transaction concerns land justifies an inference that it has unique attributes valued by the claimant for non-economic reasons because that would be true in most cases.[35] That is not obvious in a modern real estate market where residential and commercial land is often traded as an investment. Even if it was true, that the claimant values the land for its unique attributes would be within the peculiar knowledge of the claimant, and not be difficult to prove, such that no presumption would be needed.

If this material fact were merely inferred by an evidentiary presumption, it should be rebuttable by proving that the claimant did not value the land for non-economic reasons. However, there is no reported decision in English law in which the court refused specific performance to a purchaser for this reason, and many state that the order is available 'as of right' subject to there being no equitable reason to refuse the order.[36] So, in *OPM*, Brindle QC specifically enforced the sale of a home to a land developer, for whom damages were adequate, because:

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[34] Gareth Jones and William Goodhart, *Specific Performance* (2nd edn, Bloomsbury 1996), 19. See also: *OPM Property Services Ltd v Venner* [2003] EWHC 427; *Amec Properties v Planning & Research Systems* [1992] BCLC 1149.

[35] Malcolm Lavoie, 'Canada's 'Unique' Approach to Specific Performance in Contracts for the Sale of Land' (2012) 12(2) OUCLJ 207.

[36] *Eastern Counties Rly Co v Hawkes* (1855) 5 HLC 331, 376; *Hall v Warren* (1804) 9 Ves Jun 605, 608; *Patel v Ali* [1984] Ch 283, 286.

> [I]n the case of a contract to transfer an interest in land, specific performance is typically granted almost as of right, and the court does not normally refuse the remedy because of the argument that the remedy of damages is adequate. The practice may be different in Canada… or in New Zealand… but the English practice is well established.[37]

Given that the court may still order specific performance when damages would be adequate, it cannot be that an evidentiary presumption that the purchaser values certain unique attributes of the land for non-economic reasons justifies the systematic specific enforcement of contracts to dispose interests in land.

Further, as the orthodox view relies on the unique attributes of land to justify the conclusion that damages would always be inadequate for a contract to transfer an interest in land, it cannot explain why those same attributes would not justify that same conclusion for contracts to grant licences to use land. In both cases, the performance is unique because the land has certain unique physical attributes. But a claimant is not entitled to specific performance of a grant of licence unless it can be established that damages are inadequate, such as when no other suitable land is available for use.[38] That the sale of land grants an estate to the claimant, but a licence a mere personal right, cannot be a material distinction on the conventional view because what makes damages inadequate is the physical uniqueness of the land, not the nature of the claimant's right.

3.1.3.2 An alternative account

The better view is that the AODR does not apply to claims by purchasers for specific performance of contracts to dispose interests in land. That is because the claimant need not prove that damages are inadequate, and the order can be made when damages are

[37] *OPM* (n 34), [47].

[38] *Verrall v Great Yarmouth BC* [1981] QB 202, 210, 214-215.

adequate. That means that some reason must be given for why the AODR does not apply to contracts to dispose interests in land.

This can be explained by the vendor-purchaser constructive trust (VPCT). If a vendor is obliged to transfer her right to identified land to a purchaser, and is not free to deal with, or dispose of, that right as her own, the purchaser acquires an equitable right to the vendor's title, such that the vendor holds her title on trust.[39] If the purchaser becomes absolutely entitled to that right, the purchaser has a right to apply to the court to collapse the trust.[40] As the AODR does not apply to a claim to collapse a trust, damages need not be inadequate.

This explains why the purchaser is not required to establish that damages would be inadequate to obtain specific performance of contracts for the creation or transfer of identified rights in land, such as freehold,[41] leases,[42] or easements,[43] but she is required to show that damages would be inadequate to enforce grants of licences.[44] That is because, in the former cases, the transferor is obliged to create or transfer an identified right to her land, which she is not free to deal with as her own, such that the transferor's right is held on trust for the transferee who, on meeting the conditions to becoming entitled to the transfer or creation of that right, can collapse the trust. But as licences do not create or

[39] *Lysaght v Edwards* (1876) 2 Ch D 499 (land); *Neville v Wilson* [1977] Ch 144 (shares); *Pooley* (n 29); *Englewood Properties Ltd v Patel* [2005] 1 WLR 1961, [48]-[58]; Ben McFarlane and Robert Stevens, 'The Nature of Equitable Property' (2010) 4 J Equity 1; Ben McFarlane, *The Structure of Property Law* (Hart 2009), 368.

[40] *Saunders* (n 28).

[41] *Lysaght* (n 39); *Re Sweeting* [1988] 1 All ER 1916.

[42] *Walsh v Lonsdale* (1882) 21 Ch D 9.

[43] *May v Belleville* [1905] 2 Ch 605.

[44] *Verrall* (n 38).

transfer a right in land,[45] there can be no subject matter to constitute the trust, so the promisee must establish damages would be inadequate to receive specific performance.

It also draws no arbitrary distinction between land and chattels. That is because a contract to sell chattels will establish a VPCT when the seller must transfer an identified right but title cannot pass without meeting certain formalities.[46] However, there are two reasons for the apparent difference. First, most contracts to sell chattels relate to unascertained chattels, such that there is no identified right to constitute a trust.[47] Second, when the contract of sale is for identified goods, unless the parties agree otherwise, legal title is transferred when the contract is formed, or as otherwise intended by the parties, such that the buyer gets legal title without any need for a VPCT.[48]

It also explains why vendors and purchasers are treated differently when their counterparty is bankrupt. A purchaser receives specific performance against a bankrupt vendor, though damages might be adequate, because she has a right to the vendor's title, which is no longer available for distribution among creditors.[49] But the vendor, having a mere personal right, has no right to any identified monies in the purchaser's estate, and so is not entitled to specific performance.[50]

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[45] *Winter Garden Theatres Ltd v Millennium Productions Ltd* [1948] AC 173, 188-189.

[46] *Pooley* (n 29); *Neville* (n 39); *Chinn v Collins* [1980] AC 533.

[47] *Re Wait* [1927] 1 Ch 606; *Re London Wine Co) Ltd* [1986] PCC 121; *Re Stapylton Fletcher Ltd* [1994] 1 WLR 1181; *Re Goldcorp Exchange Ltd* [1995] 1 AC 74.

[48] Sale of Goods Act (SGA) 1979, ss 17-18.

[49] *Re Rabbidge* (1878) 8 Ch D 367; *Pearce v Bastable's Trustee in Bankruptcy* [1901] 2 Ch 122, 124-125.

[50] *Holloway v York* (1877) 25 WR 627.

3.1.3.3 Objection

Some jurists claim that a VPCT arises because a contract to sell land is specifically enforceable.[51] That is, equity regards as done what ought to be done by vesting the transferee with equitable title to the land when it can be specifically enforced. If that is right, our account is circular: the AODR does not apply to the specific enforcement of a contract to dispose an interest in land because it executes a trust, when the trust itself depends on the contract being specifically enforceable.

Fortunately, this reasoning was rejected in *Tailby*. Lord Macnaghten held that the effectiveness of an equitable assignment of future property, effectuated by trust in English law,[52] does not turn on specific performance, and that a right to identified title is created because the transferor is obliged, on receiving title, to transfer it to the transferee, binding the transferor's conscience not to deal with that right inconsistently with her obligation.[53]

In any event, specific performance cannot be a *sufficient* condition for recognising an equitable right to legal title.[54] That is because the order is available when damages are inadequate, even when the subject matter of the contract is not ascertained,[55] such that there could be no right to a specific right. It is also not a *necessary* condition.[56] That is

[51] *Holroyd v Marshall* (1861) 10 HLC 191 (Lord Westbury); *Lysaght* (n 39); Robert Chambers, 'The Importance of Specific Performance' in Simone Degeling and James Edelman (eds), *Equity in Commercial Law* (Lawbook Co 2005); Sarah Worthington, *Equity* (2nd edn, OUP 2006), 264; Peter Turner, 'Understanding the constructive trust between vendor and purchaser' (2012) 128 LQR 582.

[52] Chee Ho Tham, *Understanding the Law of Assignment* (2020 CUP), 21.

[53] *Tailby v Official Receiver* (1888) 13 HL 523, 544-550.

[54] *Re London Wine* (n 47); *Re Stapylton* (n 47).

[55] *Duncuft v Albrecht* (1841) 12 Sim 189; *Langen and Wind Ltd v Bell* [1972] Ch 685; *Sky Petroleum Ltd v VIP Petroleum Ltd* [1974] 1 All ER 954; *Worldwide Dryers Ltd v Warner Howard Ltd* (1982) The Times 9; *Bilkus v King* [2001] All ER (D) 31; *Land Rover Group Ltd v UPH Ltd* [2003] 2 BCLC 222; *Vibrant Doors Ltd v Rohden UK Ltd* [2018] EWHC 1761. See also: *Buxton v Lister* (1746) 3 Atk 383; *Pollard v Clayton* (1855) 1 K & J 462.

[56] *Tailby* (n 53), 544-550.

because, if the conditions precedent to the obligation to transfer that right have been satisfied, and the vendor is not free to deal with it as her own, there is no additional requirement that the contract be specifically enforceable.[57]

If the conditions precedent to the vendor's obligation to transfer a specific right have been met, and she is not free to deal with it as her own, that seems normatively sufficient to recognise that the vendor holds that right for the purchaser. For example, if the vendor is bound to transfer that right and no other, she must: (i) not dispose of that right, for otherwise she could not transfer that right; (ii) use reasonable care to preserve that right, for the purchaser has an interest in it;[58] (iii) not diminish its usefulness,[59] including by granting third parties' interests without the purchaser's consent, as the purchaser contracted for that right for her particular use.[60] This combination of obligations is sufficient to say that the vendor holds the right for the benefit of the purchaser. There is no need to superadd that the contract must be specifically enforceable.[61]

There are also compelling reasons not to rely on the maxim that 'equity regards as done that which ought to be done' to establish a VPCT. These include that:

(a) If taken seriously, that maxim would call for the instantiation in the actual world of an obligation with juridical properties approximating the juridical state in the counterfactual world in which the parties had done what they should have done. That is simply not done. Equitable rights have different juridical properties to the

[57] *Pooley* (n 29). See also: *Chinn* (n 46).

[58] *Clarke v Ramuz* [1891] 2 QB 456, 459-460; *Raffety v Schofield* [1897] 1 Ch 937, 944.

[59] *Earl of Egmont v Smith* (1877) 6 Ch D 469.

[60] *Abdulla v Shah* [1959] AC 124.

[61] That is not to say that the trustee has all obligations typically associated with traditional trusts. That is because trust obligations to which any trustee is subjected are not uniform and are a matter of construing what has been undertaken: *Berkley v Poulett* [1977] 1 EGLR 86.

legal rights to which they relate,[62] such that the maxim does not explain the juridical state resulting from a VPCT.

(b) The maxim is arbitrary. Suppose D promises to transfer to C title to one of three almost indistinguishable adjacent lots of land. C pays the price. If D has appropriated land to the contract, equity regards as done that which should have been done, and D holds the right on trust for C. But if D has not appropriated land to the contract, C has a mere contractual right against D. Why does equity deem D as having done that which should have been done in transferring title to C, but not in appropriating land to the contract?[63] There is no difference between the obligations to transfer a right and to appropriate land, that would make the former more obligatory than the latter, to justify this difference in treatment.

(c) It requires the court to treat as existing what does not exist. There is no reason that the appropriate response to an obligation not having been performed is to deem that it was performed.[64] Even if one were to assume *arguendo* that the obligee is 'bound in conscience' not to rely on her not having done what she should have done in resisting a claim brought by the obligor, it is not clear why that should bind the conscience of third parties.[65]

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[62] McFarlane and Stevens (n 39).

[63] This is more common for chattels, but see: *Webb v Direct London and Portsmouth Rly Co* (1852) 1 De G M & G 522.

[64] William Swadling, 'The Vendor-Purchaser Constructive Trust' in Simone Degeling and James Edelman (eds), *Equity in Commercial Law* (Lawbook Co 2005).

[65] *Jerome v Kelly* [2004] 1 WLR 1409, [29].

As specific performance is not a necessary or sufficient condition for a VPCT, and the supporting maxim does not justify the VPCT, the better view is that the availability of specific performance is not a condition of a VPCT. That dissolves the circularity objection.

3.1.4 Order for the agreed sum

An order for the agreed sum is a judicial ruling that enforces an accrued obligation[66] that a debtor pay the creditor a fixed sum of money.[67] It is not subject to the AODR.[68] But it can be denied when the claimant has no legitimate interest in continuing to perform her obligations following the defendant's renunciation. There are two interpretations of this qualification: that it qualifies the court's power to order the agreed sum or the claimant's power to terminate the contract.

3.1.4.1 Doctrinal basis

In *White & Carter*, the House of Lords held that where a customer renounces a contract for advertising services, it does not discharge the parties' obligations unless the advertiser terminates the contract. The advertiser can continue to perform and earn its right to the agreed sum, though damages would restore it to the same position it would have been in had the customer performed.[69]

Lord Reid (Lords Tucker and Hodson not agreeing on this point) stated in *obiter* that:

[66] *Cavendish Square Holdings BV v El Makdessi* [2016] 2 All ER 519, [14].

[67] *Jervis v Harris* [1996] Ch 195, 200.

[68] *White & Carter (Councils) Ltd v McGregor* [1962] AC 413.

[69] Ibid.

> …it may well be that, if it can be shown that a person has no legitimate interest, financial or otherwise, in performing the contract, rather than claiming damages, he ought not to be allowed to saddle the other party with an additional burden with no benefit to himself.[70]

Lord Reid considered that the basis for this rule was the 'general equitable jurisdiction of the court'[71] to withhold from parties legal remedies to which they are entitled, citing *Grahame*.[72] In that case, the House of Lords refused an application for interdict to compel magistrates to remove stables constructed for the local police service from land they held on trust for the community for recreation because it would have wasted public resources and diminished law enforcement capabilities.

The House held that these factors justified refusing the discretionary remedy of interdict because a private litigant sought to enforce a public right to the detriment of the public interest. It held that the same factors would have been irrelevant had the litigant sought to enforce a private right[73] because private rights do not turn on public convenience. It follows that this is not a sound basis for Lord Reid's 'general equitable jurisdiction' to refuse a non-discretionary legal remedy that enforces a private right when the claimant has no legitimate interest in enforcing that right, which had not been endorsed in earlier reported Scottish or English legal decisions.

3.1.4.2 Order-qualifying view

Lord Reid's claim that there is an equitable jurisdiction to withhold legal remedies supports the view that the legitimate interest rule (LIR) qualifies the courts' power to order an agreed sum. This view is self-defeating unless the LIR is supplemented by a second rule.

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[70] Ibid, 431.

[71] Ibid, 431.

[72] *Grahame v Magistrates of Kirkcaldy* (1882) 7 App Cas 547.

[73] Ibid, 562-563.

An example:[74] D promises to pay C £20,000 to travel to Hong Kong and send her a report. D renounces the agreement. C affirms, completes the report, and sends it to D. C is entitled to £20,000 because she satisfied all conditions precedent to D's obligation to pay. But if she were denied the agreed sum and then terminated, she would be entitled to damages to restore her to the position that she would have been in had D performed.[75] If D performed her duties, D would have paid C £20,000 because C had done all that needed to be done to be entitled to that amount. That is the same value as the agreed sum.[76]

It follows that the LIR is inutile unless combined with a second rule confining damages to what the promisee would have received had she terminated at the time of renunciation. The only plausible candidate is the 'obligation' to mitigate loss.[77] That is, although the contract was not discharged by renunciation, because the claimant was obliged to mitigate by terminating the contract, the court assesses damages as though she had terminated and taken steps to mitigate.[78]

This presupposes that there is an 'obligation' to mitigate loss that arises before the event which causes the loss. That is not the conventional understanding of mitigation.[79] In *Solholt,* the Court of Appeal held that:

> A plaintiff is under no duty to mitigate his loss, despite the habitual use by lawyers of the phrase "duty to mitigate". He is completely free to act as he judges to be in his

[74] *White & Carter* (n 68), 442.

[75] *Robinson* (n 15), 855.

[76] Robert Stevens, BCL Lecture, 2017.

[77] Several jurists claim the rule is justified by the AODR or that mitigation justifies a reformed version of the rule: Hugh Beale (ed), *Chitty on Contracts* (33rd edn, Sweet & Maxwell 2019), 27-015; Burrows (n 7), 10.

[78] *The Alaskan Trader (No 2)* [1984] 1 All ER 129; *MSC Mediterranean Shipping Co SA v Cottonex Anstalt* [2016] EWCA Civ 789.

[79] *Darbishire v Warran* [1963] 1 WLR 1067; *Borealis AB v Geogas Trading* [2010] EWHC 2789 (Comm) [42]-[50].

> best interests. On the other hand, a defendant is not liable for all loss suffered by the plaintiff in consequence of his so acting. A defendant is only liable for such part of the plaintiff's loss as is properly to be regarded as caused by the defendants' breach of duty.[80]

The idea is that that the defendant is liable for losses caused by their wrong, and is simply not responsible for losses caused by the claimant's unreasonable conduct.[81] That is because the claimant is free to make decisions in her life, notwithstanding that the defendant's wrong altered the course of her life, and, as a responsible moral agent, is accountable for the outcomes of her decisions, should those decisions unnecessarily increase her losses or forgo gains.

This explains why a claimant who takes reasonable, but unsuccessful, measures to mitigate can claim the increased loss caused by having taken those steps.[82] That is because that loss would not have been suffered but for the wrong, and was not caused by the claimant's unreasonable conduct. But it is not obvious why, on the obligation-based account, a claimant is allowed to *increase* the defendant's liability by recovering losses caused by unsuccessful attempts to mitigate when she is obliged to *reduce* the defendant's liability. There seems to be no obvious reason to incentivise the claimant to do badly what she was already obliged to do well.

It also explains why the requirement to mitigate does not arise before the event which causes the loss. That is because, until that time, there is no 'loss' for the claimant to mitigate; it is one of countless possible futures. The claimant cannot mitigate that which

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[80] *The Solholt* [1983] 1 Lloyd's Rep 605, 608.

[81] Robert Stevens, 'Damages and the Right to Performance: A *Golden Victory* or Not?' in Jason Neyers, Richard Bronaugh, and Stephen Pitel (eds), *Exploring Contract Law* (Hart Publishing, 2009).

[82] *The Elena d'Amico* [1980] 1 Lloyd's Rep 75, 80; James Edelman (ed), *McGregor on Damages* (20th edn, Sweet & Maxwell), 9-102.

does not exist, and cannot be expected to prevent a hypothetical future loss that may never arise if the defendant does what she is obliged to do. So, in *Shindler*, Diplock J held that a managing director was not obliged to accept an offer of employment on suitable terms by a third party after having been advised that he would be removed from office, but before his removal, because he was not required to mitigate his loss before there had been a breach of contract which he accepted as a breach.[83]

There is also no reason that a claimant's failure to avoid a loss in advance of the event that causes the loss should make the claimant responsible for that loss. Suppose that the claimant's failure to prevent a loss and the defendant's subsequent wrong were necessary conditions for the occurrence of some loss. There is a choice as to whether the claimant or defendant is responsible for that loss. However, if the claimant was free to do what is said to have been her contribution to the loss, and the loss would not have been sustained had the defendant done that which she was obliged to do, there seems to be no reason for the claimant to be responsible for that loss.

If there was an obligation to mitigate that arose before the causative event, that would *save* the LIR from being inutile, but could not *justify* the LIR. That is because the LIR applies when it would be 'wholly unreasonable' for the claimant to continue to perform;[84] it does not apply when damages would be adequate, and the claimant could mitigate.[85] That means there are some cases when the claimant can claim the agreed sum because continued performance would not be wholly unreasonable, though she was obliged to terminate the agreement, mitigate, and claim damages. But there is no reason to allow the claimant to claim the agreed sum for performing a contract she was obliged

[83] *Shindler v Northern Raincoat Co* [1960] 1 WLR 1038, 1048.

[84] *Alaskan Trader (No 2)* (n 78); *The Dynamic* [2003] 2 Lloyd's Rep 693.

[85] *White & Carter* (n 68).

not to perform. It follows that the obligation to mitigate loss, which is called into service to save the LIR from being inutile, would require that the LIR be abandoned.

Finally, there is no normative justification for qualifying the claimant's entitlement to the agreed sum with the LIR, even if supplemented by an obligation to mitigate loss. The defendant's renunciation confers on the claimant a power to terminate. If she does *not* terminate, she remains obliged to perform as the contract has not been discharged. But if she does perform and earns the agreed sum, she will then be denied her accrued rights under the contract. And she will be treated as if she had terminated and taken steps to mitigate her loss from the time she affirmed. But if she had taken those steps, she would have broken her obligations because she continued to be obliged to perform. And the loss, which it is said she should have mitigated, did not exist at that time because the contract remained on foot. This has no place in any rational system of law. It grants the claimant a power to terminate that she is not free to exercise. It obliges her to take steps she is obliged not to take. And it demands that she avoid losses which simply do not exist.

3.1.4.3 Power-qualifying view

An alternative view is that when a defendant repudiates, the claimant acquires a power to affirm. But if the claimant has no legitimate interest in performing, she acquires no such power, meaning the parties' unaccrued obligations are discharged. So, even if the claimant later earned the agreed sum, the defendant would not be obliged to pay it.[86]

This misunderstands the law of termination. If a defendant repudiates the contract, it is not discharged. The claimant acquires a power to *terminate*. If she does not terminate,

[86] *Société Générale v Geys* [2012] UKSC 63, [116] (Lord Sumption, dissenting); *MSC v Cottonex Anstalt* 78, [42] (Moore-Bick VP), [61]-[62] (Tomlinson LJ).

the obligations subsist.[87] That means that if a claimant with no legitimate interest in performing did not acquire a power to terminate, the contract would not end, and the claimant would be deprived of her means of terminating a contract she no longer has an interest in performing.

That means that the LIR cannot simply prevent the power to terminate from arising. But it also cannot simply deem the claimant to have terminated. That is because a power confers on the power-holder a freedom to change her jural relations with another liable to her exercise of power.[88] If, regardless of how the power-holder exercises her power, her jural relationship with the subject will change *as though she had* exercised her power, it is not a power at all. It is a rule of law which brings about a change in the jural relationship of the parties on an event which is independent of her exercise of power. So, to say that a claimant with no legitimate interest acquires a 'power' to terminate, but is *deemed* to have exercised that power, is to deny that the claimant acquired a power at all, and to assert that the agreement was discharged by the repudiation.

So, the power-qualifying view commits its exponents to an automatic discharge theory of termination. This theory was rejected by in *Geys*[89] because it allows a wrongdoer to take advantage of her wrong by choosing when the contract will end.[90] This still has force when the claimant has no legitimate interest in performing. However, the Supreme Court also rejected automatic discharge theory because it is uncertain.[91] That applies *a*

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[87] *Howard v Pickford Tool Co Ltd* [1951] 1 KB 417, 421; *Geys* (n 86), [15]-[20] (Lord Hope SCJ), [42] (Lady Hale SCJ), [96]-[97] (Lord Wilson SCJ).

[88] Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions As Applied in judicial Reasoning and Other Legal Essays* (Yale University Press 1920), 7-9, 60.

[89] *Geys* (n 86), [15]-[20] (Lord Hope SCJ), [42] (Lady Hale SCJ), [96]-[97] (Lord Wilson SCJ).

[90] Ibid, [15], [18] and [31] (Lord Hope SCJ).

[91] Ibid, [96] (Lord Wilson SCJ).

fortiori to the LIR because parties would be required to embark on difficult normative and factual enquiries into whether an 'interest' is 'legitimate', such that continued performance would not be 'wholly unreasonable'. And this would need to be done at a time when the material facts bearing on that assessment may be unknown.

3.1.4.4 Summation

It follows that there is no reason to accept the LIR as a qualification on the court's power to order the agreed sum or claimant's power to terminate the agreement. But, for the purpose of this thesis, it is sufficient to recognise that even if the LIR is well-founded, it is not the AODR and should not qualify the availability of the order for an agreed sum.

3.1.5 Prohibitory injunctions

3.1.5.1 Conventional view

Prohibitory injunctions compel the defendant to forbear from acting.[92] It is not a condition precedent of these orders that damages be inadequate.[93] So, in *Doherty*, Lord Cairns LC held that when a promisee seeks to restrain a breach of a negative covenant, it will be restrained unless there are special countervailing reasons.[94] That is because 'contracting parties should ordinarily be held to their bargains'.[95] Lord Cairns LC distinguished this from specifically enforcing positive covenants, where judicial intervention might do 'more harm than… good'.[96]

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[92] *LauritzenCool AB v Lady Navigation Inc* [2005] EWCA Civ 579, [32]-[33].

[93] Cf *London and Blackwall Railway Co v Cross* (1886) 31 Ch D 354.

[94] *Doherty v Allman* (1878) 3 App Cas 709, 719-720. *Araci v Fallon* [2011] EWCA Civ 668, [70].

[95] *Dyson Technology Ltd v Pellery* [2016] EWCA Civ 87, [70]. See also: *SDI Retail Services Ltd v The Rangers Football Club Ltd* [2018] EWHC 2772 (Comm).

[96] *Doherty* (n 94), 720.

The AODR is also not a condition of restraining breaches of non-voluntary obligations. In *Imperial Gas*, Lord Kingsdown held: 'if a plaintiff applies for an injunction to restrain a violation of a common law right… he must establish that right at law: but when he has established his right… unless there be something special in the case, he is entitled as of course to an injunction...'.[97] This also applies in cases of nuisance,[98] trespass to land,[99] and infringement of patents[100] and copyright.[101] It has not been changed following *Lawrence,* where Lord Neuberger held that: 'I would accept that the *prima facie* position is that an injunction [for private nuisance] should be granted, so the legal burden is on the defendant to show why it should not.'[102]

It is also not a condition of restraining interferences with chattels.[103] In *Ximenes*, the Court held it would restrain an interference with a chattel when the claimant had 'a specific right in the property… in danger of being lost'.[104] And in *United Fruit*, the Court held the fact that bananas are ordinary chattels was not a reason not to restrain their unlawful sale when the claimant had clear title to them.[105]

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[97] *Imperial Gas Light & Coke Co v Broadbent* (1859) 7 HL Cas 600, 612.

[98] *Shelfer v City of London Electric Lighting Co* [1895] 1 Ch 287; *Kennaway* (n 23); *Watson v Croft Promo-Sport Ltd* [2009] EWCA Civ 15.

[99] *Woollerton and Wilson Ltd v Richard Costain Ltd* [1970] 1 All ER 483; *Patel v WH Smith Ltd* [1987] 2 All ER 569.

[100] *Coflexip SA v Stolt Comex Seaway Ms Ltd* [2001] RPC 9, [13].

[101] *Phonographic Performance Ltd v Maitra* [1998] FSR 749, 773.

[102] *Lawrence & Anor v Fen Tigers Ltd & Ors* [2014] AC 822, [121].

[103] Cf *Lady Arundell v Taunton* (1804) 10 Ves Jun 139. Contrast: *Newlands v Paynter* (1840) 4 My & Cr 408.

[104] *Ximenes v Franco* (1751) Dick 150, 150; *Tonnins v Prout* (1766) Dick 388 (Lord Camden).

[105] *United Fruit Co v Leyland & Co* [1930] 144 LT 97, 103; *Redler Grain Silos Ltd v BICC Ltd* [1982] 1 Lloyd's Rep 435.

3.1.5.1 Explaining the relation between the AODR and prohibitory injunctions

The authorities do not make clear whether the AODR does not qualify the availability of prohibitory injunctions because: (i) damages are never an adequate substitute for a negative performance; or (ii) the AODR is not a condition precedent to claims for prohibitory injunctions.

Smith claims that damages are never adequate for a negative performance because there is no substitute for a negative performance.[106] That cannot be right because:

(a) It is inconsistent with Elias LJ's reasoning in *Araci*, because, if it were true that damages were inadequate because there is no substitute for a negative performance, he could not have held that the adequacy of damages in that case was an 'irrelevant consideration'.[107]

(b) It implies that, when there is no substitute for a performance, damages are inadequate. That is not right. That is because, if the claimant values the right only for economic reasons, there is no reason that damages would not be adequate.[108]

(c) A prohibitory injunction will be refused, and damages in lieu ordered, when damages are adequate and the injunction would be oppressive.[109] However, if damages are inadequate because there is no substitute for a negative performance,

[106] Smith, (n 16), 156-157.

[107] *Araci* (n 94), [70].

[108] Section 4.1.1.

[109] *Shelfer* (n 98).

there is either no scope for this rule, or damages would have to be both adequate and inadequate in the same case.

In *Jaggard*, Millett LJ resolved this contradiction by holding that the AODR required only that *common law* damages be inadequate. They will be inadequate in all applications for prohibitory injunctions because they cover only past, not future, wrongs.[110] However, that the court cannot order common law damages at the time of judgment is not a reason to conclude that damages would not restore the claimant to the position that she would have been in had the defendant conformed to her obligation *after* the wrong.[111] But, in any event, the court might order equitable damages in lieu of a specific order in advance of the wrong. There is no reason that the court should not refuse the specific order if equitable damages were adequate for the same reason that it would refuse the same order had the wrong been committed and common law damages were adequate.

It follows that it cannot be right that damages are never adequate for a negative performance or because common law damages cannot be ordered for a future wrong. The better view is that the rule is not a condition precedent for prohibitory injunctions, but that the adequacy of damages may, in combination with the oppressiveness of the order, be a reason to order damages in lieu under s 50 of the Senior Courts Act 1981 (SCA).[112]

[110] *Jaggard v Sawyer* [1995] 1 WLR 269, 284.

[111] *Pollard* (n 55); *Fothergill v Rowland* (1873) LR 17 Eq 132.

[112] *Shelfer* (n 98).

3.2 When is the AODR a condition precedent to ordering a specific remedy?

The AODR is a condition precedent to some specific remedies. That means that if the claimant does not establish that damages are inadequate, the order will be refused.[113]

3.2.1 Specific performance of contractual obligations

The AODR applies to specific performance of contracts other than where it executes a trust.[114]

3.2.1.1 Goods and other chattels

Section 52 of the Sale of Goods Act 1979 (SGA) provides that the court may order specific performance or delivery of 'specific or ascertained goods'. That means the goods must be identified when the contract is made, form a part of an undivided share of identified goods, or later have been identified.[115] The claimant must also establish damages are inadequate.[116]

There is controversy over whether there remains residual jurisdiction to order specific performance, aside from s 52 SGA, of contracts to sell unascertained goods. Although there is *obiter* that there is not,[117] no court has conclusively resolved this question.[118] However, though the language of s 52 SGA confers a power on the court to order specific performance when the goods are specific or ascertained, it does not *ex facie* evince an intention to exhaust the equitable jurisdiction of the court to specifically enforce

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[113] *Stena Nautica (No 2)* [1982] 2 Lloyd's Rep 336, 348-349.

[114] *Makdessi* (n 66), [30]. *Argyll Stores* (n 2), 11.

[115] SGA 1979, s 61(1); *Re Wait* (n 47), 630.

[116] *Re Wait* (n 47), 630.

[117] *Re Wait* (n 47), 636 (Atkins LJ).

[118] *Re London Wine* (n 47).

contracts to sell unidentified goods. Indeed, s 2 of the Mercantile Law Amendment Act 1856, which was incorporated into SGA 1893 with minor revisions, sought to confer on Common Law Courts jurisdiction to more readily order specific performance and delivery. It did not apply, or limit the jurisdiction of, the Chancery.[119]

Before the SGA, the Chancery could specifically enforce contracts to sell unidentified goods.[120] That is because the fact that goods are unidentified does not mean that damages are adequate.[121] This is consistent with the law's treatment of other chattels. For example, in *Duncuft*, the court compelled a defendant to transfer an unascertained 50 railway shares because they were not readily available in the market.[122] Indeed, modern courts continue to specifically enforce contracts to sell unascertained goods notwithstanding s 52 SGA.[123]

There is a clear reason that a trust cannot be constituted without identified subject matter. That is because there could otherwise be no identified right to constitute the trust. But there is no equivalent reason to limit specific enforcement of contracts to sell unascertained goods. That is because it does not depend on the claimant having a right to an identified right, but the defendant having a mere personal obligation to perform and an order of damages being inadequate. And so, though some *obiter* supports the exclusion of a residual equitable jurisdiction to specifically enforce contracts to sell unidentified goods,

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[119] Mercantile Law Commission, *How Far the Mercantile Laws in the Different Parts of the United Kingdom of Great Britain and Ireland may be Advantageously Assimilated* (Second Report, Cm 1997, 1855), 10.

[120] *Buxton* (n 55); *Adderley* (n 30); *Pollard* (n 55).

[121] *Sky Petroleum* (n 55); *Worldwide Dryers* (n 55); *Land Rover* (n 55); *Vibrant Doors* (n 55).

[122] *Duncuft* (n 55), 199; *Langen* (n 55); *Bilkus* (n 55).

[123] See fn 121.

the language, history and purpose of the SGA, recent authorities, and principle, support the continued recognition of that jurisdiction.

3.2.1.2 Monetary obligations

Courts will not usually order specific performance of an obligation to pay a sum of money.[124] That is because damages will usually be adequate when the claimant's interest is purely economic.[125] However, the courts will not refuse specific performance when:

(a) The defendant holds a chose in action (e.g., a debt) on trust for the claimant.[126] That is because the claimant has a right to collapse the trust and claim the chose.

(b) The claimant holds a chose on trust for the defendant.[127] That is because, as discussed in Section 3.2.2.2, the claimant's freedom to use her right for her own ends has been restrained because of the trust, and that restraint will not be compensated in damages.

(c) The defendant has a personal obligation to pay money but, on the unusual facts of the case, damages would be inadequate.[128]

[124] *Rogers v Challis* (1859) 27 Beav 175; *South African Territories Ltd v Wallington* [1898] AC 309, 318.

[125] *Roger* (n 124).

[126] *Wright v Bell* (1818) 5 Price 325.

[127] *Withy v Cottle* (1823) 1 Sim & St 174; *Adderley* (n 30).

[128] Section 4.3.2.

3.2.2 Specific performance of obligations relating to land on the application of the vendor

3.2.2.1 Critique of the conventional view

The conventional view is that the court will specifically enforce a contract to dispose interests in land on the vendor's motion, unless there is some countervailing reason.[129] In *Hawkes*, a railway company resisted specific performance of a contract to sell *identified* land because it claimed that damages were adequate. The House of Lords affirmed the decision to order specific performance:

> [S]pecific performance is the right of every seller, as well as of every purchaser, unless it can be displaced. It has… long since been overruled, that a seller may go to law, as he only wants the money, whereas the purchaser wants the estate…[130]

However, some courts have refused specific performance of a contract to sell *unascertained* land because damages were adequate.[131] For example, in *Webb*, a company bought an unascertained eight acres of a vendor's land but later resiled. The Court of Appeal refused specific performance because the vendor had 'ready means of obtaining complete redress at law'.[132]

It is said that vendors are entitled to specific performance though damages are adequate because the remedies between contracting parties must be 'mutual'.[133] This cannot be right for two reasons. First, there is no norm of affirmative mutuality for specific performance because there are many cases in which only one party might obtain specific

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[129] *Lewis v Lechmere* (1722) 10 Mod 503, 505; *Hall* (n 36), 608; *Patel* (n 36), 286.

[130] *Hawkes* (n 36), 376.

[131] *Webb* (n 63); *Lord Stuart v London and North-Western Ry Co* (1852) 1 De G M & G 721.

[132] *Webb* (n 63), 530.

[133] *Lewis* (n 129), 505.

performance.[134] For example, if a purchaser is bankrupt, the vendor cannot get specific performance against her trustees in bankruptcy, though the trustees could get specific performance against the vendor.[135] Second, there is no justification for the rule. That the purchaser is entitled to specific performance is no reason to order it for the vendor when the reason the purchaser is so entitled does not apply to the vendor.

That the vendor wants the 'exact sum agreed' also does not make damages inadequate.[136] That is because in modern markets the vendor can usually identify an alternative buyer. If that takes time, subject to the vendor taking reasonable steps to mitigate, she can claim damages for the difference between the agreed sum and sale price.[137] And if the vendor needs the money to complete another contract, she can obtain a loan and claim interest and costs as damages.[138]

That the vendor wants to be divested of liabilities for the land also will not make damages inadequate.[139] That is because a vendor can usually find an alternative buyer and claim damages for additional liabilities that would not have been incurred had the contract been performed.

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[134] Eight examples are listed in James Ames, 'Mutuality in Specific performance' (1903) 111(1) Colum L Rev 1, 1-2.

[135] *Rabbidge* (n 49); *Holloway* (n 50).

[136] Cf *Hawkes* (n 36), 376.

[137] *Hooper v Oates* [2013] EWCA Civ 91.

[138] *Wadsworth v Lydall* [1981] 2 All ER 401, 405-406.

[139] *Hawkes* (n 36). See also: *Shaw v Fisher* (1855) 5 De G M & G 596; *Cheale v Kenward* (1858) 3 De G & H 27.

3.2.2.2 Alternative account

The starting point is that the vendor, by undertaking an obligation to transfer specific land to the purchaser, holds the right on trust for the purchaser.[140] This was recognised in *Hawkes* as forming part of the reason for a vendor's entitlement to specific performance. Lord Campbell held that:

> [T]he remedy must necessarily be afforded to the vendor… [because] on the signing of a valid contract for the sale of land, the equitable estate then vest[s]… in the purchaser, and the vendor… [holds] the legal estate only as his trustee.[141]

However, this is a reason for the *purchaser* to be entitled to specific performance because they are entitled to collapse the trust as of right. It is not, on its own, a reason that the *vendor* should be entitled to compel the purchaser to perform an obligation to pay monies.[142]

To understand why damages are not adequate for vendors in contracts to sell land requires an examination of their trust obligations. These include the following:

(a) to take reasonable measures to prevent physical deterioration of the land, and not cause damage to the land through want of reasonable care;[143]

(b) to secure the land against trespassers;[144]

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[140] *Lysaght* (n 39), 509-510.

[141] *Hawkes* (n 36), 360.

[142] Paul Davies, 'Being Specific about Specific Performance' (2018) 4 Conv 324, 329-330.

[143] *Phillips v Silvester* (1872) LR 8 Ch App 173; *Royal Bristol Permanent Building Society v Bromash* (1887) 35 Ch D 390; *Clarke* (n 58), 459-460; *Raffety* (n 58).

[144] *Clarke* (n 58), 459.

(c) if the land that has a particular use, to ensure its use is preserved, such as by maintaining cultivation on agricultural land;[145]

(d) not to re-let land without consulting the purchaser;[146]

(e) not to materially change the physical state of the land, such as by removing trees or fixtures;[147]

(f) that any improvements or affixations made by the vendor to the land after executing the contract of sale, even if made for her own benefit, enure for the purchaser's benefit and cannot be removed without her consent;[148] and

(g) that should the vendor obtain a windfall on her land, such as through trees being blown down, the vendor shall hold the severances for the purchaser or, if they are sold, account to the purchaser.[149]

These obligations, which arise when the vendor enters the agreement, and which become more onerous on payment of the price, are restraints on the vendor's freedom to use her rights for her ends. They are undertaken on the condition that the purchaser completes. But if the purchaser does not complete, the vendor receives no compensation for those restraints on her freedom.

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[145] *Egmont* (n 59), 475.

[146] *Abdulla* (n 60).

[147] *Maggenis v Fallon* (1828) 2 Molloy 561, 590-591; *Bromash* (n 143).

[148] *Hitchman v Walton* (1838) 4 M & W 409, 414-415; *Ex parte Belcher* (1835) 2 Mont & Ay 160, 165-166.

[149] *Poole v Shergold* (1746) 2 Bro CC 119; 1 Cox 273.

These restraints on the vendor's freedom to use her rights for her ends are a substantial detriment. Suppose she has a good lessee on above-market terms and the lease expires before conveyance. Pursuant to her duty to consult, the vendor receives, and follows, instructions not to renew the lease. If the purchaser does not complete, the vendor cannot be compensated for the value of the old lease's rent until a new lease is executed, or the difference in value between the old and new lease until the land is sold.[150] Those losses were not caused by the purchaser's breach and would have been suffered if she had performed. But the vendor is clearly worse off than if her freedom to use her rights for her own ends had not been restrained.

Examples can be multiplied. However, the idea is that damages will not compensate the vendor for being restrained in her freedom to use her rights for her ends, because, had the contract been performed, the vendor would have been subject to the same restraint. The vendor's interest in being free to use her rights for her own ends is a valuable interest[151] restrained on the condition that the purchaser conform to her obligations. Should the purchaser not so conform, the condition on which the vendor's freedom was restrained for the purchaser's benefit would have failed, but no compensation could be received, such that an interest of the vendor, a reason for the purchaser to have performed her duties, would remain unsatisfied.

It might be said that this interest is not a reason to make a specific order because the vendor restrained her freedom to use her rights as consideration for the price, so damages would give her all she bargained for. That is not right. The vendor's obligation to transfer her right to the purchaser is a term of the contract. This undertaking justifies

[150] The vendor could only recover these losses if purchaser promised to indemnify the vendor: *Abdulla* (n 60), 132.

[151] Arthur Ripstein, *Private Wrongs* (2016 HUP), 31-34.

ascribing trust obligations to the vendor. But those obligations are not terms of the contract or undertaken for the price. They are construed as having been undertaken because the vendor promised to transfer an identified right. That means that to say that damages would give the vendor all she had bargained for is no answer to the claim that the vendor has an interest in freely using her rights for which she will not be compensated. That is because the vendor has undertaken obligations additional to those under the contract to benefit the purchaser for which she will not receive compensation.

There are substantial advantages to this account:

(a) It explains *Webb* and *Lord Stuart*.[152] These cases concerned contracts to sell unascertained land, such that there could be no VPCT. As the vendors' rights were not restrained beyond the agreed terms, and their only interest was in the price, damages were adequate.

(b) It explains why specific performance is extended to vendors of chattels whose freedom to use their rights for their own ends have been constrained by a VPCT.[153]

(c) It explains several 'exceptions' to rules on mutuality:

    (i) A vendor cannot obtain specific performance against a purchaser's trustees in bankruptcy because the vendor is enforcing a personal obligation to pay monies. That damages are inadequate is not a sufficient reason for her to be prioritised over other creditors.[154] But a purchaser can get specific

[152] *Webb* (n 63); *Lord Stuart* (n 131).

[153] *Cogent v Gibson* (1864) 33 Beav 557; *Shaw* (n 139); *Cheale* (n 139).

[154] Section 4.3.3.

performance against the vendor's trustee in bankruptcy. That is because she has a right to the title to the land, so it does not form part of the vendor's estate.[155]

(ii) A vendor that does not have title to land at the time of contracting cannot obtain specific performance because damages would be adequate.[156] That is because the vendor has not had her freedom to deal with any right restrained until the right has been acquired. But if the vendor gets title, she becomes subject to a VPCT such that the order need not be refused to the vendor, because damages have become inadequate.[157]

(d) It explains why a vendor is entitled to specific performance when she has:

(i) conveyed her land to the purchaser, but the price remains unpaid;[158]

(ii) received payment of the price, but the purchaser refuses to complete.[159]

3.2.3 Mandatory injunctions

A mandatory injunction enforces an obligation that requires the defendant to do something.[160] It does not include an order which creates a mere incentive for the defendant

[155] *Rabbidge* (n 49).

[156] *Forrer v Nash* (1865) 35 Beav 167; *Wylson v Dunn* (1887) 34 Ch D 569, 577.

[157] *Langford v Pitt* (1731) 2 P Wms 629; *Coffin v Cooper* (1807) 14 Ves Jun 204.

[158] *Turner v Bladin* (1951) 82 CLR 463, 473-474.

[159] *Shaw* (n 139); *Cheale* (n 139).

[160] See: *Isenberg v East India House Estate Co Ltd* (1874) 3 De G J & S 263; *Redland Bricks Ltd v Morris & Ors* [1970] AC 652; *Shepherd Homes Ltd v Sandham* [1971] Ch 340, 351; *SDI* (n 95).

to do what they were obliged to do.[161] They are only ordered when damages are inadequate.[162] As held in *Isenberg*:

> The exercise of that power is one that must be attended with the greatest possible caution. I think, without intending to lay down any rule, that it is confined to cases where the injury done to the Plaintiff cannot be estimated and sufficiently compensated by a pecuniary sum. Where it admits of being so estimated… [and can be] compensated in money there appears to me to be no necessity to superadd the exercise of that extraordinary power by the court.[163]

This extends to contractual[164] and non-contractual duties.[165] But a principal is entitled to an order as of right to compel a fiduciary or trustee to perform an obligation, or to restrain her from breaching an obligation, whether or not compensation would be adequate.[166]

3.2.4 Specific delivery

Specific delivery compels the defendant to deliver up chattels to which the claimant has superior title. The Chancery had jurisdiction to order specific delivery when damages were inadequate.[167] For example, in *Pusey* the Lord Keeper ordered specific delivery of a Cornish horn which evidenced tenure of land.[168] The order is usually executed by contempt.

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[161] *LauritzenCool* (n 92), [7], [32]-[33].

[162] *Redland Bricks* (n 160), 665.

[163] *Isenberg* (n 160), 273.

[164] *Doherty* (n 94), 719-720; *SDI* (n 95); *Harcus Sinclair Llp v Your Lawyers Ltd* [2018] 1 WLR 2479.

[165] *Redland Bricks* (n 160), 665.

[166] *Attorney-General v Mayor of Liverpool* (1835) 1 My & Cr 171, 209.

[167] *Pusey v Pusey* (1684) 23 Eng Rep 465; *Pearne v Lisle* (1749) Amb 75.

[168] *Pusey* (n 167).

Historically, the Common Law Courts could order the defendant to return a chattel or pay damages on an action in detinue. But the defendant could always satisfy the order by paying damages.[169] Section 78 of the Common Law Procedure Act 1854 (CLPA) conferred jurisdiction to order specific delivery, without allowing the defendant to choose to retain the chattel. It was enforced through seizure, or distraint if the chattel could not be found,[170] and would be ordered when damages were inadequate.[171]

The jurisdiction to order specific delivery of goods remains under s 3(2)(a) of the Torts (Interference with Goods) Act 1977 (TIGA). TIGA abolishes detinue, but empowers courts to order specific delivery when 'appropriate'.[172] But the court continues to order specific delivery only when damages are inadequate. So, in *Devon Cider*, the court refused specific delivery of equipment used in brewing cider because they were ordinary articles of commerce available in the market.[173]

The AODR is not a condition for compelling a fiduciary or trustee to deliver chattels to her principal.[174]

3.3 Justifying the AODR

No system of law need make the availability of a remedy depend on the inadequacy of another. Indeed, in English law the claimant is usually entitled to elect between alternative

[169] *Bailey v Gill* [1919] 1 KB 41, 43.

[170] *In Re Scarth* (1874) LR 10 Ch App 234.

[171] *Whitely Ltd v Hilt* [1918] 2 KB 808, 819.

[172] TIGA, ss 2, 3(2)(a).

[173] *Tanks and Vessels Industries Ltd v Devon Cider Co Ltd* [2009] EWHC 1360 (Ch).

[174] *Wood v Rowcliffe* (1847) 2 Ph 382, 382-383.

remedies.[175] Some account must be given for why a successful claimant is not free to choose a specific order over damages when she considers it more beneficial. This explanation must also be consistent with the distribution of the AODR in Table 1.

Table 1. Distribution of the AODR[1]

Order	Does the AODR apply?	Comment
Prohibitory injunction	No	
Mandatory injunction	Yes	Rule does not apply when enforcing fiduciary/trust obligation
Specific performance	Yes	Rule does not apply when executing a trust
Specific delivery	Yes	Rule does not apply when enforcing fiduciary/trust obligation
Order of possession	No	
Execution of trust of land or chattels	No	

[1] This Table 1 refers only to the AODR as a condition precedent to the availability of the order. It does not consider the jurisdiction of the court to order damages in lieu.

After evaluating existing accounts for the AODR, this Section sets out a normative account which justifies the AODR as a condition precedent to certain specific orders and explains its distribution.

3.3.1 Existing justifications for the AODR

3.3.1.1 Concurrent jurisdiction

A common explanation for the AODR is that the law of equity has, as its purpose, the provision of a more perfect and complete justice than that which can be obtained at

[175] *Tang Man Sit (dec'd) v Capacious Investments Ltd* [1996] AC 514, 521-522, 525-527. See also: *United Australia Ltd v Barclays Bank Ltd* [1941] AC 1, 18-19, 30, 34.

common law.[176] And so, when common law remedies are adequate, there is simply no reason for equity to intercede.[177]

This explanation is inadequate for three reasons. First, the early Chancery did not generally consider that damages were an adequate substitute for specific enforcement of obligations[178] until *Cud.*[179] That means that to claim that the reason for the AODR is that equity would only intercede to provide a more perfect justice is an incomplete account because it does not explain why the Chancery came to accept that damages might be an adequate substitute for a specific remedy.

Second, the AODR did not apply to all specific orders made by the Chancery. For example, it did not apply to prohibitory injunctions, even after it was given jurisdiction to order damages in lieu. However, if the reason for the rule was that the Chancery would only intercede to ameliorate defects in the common law, there would be no reason to distinguish between prohibitory and mandatory orders. Third, when the CLPA gave statutory jurisdiction to Common Law Courts to order specific delivery of chattels without giving defendants the option of paying their value, the remedy became subject to the AODR. However, if the reason for the rule related to the function of Chancery, there would be no reason for this statutory jurisdiction to be subject to the AODR.

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[176] *Earl of Oxford's Case* (1615) 1 Ch Rep 1. Frederic William Maitland, *Equity: A Course of Lectures* (CUP 1936), 18-19.

[177] *Anon* (1460) Y.B. 39 H. VI. 26, 31. See also: John McGee (ed), *Snell's Equity* (34th edn, Sweet & Maxwell 2019), [1-002], [17-007]; Ian Spry, *Equitable Remedies* (9th edn, Sweet & Maxwell, 2013).

[178] Jeff Berryman, 'The Specific Performance Damages Continuum: An Historical Perspective' (1985) 17 Ottawa L Rev 295, 297; Alfred William Brian Simpson, *A History of the Common Law of Contract: The Rise of the Action of Assumpsit* (OUP 1987), 595; Willard Titus Barbour, 'The History of Contract in Early English Equity' in Paul Vinogradoff (ed), *Oxford Studies in Social and Legal History* (Clarendon Press 1914), 111-113.

[179] *Cud v Rutter* (1719) 1 P Wms 569. Although *Pusey* (n 167) was earlier in time, the actual reasons for decision, as opposed to its subsequent interpretation, do not refer to the AODR.

I will not attempt a more complete historical explanation of the AODR. Even if it explained *how* the rule came to be, it could not *justify* its continued existence. That is because the historical conditions thought to be pragmatic reasons for the rule cannot justify its maintenance following the administrative fusion of both courts, as those reasons no longer apply. That a function of equity was to supplement the common law does not explain why that should remain its purpose when its remedies are more effective in compelling the defendant to do what she has most reason to do, or why the defendant's failure to do the same should not be considered a defect in the common law which ought to be ameliorated through equitable specific remedies.

3.3.1.2 Economic arguments explaining the AODR

Scholars using economic methods to explain and justify the law have written extensively on the AODR as it applies to specific performance. Although there is insufficient space to give a complete account of each theory, some significant theories will be addressed.

Efficient Breach

Suppose C contracts to buy ψ from D for £20,000. X offers to buy ψ for £30,000. If C values ψ for less than £30,000, it would be more efficient for D to sell to X and compensate C for its losses, if there are no transaction costs. The doctrine of efficient breach asserts that, in such cases, D ought to be entitled to sell ψ to X, and compensate C, instead of being compelled to perform. It is sometimes thought that the AODR facilitates this outcome through refusing specific remedies when C can enter the market, obtain a substitute for ψ, and be compensated for the difference in value.[180]

[180] Restatement (n 7), Chapter 16 and § 359.

The doctrine of efficient breach is incompatible with English law. A promisor has an obligation to perform, not to perform *or* pay damages.[181] If that was the true understanding of contractual obligations, there would be no reason to: (i) order specific performance, because the promisor would be entitled to perform by paying damages;[182] or (ii) hold third parties liable for inducing a promisor to breach her obligation because they could not be secondarily liable for inducing acts or omissions that were merely an alternative mode of performing an obligation.[183]

The AODR also cannot be explained by a modified efficient breach theory which refuses specific orders when the claimant can obtain a substitute performance and it is more efficient for the defendant not to perform. That is because if ψ is valued for non-economic reasons for which no substitute is available, a specific order can be ordered even though it is less efficient.[184] Conversely, if ψ was a mere article of commerce, even if the most efficient transaction is between C and D, C would still be confined to damages.[185] It also cannot explain the distribution of the AODR because an assessment of the economic consequences of alternative remedies might be made of all specific orders, not just those qualified by the AODR.

Other theorists claim that the AODR should be reformed to conform to efficient breach theory. This should not be supported for three reasons. First, it assumes that private law should be justified by the extent to which it maximises the satisfaction of individual preferences. This is not so. Economic methods do not capture many important

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[181] *AB v CD* [2014] EWCA Civ 229, [27]; *Bath & North East Somerset District Council v Mowlem plc* [2015] 1 WLR 785, [15] (Mance LJ).

[182] Daniel Friedmann, 'The Efficient Breach Fallacy' (1989) 18(1) Legal Studies 1.

[183] *Lumley v Gye* (1853) 2 E & B 216; *OBG v Allan* [2008] 1 AC 1, [32].

[184] *Redler Grain* (n 105), 438.

[185] *Cohen v Roche* [1927] 1 KB 169.

values which characterise human experience.[186] And they deny the separateness of human lives: agents are means of bringing about desirable ends. These agents might be called on to sacrifice that which defines the character of their lives to secure marginal benefits for others.[187] This is not a legal system worth having. Second, the law of remedies is not a forward-looking instrument aimed at creating efficient economic outcomes. So, reforming the AODR in this way will make the law less intelligible and coherent. Third, it would require reform of both the role of judges and court procedures. That is because judges have no special expertise in determining the socio-economic consequences of their orders, and evidence required to establish those conclusions is rarely tendered in proceedings.[188]

Default rules

Some theorists claim the AODR is a 'default rule' that is justified because it is what notional parties would have agreed had they negotiated that rule.[189] The force of this argument is unobvious. If it is that the actual parties, or standard contracting parties, would have actually agreed to the AODR had they turned their mind to the question, this empirical fact could not be established by an imagined negotiation between notional parties. Even if the actual or standard parties had the attributes ascribed to the notional parties, the imagined negotiation would give no reason to believe their actual negotiations would arrive at the AODR. That is because, even if the AODR is the best rule among all possible rules, if the notional parties had the same attributes as actual or standard parties, the rules to which they would consent might be unjustified, inefficient or contradictory, as

[186] John Gardner, 'Backwards and Forwards in Tort Law' in John Gardner (ed), *Torts and Wrongs* (OUP 2019), 176.

[187] Bernard Williams, 'Persons, Character and Morality' in Bernard Williams (ed), *Moral Luck* (CUP 1981).

[188] Stevens (n 14), 312-314.

[189] For example: Kronman (n 7), 366-369.

they are liable to ordinary errors of reasoning. In any event, that commercial parties would have agreed to a rule had they considered the matter is not a reason for that rule to be instantiated in law, especially if it is otherwise unjustifiable.

However, it might be that the notional parties are ascribed with the attributes of 'ideally rational' parties so that they arrive at that rule which is in their mutual best interests even if it is not what they would have actually agreed. If so, the negotiations are narratives to support an outcome predetermined by the values imputed to the 'ideally rational' parties. Those values, which determine the rule, need independent justification.

This account also cannot justify the distribution of the AODR. That is because it could not be used, without artificiality, to explain why it limits orders that enforce non-contractual duties. Even for contractual duties, it does not explain why the AODR distinguishes between specific performance and prohibitory injunctions.

Bargaining positions

Another justification is that the ready availability of specific orders allows the promisee to negotiate a sum for a release of the promise that exceeds the right's value, because the promisor would pay any sum less than the cost of performing and the value she places on her liberty. In *Argyll Stores*, Lord Hoffmann held that this is objectionable because:

> [T]he purpose of the law of contract is not to punish wrongdoing but to satisfy the expectations of the party entitled to performance. A remedy which enables him to secure, in money terms, more than the performance due to him is unjust.[190]

The proposition that the fact that the promisee might negotiate a release for an amount which exceeds the value of performance 'punishes' the defendant cannot be right. That is because, in all cases, the defendant will not agree to compensate the claimant in an amount

[190] *Argyll Stores* (n 2), 15.

which exceeds the cost of performing, because she always has the option of performing. If the terms of the release would be more favourable to the defendant than her doing what she agreed, and remains obliged, to do, it does not punish the defendant.

Similarly, the promisee is not 'unjustly' enriched because she can negotiate a release exceeding the value of performance. The promisor has undertaken an obligation to perform. She has not undertaken a disjunctive obligation to perform or pay the value of performance. In so doing, she grants the promisee a power to control whether she should be released from her duties. That power is usually not granted subject to qualifications. That means the promisor has no moral or legal right to be released on terms that she pays the value of performance, or indeed at all. It follows that if the promisee refuses to release the promisor unless she pays more than the value of performance, the promisee is not unjustly enriched because she was not subject to a moral or legal obligation to release the promisor in exchange for her paying the value of the performance.

It might then be thought that what makes the transaction unjust is not that the promisee can secure a release for an amount which exceeds the value of performance, but that the promisor is coerced into doing the same if specific performance were readily available in the legal order. That is because the promisee could always obtain an order of specific performance compelling the defendant to perform on pain of contempt. That cannot be right. That is because, whether or not specific performance is available in a legal order, when a promisee refuses to release a promisor for monies equal to the value of performance, the promisor should do what she is obliged to do. That which enables the promisee to negotiate a release for an amount which exceeds the value of performance is the promisor's voluntary assumption of an obligation to perform, and conferral on the promisee a power to control whether she is released from her obligation. That, in English law, the promisee cannot, in practice, demand an amount greater than the value of

performance for a release when specific performance is *not* available because it would be to the promisor's economic advantage to breach her obligation, does not prove that, when specific performance *is* available, the promisor transacts under an unjust coercion of law. That is because it cannot be thought unjust or coercive that the promisor is denied the tactical advantage of threatening to breach her obligation to secure a release on more beneficial terms, when she has no moral or legal entitlement to do the same.

Even assuming that it *would* be unjust, this account would justify a rule different from the AODR. That is because the fact that the promisee would suffer some small, non-trivial loss for which she could not be compensated is not a reason to conclude that the promisee would not use the order to extract a payment for greater than the value of performance from the promisor to put herself in a better (but decidedly different) position than if the duty had been performed. Unless any non-trivial amount of irreparable harm pre-emptively defeats the injustice of the promisee negotiating a 'ransom price', this rule would require court to balance the magnitude and probability of the promisor being held to ransom against the risk of irreparable harm. This is simply not the AODR.

Finally, if this was the justification for the AODR it would apply to all categories of specific orders that are enforced by contempt, including prohibitory injunctions and orders that enforce trust or fiduciary obligations. That means it cannot explain the distribution of the AODR.

3.3.1.3 Mitigation

Some authors justify the AODR on the basis that it encourages claimants to mitigate their loss, because if specific performance was readily available, claimants would have incentive to be 'idle and inefficient' which would cause economic waste.[191] This presupposes that

[191] Burrows (n 7), 412-414.

there *is* a broad policy to avoid economic waste in English law.[192] That is thought to be proven by the rules on mitigation.[193] But those rules do not support the recognition in law of any such policy. For example:

(a) The claimant is not required to mitigate before a defendant's breach, even though she knows a breach will be inevitable and is well-positioned to avoid her loss.[194] But if there was a policy of self-reliance or avoiding economic waste, there would be no reason for the claimant not to have been obliged to prevent her loss before the wrong.

(b) The claimant is entitled to claim expenses and increased losses associated with unsuccessful efforts to mitigate.[195] However, if the claimant is obliged to mitigate to avoid economic waste, there is no reason to incentivise her to do badly what she is obliged to do well.

(c) The court does not take into account the broader economic consequences associated with a claimant's course of action. Suppose a defendant repudiates a contract to build a folly on the claimant's land that would diminish the value of her, and surrounding, land. If the claimant arranges for a third party to build the

[192] Ibid. Edwin Peel, *Treitel's Law of Contract* (14th edn, Sweet & Maxwell 2015), 21-018; *Chitty* (n 77), 27-015.

[193] David Campbell and Donald Harris, 'In defence of breach: a critique of restitution and the performance interest' (2002) 22 Legal Studies 208, 220; Peel, (n 192), 21-013. *MSC Mediterranean Shipping Co SA v Cottonex Anstalt* [2015] EWHC 283, [111] (Leggatt J).

[194] *Shindler* (n 83).

[195] *Elena d'Amico* (n 82), 80; *McGregor* (n 82), 9-102.

folly, she can claim the cost of construction, and will not have failed to mitigate, though her actions caused economic waste.[196]

The better view is that there is no policy that the claimant must be self-reliant and avoid waste.[197] As discussed in Section 3.1.4.2, the rules on mitigation merely recognise that a defendant is not responsible for increased losses or forgone gains caused by a claimant's unreasonable decisions.

However, even if there was a policy of self-reliance or avoiding economic waste in English law, it is not considered a reason to refuse specific remedies. For example, a:

(a) promisee may deliver an unwanted performance to a promisor that has renounced her contract to earn the agreed sum, even when damages would be adequate and she could mitigate her loss; [198]

(b) beneficiary absolutely entitled to rights held on trust may collapse the trust as of right even when an order of equitable compensation would be adequate;[199]

(c) claimant may obtain an injunction to enforce a negative obligation, even when damages would be adequate, and the enforcement of the obligation is likely to prejudice the interests of both parties;[200]

[196] *Ruxley Electronics & Construction Ltd v Forsyth* [1996] AC 344 (HL), 361.

[197] Section 3.1.4.

[198] Section 3.1.4.2.

[199] Section 3.1.2.

[200] Section 3.1.5.

(d) principal may enforce any positive or negative obligation of a trustee or fiduciary, even when equitable compensation would be adequate and the principal could mitigate her loss;[201] and

(e) vendor may obtain specific performance of a contract for the sale of land, though she wants only the value of the land and could sell her land to a third party for the same price.[202]

If the reason for the AODR is that the claimant should be incentivised to mitigate her loss, each of these claims should be qualified by the AODR. However, as they are not, there is reason to conclude that, even if a policy of self-reliance or avoiding economic waste justified the rules on mitigation, it is not recognised as a reason to refuse at least some specific orders.

This would make the mitigation explanation arbitrary. That is because the normative force of the mitigation account is consequentialist: it is better to refuse specific orders when damages would be adequate, because otherwise claimants would have incentives to be inefficient. But if that reason has force, it has force regardless of the attributes of the right enforced, because in all cases the availability of specific remedies will create an incentive for the claimant not to mitigate her loss. That means that the mitigation account cannot explain the distribution of the AODR.

Additionally, a policy to incentivise the claimant not to be 'idle and inefficient' would justify a rule different from the AODR. That is because whether damages are inadequate does not depend on whether the claimant is in a position to mitigate her loss.

[201] Section 3.3.2.3.

[202] Section 3.2.2.

For example, when a vendor of land could sell her land to third parties for an equivalent or greater price than that for which the purchaser had agreed to buy the land, she is still entitled to specific performance though her loss could be mitigated.[203] Conversely, though a patentee cannot mitigate loss in selling services on products that are substitutes for the patented invention, she will be refused an interim injunction if damages are adequate.[204] That is because the court is concerned with whether damages would restore the claimant to the position that she would have been in had the defendant conformed to her obligation, relative to her legitimate interests.[205] It is not concerned with mitigation.

3.3.1.4 Change of mind

Chen-Wishart justifies the AODR on the basis that, when damages are adequate, the court refuses specific performance to permit change of mind. That is because the law values autonomy both at the time of contracting, and when the defendant changes her mind, but recognises that the defendant's change of mind is not cost-free, and so only permits her to change her mind when damages would be adequate.[206]

This could only be a local justification for the AODR. That is because it is meaningless to say that the rule qualifies specific delivery or injunctions to restrain or reverse torts to allow the defendant to change her mind. Even then, the account provides no explanation for why the defendant can change her mind when damages are adequate

[203] Section 3.1.3.

[204] *Polaroid* (n 8), 397.

[205] Section 4.2.2.

[206] Mindy-Chen Wishart, 'Contractual Remedies: Beyond Enforcing Contractual Remedies' (2016) 85 Geo Wash Law Rev 1617; Mindy Chen-Wishart, 'Specific Performance and Change of Mind' in Graham Virgo and Sarah Worthington (eds), *Commercial Remedies: Resolving Controversies* (CUP 2017), 115-118.

and the order enforces a positive obligation,[207] but not a negative obligation.[208] That when the claimant seeks to enforce a negative obligation there is a discretion to order damages in lieu when damages are adequate is no answer, because there would be no reason to *also* require that the making of the order be oppressive.[209]

The justification for allowing change of mind is that binding our future selves can constitute an undue constraint on our autonomy by compelling us to undertake a course of action that relates to goals or projects 'no longer authentically ours' by reason of changes in our values, attitudes, knowledge, and passions.[210] This implies that the AODR should not apply when the change of mind is not caused by some important alteration in the motivational set of the promisor. That is not the law. If a colliery decides it will no longer sell coal to a buyer because it can get a better bargain elsewhere, though it cannot be said that the undertaking is not 'authentically' its own, the court will still refuse specific performance because damages are adequate.[211]

Chen-Wishart answers this objection through raising a 'presumption in favour of liberty' which extends the AODR to '*all* cases of breach', which has the 'further advantage of saving judicial time' by not having to distinguish between 'worthy' and 'unworthy' changes of mind.[212] But why should that 'presumption' defeat the submission that the promisor, in the exercise of her liberty, had undertaken to deliver a future performance, for which she received consideration, and so should do what she promised? The premiss

[207] Sections 3.2.1 and 3.2.3.

[208] Section 3.1.5.

[209] *Shelfer* (n 98).

[210] Chen-Wishart (2017) (n 206), 116.

[211] *Pollard* (n 55); *Fothergill* (n 111).

[212] Chen-Wishart (2017) (n 206), 117.

of Chen-Wishart's account is that the law recognises that there is a conflict between the value of respecting the defendant's autonomy: (i) to bind herself to a future course of action; and (ii) not to undertake a course of action she has renounced. The defendant is not held to her promise because there has been a change in her motivational set that justifies allowing her later change of mind to defeat her earlier undertaking. But if there has been no important change in her motivational set, there is no reason to allow her change of mind to defeat her autonomous decision to bind herself to a future course of action. To then raise a 'presumption of liberty', which was neither explained or justified by Chen-Wishart, to justify letting the defendant resile from her contract even when there has been no important change in her motivational set, renders the change of mind account wholly redundant.

Compare the colliery with *Dyson Technology*.[213] The Court of Appeal restrained an engineer from taking employment with Tesla in breach of a restrictive covenant. That was a serious constraint on his autonomy to practice his chosen profession. Although his change of mind was 'worthy', the Court held that the AODR was not a condition of restraining the breach because of the 'basic principle… that contracting parties should ordinarily be held to their bargain…'.[214] That seems irreconcilable with the change of mind account.

3.3.1.5 Harm principle

Kimel asserts that the AODR is justified because the State is not justified in imposing constraints on the freedoms of a subject unless it is aimed at preventing harm, and no

[213] *Dyson Technology* (n 95).

[214] Ibid, [70].

harm will be prevented when damages would be adequate.[215] This account errs in relying on the harm principle.

First, the court can order specific remedies which restrain the freedom of its subjects even when damages would be as effective at averting harm. So, in *Redler Grain*, the court restrained a defendant, who sold ordinary electrical cables to the claimant, to whom title had passed, from delivering it to Iran, even though damages were adequate.[216]

Second, the court can refuse specific remedies because damages are adequate even when an order would avert harm to the claimant or third parties. For example, if the:

(a) claimant would suffer distress or frustration because of the defendant's breach, that would be an actual harm avoided by a specific order that would not make damages inadequate,[217] unless the claimant's peace of mind is an important object of the contract;

(b) claimant did not mitigate its loss, and that loss could be avoided by specific performance, that avoidable harm does not make damages inadequate;[218]

(c) defendant's breach would cause harm to an interest of the claimant, but it is not a reason for her duty, that it will not be compensated does not make damages inadequate;[219] and

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[215] Dori Kimel, *From Promise to Contract: Towards a Liberal Theory of Contract* (Bloomsbury 2003), 103-104.

[216] *Redler Grain* (n 105); *United Fruit* (n 105).

[217] *Stena Nautica (No 2)* (n 113).

[218] Ibid.

[219] *Polaroid* (n 8), 397.

(d) defendant's breach would cause a loss to a third party, but the reason for the obligation was not to benefit that third party, that they would suffer actual harm that would not be compensated does not make damages inadequate.[220]

As there is no principle of law that the court will not restrain the freedom of a subject by ordering specific remedies unless it is aimed at preventing harm, that cannot justify the AODR.

3.3.1.6 Administrative costs

Smith claims that what justifies the AODR is a combination of two propositions. That damages: (i) are often a reasonable substitute for specific orders; and (ii) typically impose fewer costs on the legal system.[221] It is not clear this unsubstantiated empirical claim is true: a difficult inquiry into damages may be more costly than a specific order.[222] Even in quotidian cases, such as enforcing contracts to sell goods, it is not clear ordering performance is more costly than assessing damages. That the defendant might breach the order, leading to costly contempt proceedings, cannot justify the AODR when most defendants conform to specific orders. In any event, if this justification were true, the court should make specific orders in all cases when the cost of assessing damages exceeds the cost of a specific order. This has not been done in any reported English decision.

[220] *Peaudouce* (n 8), 692.

[221] Smith, (n 16), 304-308

[222] *Societe Des Industries Metallurgiques SA v Bronx Engineering Co Ltd* [1975] 1 Lloyd's Rep 465.

3.3.2 Justifying the AODR

This Section sets out the justification for the AODR, before explaining why some orders, such as rights-based orders or orders enforcing trustee and fiduciary obligations, are not subject to that rule.

3.3.2.1 Principle of minimum restraint

Specific remedies and damages are aimed at achieving the same remedial objective: to restore the interests of the claimant recognised as reasons for the obligation enforced ('legitimate interests') as near as possible to the position they would have been in had the obligation been performed. This can be achieved by ordering the defendant to do what they have most reason to do or to pay damages. An order of damages will be 'adequate' when they are as good at achieving the remedial objective as a specific order.

As discussed in Chapter 4, only deficiencies in satisfying legitimate interests are relevant in evaluating the adequacy of damages. This explains why the interests of the claimant in:

(a) avoiding distress or frustration in contractual claims are not a reason that damages would be inadequate,[223] unless that is the object of the obligation;

(b) avoiding losses to third parties are not a reason that damages would be inadequate, unless that was the object of the obligation;[224] and

[223] *CN Marine Inc v Stena Line A/B*, The Times 11 May 1982 (QB) (Parker J).

[224] *Polaroid* (n 8), 397.

(c) avoiding losses that would not have been incurred were it not for the claimant's failure to mitigate are not a reason that damages would be inadequate.[225]

However, that damages would be 'adequate' is not, on its own, a sufficient reason to refuse a specific order.[226] It is an observation that a reason which might have otherwise counted against ordering damages (i.e., damages being inadequate) does not exist. And in English law, when the same cause of action gives rise to alternative remedies, the claimant is entitled to choose that remedy she considers most beneficial.[227] Nevertheless, that damages are as good as a specific order means that only a relatively weak reason is required to justify refusing the specific order.

A claimant that claims a specific remedy calls on the coercive power of the State to enforce an obligation that they assert the defendant owes them. That D is obliged to ψ for C is a reason, but not always a decisive reason, for the court to order D to ψ for C. That is because the set of reasons which determines issues of interpersonal justice between the parties is not identical with that applying to the court in determining whether a coercive order should be made.[228]

The State is not justified in interfering with the freedom of its subjects without sufficient reason. That is because the freedom of the subjects of a State to choose the character and values of their lives is an important value in any liberal society.[229] And so, to the extent that the State has two means that are equally good at achieving the same objective, the State is not justified in choosing that method that would entail a greater

[225] *Stena Nautica (No 1)* (n 223).

[226] Kimel (n 215), 104.

[227] *Tang Man Sit* (n 175), 521-523; *United Australia* (n 175).

[228] Gardner, (n 20).

[229] *Smethurst* (n 18), [250].

degree of restraint on the freedoms of its subjects, unless there is some other compelling reason that defeats the value of personal freedom.[230] This shall be described as the 'principle of minimum restraint'.

Specific orders can be separated into two categories:

(a) orders compelling the defendant to undertake a course of action ('positive specific remedies'), such as specific performance, mandatory injunctions, or specific delivery;

(b) orders restraining the defendant from undertaking a course of action they are obliged not to undertake ('negative specific remedies'), such as prohibitory injunctions.

Positive specific remedies restrain the freedom of the subject more than comparable negative specific remedies.[231] Compare the following orders:

> Order A: That D ψ for C.
>
> Order B: That D not-ψ for C.

The set of acts or forbearances consistent with Order B will, in almost all cases, be more extensive than those that are consistent with Order A. For example, if Order A compels D to deliver specified chattels to C at 5:00 pm on 1 July, not only can D not deal with those chattels in the interim in any way that defeats the order, but at 5:00 pm on 1 July D can do nothing other than deliver, or have an agent deliver, the chattels to C. However, if

[230] See also: Kimel (n 215), 103-104. That which distinguishes this account from Kimel's, which relies on the harm principle, is the reason the court is not justified in making a specific order when damages would be adequate.

[231] *Smethurst* (n 18), [250].

Order B restrains D from interfering with chattels for a time, D is free to undertake any course of action which does not do so.

This is formally true in all cases. That is because, within a finite set of temporal states, when each state has an infinite number of possible counterfactual variations, controlling the content of one state of the finite set of states will cause the relative size of the finite set of infinitely varied states, to be less than if, in each finite state, one variation of the infinite variations is restrained. It for this reason that a positive specific remedy, including ordering the defendant to pay monies, that controls the content of a member of a finite set of infinitely variable states, will entail a greater constraint on the defendant's degrees of freedom than a negative specific remedy.[232]

This explains why the AODR is a condition precedent to specific performance, specific delivery, and mandatory injunctions, but not prohibitory injunctions. That is because the former orders compel the defendant to undertake a course of action; the latter restrains a course of action. That means that, when assessed relative to an order of damages, specific performance, specific delivery, and mandatory injunctions entail a greater constraint on the degrees of freedom of the defendant, whereas a prohibitory injunction is a lesser constraint. And so, the AODR prevents the court from imposing a greater degree of constraint on the defendant to choose the character and value of her life when damages would be as good at achieving the court's remedial objective.

An obvious objection is that what is valuable in the defendant's life is not the number of possible counterfactual states that are available to her over her lifetime; it is the

[232] This can be demonstrated by conceptual representation. Suppose that there are two identical sets containing three variables [Set 1: (α β γ); Set 2 (α β γ)], and that each variable of the finite set could represent any integer. Now, say that in Set 1 the variables could be set at any value except '3', and in Set 2 γ must be set to the integer '3'. That means that the number of sets of unique permutations in Set 1 would be $(\infty\text{-}1)^3$, whereas the number of unique sets of permutations in Set 2 would be ∞^2, such that Set 1 would be larger than Set 2. This would also be true even when the set of variations for each variable is not infinite, but is a finite number greater than the finite number of sets.

extent to which her actualised states contribute to her wellbeing. And so, though damages might be a greater constraint on the defendant's degrees of freedom, an injunction which restrains a defendant from undertaking that course of action which contributes most to her wellbeing, such as practising her profession, will be more detrimental than damages.

This is true. But the adequacy of damages is a mere negative guideline for positive specific remedies. If the restraint on the freedom of the defendant is oppressive, the court may order damages in lieu if damages are adequate[233] or the order would cause hardship.[234] But that does not mean the rule has no purpose. It requires the court to refuse a positive specific remedy when two conditions are met: (i) damages are as good as the specific remedy; and (ii) the specific remedy is a greater restraint on the defendant's degrees of freedom than damages. If these conditions are satisfied, there is no need to enquire into the extent to which the restraint would deprive the defendant of what is valuable to her, as the specific order would not, in any event, be justified.

3.3.2.2 Rights-based claims

The principle of minimum restraint implies the AODR should be a condition of the availability of orders of possession and the execution of a trust. An explanation must be given for why it is not.

These remedies, and the agreed sum, respond to rights-based claims. That means that the claimant has an actionable right without having to establish an actual or threatened wrong.[235] So, an order to collapse a trust requires no breach of trust.[236] And an action for

[233] Senior Courts Act 1981, s 50; *Shelfer* (n 98); *Jaggard* (n 110); *Lawrence* (n 102).

[234] *Patel* (n 36).

[235] *Currie v Dempsey* (1967) 69 SR (NSW) 116, 139.

[236] *Saunders* (n 28).

the agreed sum can be brought when a debt has accrued[237] without establishing a breach of contract.[238]

An order of possession also responds to an actionable right to an estate in land.[239] The claimant is entitled to the order on establishing that she has title to the land and intends to regain possession; the defendant must then establish that she has a right to possession consistent with the claimant's title.[240] But the claimant need not prove trespass unless she claims damages. That explains *Gledhill*, in which Jessell MR held that an action to recover land, being a 'possessory action', had the same juridical ground as a declaration of title, but that a claim for mesne profits or an arrears goes on 'totally different grounds'.[241] Though in almost all cases in which the claimant seeks possession the defendant will have trespassed on her land, it is not essential to the action. For example, in *Harte*, the Court of Appeal made an order of possession when the only evidence before the court was that the defendant was not in occupation, but had asserted an estate in the land and sublet it to third parties. As there was no evidence of direct interference with the land, and accessory liability was not pleaded, this order could not have been grounded in trespass.[242]

That these causes of action are rights-based determines the available remedies. That is because, without a wrong having been committed, there is no reason to order that the defendant compensate the claimant for loss. That is because the claimant has not

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[237] *Jervis* (n 67), 200.

[238] *Young v Queensland Trustees Ltd* (1996) 99 CLR 560, 569.

[239] The action for recovery derives from the writ of ejectment which was, at least in form, a wrongs-based claim. But using artificial fictions, the landowner could bring her claim through establishing that she had a right to the land and an intention to regain possession, without establishing trespass: 3 Bl Comm 203-206; Frederic Maitland, *The Forms of Action at Common Law* (CUP 1936), 57-60.

[240] *Harte* (n 26), 316.

[241] *Gledhill v Hunter* (1880) 14 Ch D 492, 495-496.

[242] *Harte* (n 26).

established the defendant is responsible for that loss. For example, a beneficiary seeking to collapse a trust could not receive damages even if she would have invested the monies held on trust in a profitable business venture without establishing the trustee committed breach of trust. The same principle explains why damages are not an appropriate remedial response to claims in unjust enrichment.[243]

However, most rights are not actionable without establishing a wrong. A defendant is not entitled to specific performance, specific delivery or an injunction unless the claimant can establish that the defendant has breached, threatened to breach, or is likely to breach, her obligation.[244] That is because, unlike orders to collapse a trust, enforce a debt, or recover possession, a claimant cannot make out her cause of action without establishing an actual or threatened wrong. But that does not mean the underlying rights do not exist. That they do is established by the fact that they can be the subject of a declaration.[245] It means that there is no power to enforce those rights without establishing that the defendant has committed, or threatened to commit, a wrong.

It is not possible in this thesis to provide a comprehensive account as to why certain rights are actionable without establishing a wrong and others are not. It would require a developed theory of the distribution of powers to enforce rights and the conditions under which the State is willing to assist in enforcing those rights. However, there are some practical differences between those categories of rights that can be enforced using rights-based claims and those that cannot. So, to say 'you are occupying my land', 'that is my right you hold on trust', or 'you owe me a debt' gives a reason for the

[243] Peter Birks, 'The Concept of a Civil Wrong' in David Owen (ed), *The Philosophical Foundations of Tort Law* (OUP 1997), 48-49.

[244] *Fletcher v Bealey* (1885) 28 Ch D 688; *Turner* (n 158), 473-474; *Marks v Lilley* [1959] 1 WLR 749, 753-753; *Hasham v Zenab* [1960] AC 316, 329-330; *Clayton v Le Roy* [1911] 2 KB 1031.

[245] *Pyx Granite Co Ltd v Ministry of Housing* [1958] 1 QB 554; *Mellstrom v Garner* [1970] 1 WLR 603.

intervention of the court, as the claimant can establish that they have a current right that the defendant do something. But, for example, to say 'you must not enter my land' or that 'you promised to build me a house' gives no reason for intervention without also asserting the defendant intends to enter one's land or the promise has been broken. Such rights will only be actionable when the claimant establishes an actual or threatened wrong, because otherwise there is simply no reason for the court to intervene and enforce the right.

The exception is rights to chattels. To say 'you are in possession of my wristwatch' is a reason for a court to order specific delivery, without also saying 'you converted it to your own use' or that 'you refused to return it to me'. But this is not the law in England.[246] Why, then, are rights to land, but not chattels, enforceable by rights-based claims? Though our moral rights are determined by the reasons for action in our interpersonal relations with others, in determining which moral rights should be recognised as legal rights, and the powers we should have to enforce those rights, second-order values that are reasons for any legal system to do the same become relevant.[247] Although there is no adequate explanation[248] for why rights to chattels are not actionable without wrongdoing, rights to land have been, and remain, a socio-economic resource which are typically more important than chattels, both in the character of life that one leads and as an investment. This may be sufficient to mark out land as distinguishable from chattels in distributing powers to enforce rights in society, such that rights to land might be deserving of better protection than chattels through being actionable by rights-based claims.

The reason it matters that a claim is rights-based is because the principle of minimum restraint can apply only when alternative orders responding to the same cause

[246] *Clayton,* (n 244).

[247] Gardner, (n 20).

[248] Nicholas McBride, 'Vindicatio – The Missing Remedy?' (2016) 28 SAcLJ 1052.

of action are as good at achieving the same object. When the claimant has a rights-based claim, there is no entitlement to damages, such that the only legal response to that right is specific enforcement. That the claimant might have, in proving the material facts necessary to establish her rights-based claim, *also* made out a wrongs-based claim (e.g., trespass in an action for recovery of land) is immaterial; the claimant is free to elect to maintain that cause of action she considers most beneficial.[249] That is because the fact the defendant has also committed a wrong is not a reason not to vindicate the claimant's right if it is actionable or to deny her remedies that respond to that right. Nor in England do judges have discretion to determine which remedy is appropriate from the set of remedies that respond to the various established causes of action.[250] For example, if the same facts would establish a cause of action for tort or unjust enrichment, the court does not refuse restitution for unjust enrichment because compensation for tort would be adequate.[251] It follows that if the claimant has established such facts as would entitle her to maintain a rights-based or wrongs-based claim, she might elect to rely solely on her rights-based claim in receiving judgment, even if a wrong has also been established, and as an order of damages is not an available remedy for that cause of action, the claimant need not establish that damages would be inadequate.

This has not been changed by s 50 of the SCA. That statute does not confer a power on the courts to expropriate the claimant's right in return for the defendant paying its value.[252] It recognises a limited jurisdiction to order damages in lieu for specific

[249] *Henderson v Merrett Syndicates Ltd* [1994] UKHL 5.

[250] Peter Birks, 'Three Kinds of Objection to Discretionary Remedialism' (2000) 29 WALR 1.

[251] *United Australia* (n 175).

[252] *Shelfer* (n 98), 316; *Leeds Industrial Cooperative Society Ltd v Slack* [1924] AC 851, 860-862.

performance or injunctions.[253] That means that it cannot be used to order damages in lieu when the cause of action is not that the defendant has committed a wrong or is likely to commit a wrong in the future. That is because, in the absence of an historical, continuing, or future wrong, the defendant is not, and may never be, obliged to achieve next best conformance with the reasons for her primary obligation. So, there can be no reason to order compensatory damages. That the court can order damages in lieu for injunctions to restrain future wrongs is not inconsistent with this position. That is because the court is ordering that the defendant achieve next best conformance with a primary duty she will breach in the future.[254] It is not ordering damages as a price for the claimant's right.[255]

3.3.2.3 Fiduciary and trustee obligations

The principle of minimum restraint implies that the AODR should qualify orders that compel trustees and fiduciaries to act. But it does not. For example, in *Wood*, Lord Cottenham held that the court would restrain a fiduciary from selling, and compel her to deliver up, chattels belonging to her principal 'whether the subject be stock, cargoes, or chattels of whatever description'.[256] This must be explained.

A trustee or fiduciary is obliged, within the scope of her office, to subordinate her interests to the interests of her beneficiary.[257] This obligation is undertaken[258] and requires her to loyally carry out the non-fiduciary obligations or functions associated with her

[253] *Ferguson v Wilson* (1866) LR 2 Ch App 77, 88-89; *Eastwood v Lever* (1863) 4 De G J & S 114, 128; *Leeds* (n 252), 858.

[254] *Leeds* (n 252), 860-862; *Jaggard* (n 110), 206-208.

[255] Ibid. This is also consistent with the original formulation of s 2 of the Chancery Amendment Act 1958 (21 & 22 Vict. c. 27): *Leeds* (n 252), 857.

[256] *Wood* (n 174). See also: *Liverpool* (n 166), 209.

[257] *Grimaldi v Chameleon Mining NL (No 2)* (2012) 200 FCR 296, [177].

[258] Ibid.

office.[259] There are two reasons this makes a fiduciary liable to the specific enforcement of her obligations when damages are adequate. First, as the reason for the obligation is to ensure that she faithfully performs her non-fiduciary obligations, that reason would be defeated if the court were to refuse to order her to do what she has most reason to do, but only pay monies as a substitute for not having conformed to the obligation. For example, if F is obliged to ψ for P, F has reason to ψ for P. But if F has also undertaken to subordinate her interests to P, then not only does F have reason to ψ for P, she has reason to faithfully ψ for P. Damages might restore P to the position that she would have been in had F conformed to her obligation to ψ for P. However, it leaves reasons to which F has not conformed at all. That is because F has still failed to faithfully conform to her obligations to P when, at the time of judgment, she knew she was obliged to ψ for P. And so, damages will not be as good as a specific order at achieving next best conformance to the reasons for F's obligation because she has also undertaken to loyally do that which she has most reason to do, and not to perform her obligations in any other manner.

Second, as fiduciaries have undertaken to subordinate their interests to their beneficiaries, they cannot claim that their interest in personal freedom is a reason for the court to refuse a specific order. That is because the very reason for their having undertaken an obligation to subordinate their interests to the beneficiary is to assure the beneficiary of the due performance of their obligations. And so, even if an order of damages is as good as a specific order, the court is justified in ordering the defendant to do what she has most reason to do, because it would otherwise defeat the very reason for the fiduciary's obligation to subordinate her interests to her beneficiary.

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[259] *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 96–7; *Pilmer v Duke Group (In liq)* (2001) 207 CLR 165, [70]-[71]; *John Alexander Tennis Club v White City Tennis Club* (2010) 241 CLR 1, [87]. See also: James Edelman, 'The Role of Status in the Law of Obligations' in Andrew Gold and Paul Miller (eds), *Philosophical Foundations of Fiduciary Law* (OUP 2014), 36-37.

4. Meaning of the AODR

Odudu and Virgo claim the AODR is so 'treacherous' and 'bedevilled by uncertainty and inconsistency' that it should be rejected as a condition for awarding any remedy.[260] This is an indictment of the orthodox understanding of the AODR which consists of lists of reasons for which damages have been held inadequate by judges[261] without a theoretically rigorous framework for understanding the rule. This Section addresses that deficiency.

4.1 Orthodox approach

The orthodox understanding is that the AODR is a 'mercurial principle'.[262] That is because there are several factors thought to contribute to an assessment of whether damages are inadequate, and it can be difficult to predict which factor will be salient in each case.

This Section outlines the main grounds that leading works claim make damages inadequate. However, it aims to establish that these are not *independent* grounds for the inadequacy of damages. That is because the sole reason that damages are inadequate is that an order of damages would not restore the claimant to the same position, relative to her legitimate interests, that she would have been in had the defendant conformed to her obligations. The reasons listed in leading works are facts which contingently explain why that ground may, or may not, be satisfied in a given case.

[260] Okeoghene Odudu and Graham Virgo, 'Inadequacy of Compensatory Damages' (2009) 17 RLR 112, 121.

[261] For example, see: Jones and Goodhart (n 34), 18-22 and Chapter 4; Robert Sharpe, *Injunctions and Specific Performance* (5th edn, 2017 Thomson Reuters); Katy Barnett and Sirko Harder, *Remedies in Australian Private Law* (2nd edn, CUP 2018), Chapters 10-11; Burrows (n 7), Chapters 22-23.

[262] Jones and Goodhart (n 34), 32.

4.1.1 Substitutes in the market

Burrows claims that the 'most important factor in determining whether damages are adequate is whether money can buy a substitute for the promised performance'.[263] His criterion for whether there is a substitute for a performance is whether it is unique. This Section cannot repeat the critique of uniqueness in Section 3.1.3.1. It is sufficient to recognise that damages can be: (i) adequate when a performance is unique, but substitutes are available that are just as good at satisfying the claimant's legitimate interests;[264] and (ii) inadequate when a performance is not unique, but no substitute is available.[265] This Section focuses on whether there being no substitute for a performance is a sufficient reason for damages to be inadequate.

The starting point is to recognise that, once one abandons the criterion of 'uniqueness', there is no standard against which the court can assess whether a candidate performance is a substitute for a performance. This has not been discussed in detail in the literature. Some leading commentators claim it is an impersonal standard: that there is an attribute of a performance not instantiated in any candidate performance that is a reason for which the performance is valued independently of the claimant's interests.[266] But this is not a positive standard for determining whether there is a substitute for a performance. It merely excludes a personal standard. However, some jurists implicitly invoke a market-based standard: that the attribute must be a reason for which the performance is valued in the market.[267] But no court has required the claimant to adduce evidence of that fact, and

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[263] Burrows (n 7), 403.

[264] *Pearne*, (n 167); *Stena Nautica (No 2)* (n 113).

[265] *Sky Petroleum* (n 55); *Howard Perry & Co v British Railways* [1980] 1 WLR 1375; *Worldwide Dryers* (n 55); *Land Rover* (n 55); *Vibrant Doors* (n 55). See also: *Dougan v Ley* (1946) 71 CLR 142.

[266] Sarah Worthington, *Equity* (2nd edn, OUP 2006), 25-26; Burrows (n 7), 404-405.

[267] Worthington (n 266), 25-26.

it cannot be taken on judicial notice as a notorious or well-known fact.[268] Nor is it obvious why the fact that damages would be adequate for a notional market participant would be relevant in determining whether damages is adequate for the claimant. And to revert to a criterion of uniqueness exposes the account to the objections raised in Section 3.1.3.1.

Alternatively, one might use a personal standard: that there is an attribute of a performance not instantiated in any available candidate performance that is a reason for which that performance is valued by the claimant.[269] This interpretation is supported by leading authorities on specific delivery. For example, in *Cohen*, the Court refused specific delivery to an antiques dealer who had bought antique Hepplewhite chairs at an auction to be sold as inventory for his business. That was because: '[t]he plaintiff bought them in the ordinary way of his trade for the purpose of ordinary resale at a profit. He had no special customer in view. The lot was to become a part of his usual trade stock.'[270] Compare *Phillip*, where the Court ordered the defendant to restore an Adam-style door to the claimant's house as it contributed to an environment more congenial for her home.[271] These cases cannot be reconciled on a market-based standard, because both antique chairs and doors have attributes which are reasons for their being valued by the market. In each case, it was the reasons the claimants valued the chattels that determined whether damages were inadequate.

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[268] *Scott v Attorney General (Bahamas)* [2017] UKPC 15, [41].

[269] See Sharpe (n 261), [8.350].

[270] *Cohen* (n 185), 179; *Pearne*, (n 167); *Stena Nautica (No 2)* (n 113). This is the same reason that Canadian and New Zealand courts have refused to specifically enforce contracts for the sale of land when the buyer values the land for only for economic reasons: *Bonner* (n 32); *Semelhago* (n 4), [21]-[22]; *Southcourt Estates* (n 4). English law diverges on this point because it does not consider the availability of specific performance a condition precedent for the existence of a VPCT, which can be collapsed as of right: Section 3.1.3.3.

[271] *Phillip v Lamdin* [1949] 2 KB 33. See also: *North v Greater Northern Rhy Co* (1860) 2 Giff 64; *Howard Perry* (n 265).

Indeed, no impersonal standard for ascertaining whether a candidate performance is a substitute for a performance could be consistent with the justification for the AODR. That is because the reason for the AODR is that the court is not justified in making a specific order which entails a greater constraint on the freedom of the defendant when damages would be just as good. Damages will be 'as good' when they put the claimant in the position she would have been in had the defendant conformed to her obligation. But it is impossible to determine whether the claimant would be put in that position without taking into account her actual interests in the performance, which depend on her particular circumstances, that were affected by the defendant's conduct. And so, the AODR requires consideration of the reasons the claimant valued the performance.

However, as soon as this reasoning is used to understand that one could not know whether a candidate performance is a substitute for a performance without also knowing the reasons for which the claimant values that performance, the test must be abandoned. That is because damages can be as good as a specific order, even when there are no substitutes for a performance, when the claimant only values that performance for economic reasons. So, in *Dowling*, an artist bailed a painting to a dealer for engraving and exhibition for a time, with an option to buy at the end of the term. However, the dealer sold the painting to the defendant before the end of the term. The Court refused specific delivery, even though there were no substitutes for the artwork, because the claimant had wanted the agreed price for the painting, or its return so that it might be resold.[272] That means that damages can be adequate even when there are no substitutes for a performance if damages would restore the claimant to the position she would have been in had the defendant conformed to her obligation.

[272] *Dowling v Betjemann* (1862) 2 J & H 544. Compare: *Lowther v Lowther* (1806) 13 Ves Jun 95.

The idea that the absence of substitutes is an independent ground for concluding that an order of damages is inadequate should be abandoned. That is because damages can be inadequate when there are substitutes for a performance, and adequate when there are none. What matters is whether damages would restore the claimant to the position that she would have been in had the defendant conformed to her obligation. Establishing that there are no substitutes negatives one state of affairs which could in some, but not all, cases be a material fact that might contingently justify the conclusion that damages are adequate. But it should not be treated as an independent ground, for though it might form an important part of the explanation for why damages might be inadequate, it is never the reason that condition is satisfied.

4.1.2 Nominal damages

Damages are said to be inadequate when they would be nominal.[273] That cannot be right.[274] Suppose D sold C ordinary shares tradeable on the market and failed to transfer the shares on the agreed date, when their market value was not greater than the agreed sum. That D would receive nominal damages is not a reason to conclude that damages would be inadequate. That is because C had a mere economic interest in holding the shares for economic gain. She might have bought replacement shares and been no worse off. Damages would restore her to the position she would have been in had D performed.[275]

[273] *Chitty* (n 77), 27-019; Burrows (n 7), 409; Peel, (n 192), 21-022. *Beswick* (n 6); *Sudbrook* (n 31).

[274] *Peel Land and Property (Ports No 3) Ltd v TS Sheerness Steel Ltd* [2013] EWHC 2689 (Ch).

[275] *Re Schwabacher* (1908) 98 LT 127, 128-129.

4.1.3 Damages not recoverable for loss

Plainly, damages will be inadequate for the infringement of a right when they are not available at all.[276] But they will also be inadequate when the claimant would suffer a head of loss that could not be recovered, or a loss which would exceed the defendant's liability. For example, in *AB* damages were inadequate because a limitation clause excluded loss of bargain damages and capped the defendant's liability.[277]

However, that the claimant would suffer an irrecoverable loss is not always a sufficient reason to conclude that damages are inadequate. In *Polaroid*, the defendant infringed on the claimant's patent by manufacturing and selling instant photographic cameras which did not require film processing. This caused losses to the claimant's film processing activities for traditional cameras, which were crucial to its commercial interests. The Court of Appeal held that the losses to the film processing activities were not a reason to conclude that damages were inadequate, though they could not be recovered because they were too remote.[278] But in *Corruplast*, the Court held a loss in the sales of patented items after the expiration of the patent because the infringer would establish a bridgehead in the market to compete with the patentee by that time was not too remote to be considered.[279] These cases were described as irreconcilable in *Gerber Garment*,[280] because, if the loss of sales on unpatented items was not foreseeable during the life of the patent, there is no reason a loss of sales on patented items after the expiration of a patent would be foreseeable. But as discussed in Section 4.3.2, these decisions can be reconciled on this

[276] *Factortame Ltd v Secretary of State for Transport* [1990] 2 AC 85; *Woodford v Smith* [1970] 1 WLR 806.

[277] *AB v CD* (n 181). See also: *Bath* (n 181); *SDI* (n 95), [60].

[278] *Polaroid* (n 8).

[279] *Corruplast Ltd v George Harrison (Agencies) Ltd* [1978] RPC 761.

[280] *Gerber Garment Technology Inc v Lectra Systems Ltd & Anor* [1995] RPC 383.

account of the AODR once one develops a suitable criterion to delineate the claimant's legitimate interests.

4.1.4 Damages not recoverable for a loss that a third party suffered

In *Beswick*, the administrator of the deceased's (H) estate sought to specifically enforce the deceased's nephew's (N) promise to pay an annuity to his wife (W) after his death in consideration for H having transferred his business to N. W could not enforce the contract because she was not the promisee. H's estate also suffered no loss and so would receive only nominal damages.[281] The House of Lords ordered specific performance because, if nominal damages were all that was available, the remedy was 'manifestly useless'. [282] However, as discussed in Section 4.1.2, that damages would be nominal is not a sufficient reason to conclude that damages are inadequate.

Lord Reid claimed that specific performance was ordered to prevent N's unjust enrichment by having received the benefit of H's business, without providing an annuity for W.[283] This cannot be right. There is nothing 'unjust' about N's enrichment: he had a right to a transfer of the business. Had his having received the transfer of the business been unjust, the appropriate legal response would have been to reverse the enrichment, not compel performance. That which was unjust was N's not having performed his obligation to H to pay an annuity to W, and what needs to be explained is why nominal damages would not have been adequate when H would suffer no loss.

It might be thought H was entitled to specific performance because he had an interest in the advancement of W, who would suffer loss if N did not perform his obligation to H. But this, on its own, cannot be right. In *Peaudouce*, C sought an interim

[281] *Beswick* might have been decided differently under Contracts (Rights of Third Parties) Act 1999, ss 1, 4.

[282] *Beswick* (n 6), 102 (Lord Upjohn).

[283] Ibid, 73. This is the interpretation endorsed in *Chitty* (n 77), [27-019] and Peel, (n 192), 21-022.

injunction to restrain D from making and selling disposable nappies which infringed on C's patent. C claimed that D's continued infringement would cause loss to related entities in its corporate group (X_n), who had no claim against D, and whose losses could not be recovered by C, which amounted to irreparable harm. The Court held that it was 'wrong in principle' to restrain D from infringing on C's patent because it would cause irrecoverable loss to X_n,[284] in whose advancement C had an interest.

4.1.5 Impecuniosity of the defendant

In *The Oro Chief*, Staughton J held that when an order of damages would be as good for the buyer as the seller delivering to the buyer the goods which were promised, 'it may be that in special circumstances, such as when the seller is insolvent and can pay no damages, [the buyer] will still obtain an order for specific performance.'[285] But in *Anders*, Goulding J held 'commercial life would be subjected to new and unjust hazards if the court were to decree specific performance… simply because of a party's threatened insolvency'.[286] Some account must be given for why, and when, impecuniosity of the defendant will be considered a reason for the court to conclude that damages would be inadequate. This is explained in Section 4.3.3.

4.1.6 Difficulty in assessing damages

A controversial ground for the inadequacy of damages is difficulties assessing damages. In *Bronx Engineering,* Buckley LJ held that, although there would be difficulties in assessing damage caused by the non-delivery of machinery which would delay the expansion of a

[284] *Peaudouce* (n 8).

[285] *The Oro Chief* [1983] 2 Lloyd's Rep 509. This is a standard consideration in interim injunction cases: *American Cyanamid Co v Ethicon* [1975] 1 All ER 504; *Fellowes v Fisher* [1976] QB 122, 134, 140; *Evans Marshall* (n 6); *Associated Portland Cement Manufacturers Ltd v Tiegland Shipping A/S* [1975] 1 Lloyd's Rep 581.

[286] *Anders Utkilens Rederi A/S v Lovisa Stevedoring Co A/B* [1985] 2 All ER 669.

business in Tunisia for 6-12 months, it is not 'a matter that really affects principle at all'.[287] However, more recent authorities hold it is an 'acknowledged basis for treating damages as an inadequate remedy [because] it can be unjust to leave a party to claim damages which the court if necessary would have to quantify.'[288]

Austen-Baker attempts to reconcile these cases on the ground that the former were 'essentially problems of proof', whereas in the latter the loss was 'inherently unprovable'.[289] He claims that damages are inadequate for the assignment of a bankrupt's debt because intervening events might affect its value before creditors are paid out,[290] but not for losses caused by delayed expansion of a business.[291] That is not right. That is because the counterfactual gains the business would have made had its expansion not been delayed would also be affected by counterfactual or intervening events that are 'inherently unprovable'. But even if the cases were explained on this basis, it is not clear why the court should distinguish between losses conceptually impossible to prove (but simple to estimate) and losses not impossible to prove, but practically so difficult the court is not satisfied that its order of damages would adequately compensate the claimant.

Jones and Goodhart claim that damages will be inadequate only where they are *impossible* to quantify. That is because difficulties in estimation are a 'natural hazard of litigation'.[292] This is not to the point. If difficulties in quantifying damages were recognised

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[287] *Bronx Engineering* (n 222), 467. See also: *Fothergill* (n 111).

[288] *Bath* (n 181). See also: *Decro-Wall International SA v Practitioners in Marketing Ltd* [1971] 1 WLR 361; *Garden Cottage Foods Ltd v Milk Marketing Board* [1984] AC 130; *Evans Marshall* (n 6), 379, 382; *Araci* (n 94); *Smithkline Beecham Plc v Apotex Europe Ltd* [2003] EWCA Civ 137.

[289] Richard Austen-Baker, 'Difficulties with Damages as a Ground for Specific Performance' (1999)10 KLJ 1, 2, 5.

[290] *Adderley* (n 30).

[291] *Bronx Engineering* (n 222), 467.

[292] Jones and Goodhart (n 34), 114.

as a reason to conclude that damages were inadequate, that they often arise in litigation is not a reason not to avoid those difficulties when they can be avoided by specific order.[293] Burrows claims that the authorities support the conclusion that difficulties in assessing damages are relevant to enforcing negative, but not positive duties.[294] However, *Bronx Engineering* and *Fothergill* concerned the restraint of breaches of contract, though in practice the orders would have induced performance. Other leading works claim difficulties of quantification can be relevant, but are not decisive,[295] without stating the conditions under which they will be relevant. An account of these conditions is provided in Section 4.4.

4.2 Conceptual foundations of the AODR

The orthodox understanding does not provide a theoretically rigorous framework for the AODR. It comprises of an unorganised and conflicting collection of reasons for which courts have decided that damages are inadequate.

Section 4.2 elucidates the conceptual foundations for a new framework to understand the AODR. This framework is used to reconcile the authorities in Section 4.3.

4.2.1 Criterion for evaluating the adequacy of damages

A court makes orders to enforce an obligation to give the defendant additional reason to do what she already had reason to do when the order was made.[296] That is, to conform to the reasons for the obligation to which she has not conformed, is not conforming, or threatened not to conform. Should the defendant breach an obligation, those reasons

[293] Elizabeth MacDonald, 'The Inadequacy of Adequacy: The Granting of Specific Performance' (1987) 38 NILQ 244.

[294] Burrows (n 7), 407-408.

[295] Peel (n 192), 21-021; *Chitty* (n 77), 27-018.

[296] Smith (n 16), 134.

require the defendant to restore the claimant to the position she would have been in had the defendant conformed to her obligation.

The court might achieve this remedial object through making: (i) a specific order that requires the defendant to do that which she has most reason to do (i.e., the very thing she ought to do at the time of judgment); or (ii) an order of damages which is a substitute for the defendant doing that which she has most reason to do, in that it requires the defendant to pay to the claimant a sum of monies aimed at restoring the claimant to the position that she would have been in had the defendant conformed to her obligation.[297] However, the court is not justified in making a specific order which entails a greater constraint on the degrees of freedom of the defendant when an order of damages would be as good at achieving the remedial object.[298]

The AODR is the mechanism used to determine whether damages would be as good at achieving that remedial object as a specific order. That means that damages will be 'adequate' when it would restore the claimant to the position, or a position as beneficial to her, that she would have been in had the defendant conformed to her duty. So, in *Harnett v Yielding* Lord Redesdale held:

> Unquestionably the original foundation of these decrees was simply this, that damages at law would not give the party the compensation to which he was entitled; that is, would not put him in a situation as beneficial to him as if the agreement were specifically performed. On this ground, the court, in a variety of cases, has refused to interfere, where, from the nature of the case, damages must necessarily be commensurate to the injury sustained…[299]

[297] Section 2.2.

[298] Section 3.3.2.1.

[299] *Harnett v Yielding* (1805) 2 Sch & Lef 549, 552.

This requires the court to assess the extent to which the interests of the claimant have been affected by the defendant's breach of duty.[300] That is because it is impossible to determine whether the claimant would be restored to the same position that she would have been in had the defendant conformed to her obligation without taking into account the reasons for which the claimant valued the performance. For example, damages would not be an adequate substitute for a painting bought by a collector and valued for its beauty and brushwork,[301] but it would be adequate for a trader that has acquired a well-crafted antique chair to be traded as an article of commerce.[302] If the trader can establish the value of the chair she might have that sum in damages and be no worse off; but the collector wants not the value of the painting but for it to be added to her collection.

4.2.2 Delineating legitimate interests

A right exists when an interest or set of interests of the rightsholder is recognised as a reason to impose a correlative obligation on the defendant.[303] If that obligation is broken, it: (i) is the juristic basis for the defendant being subject to a secondary obligation;[304] and (ii) gives substance to that secondary obligation, which is to put the claimant in the position she would have been in had the defendant conformed to her obligation.[305] That is because the reasons for the obligation (i.e., the claimant's interests which are the juridical and normative bases for the obligation) continue to operate on the

[300] Cf Chambers (n 51), 437-441.

[301] *Lowther* (n 272). *North* (n 271); *Phillip* (n 271); *Howard Perry* (n 265); *Falcke v Gray* (1859) 4 Drew 651.

[302] *Cohen* (n 185). *Pearne*, (n 167); *Dowling* (n 272); *Stena Nautica (No 2)* (n 113).

[303] Raz (n 13).

[304] *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827, 850.

[305] *Robinson* (n 15), 855; *Livingstone* (n 15), 39.

defendant, who then has reason, and becomes obliged, to do that which achieves next best conformance to the reasons for that obligation.[306]

The 'minimum condition' for damages to be inadequate is that the claimant has a 'legitimate interest extending beyond pecuniary compensation for the breach'.[307] That means that the interest must not be of such a kind that it would be satisfied through an order of damages. But it also implies that not all interests of the claimant are relevant in determining whether damages would be adequate, even though those interests might be harmed by the defendant's wrong.

An interest will be 'legitimate' when it is within the set of interests which are recognised as reasons for the duty of the defendant. This requires an examination of the second-order reasons for which the law recognises the category of obligation imposed on the defendant to determine whether the interest relied on is an interest recognised as a reason for the obligation. These include considerations of interpersonal justice between the parties that determine what the defendant has reason to do, and second-order reasons for the State to impose a legal obligation on the defendant to do what she already has reason to do. This is a matter of construction of the obligation.

This analysis is also used in assessing whether a defendant is responsible for a loss.[308] That is because an interest that is not recognised as a reason for an obligation is not a reason which continues to operate on the defendant making her obliged to achieve next best conformance. So, in *Gorris* a shipowner was not liable to an owner for sheep washed overboard that would not have been lost had the shipowner provided fencing

[306] Gardner (2018) (n 14), 98-102; Gardner (2019) (n 14). Raz, (n 14), 191; Stevens, (n 14), 59; Ripstein, (n 14), 304; Weinrib, (n 14), 135.

[307] *Makdessi* (n 66), [30]; *Zinc Cobham Ltd v Adda Hotels* [2018] EWHC 1025 (Ch), [48].

[308] See also: Robert Stevens, 'Rights Restricting Remedies' in Andrew Robertson and Michael Tilbury (eds), *Divergences in Private Law* (Bloomsbury, 2015), 159.

required under the Contagious Diseases (Animals) Act 1869. That is because the object of that duty was to protect sheep from the transmission of diseases, not the hazards of the high seas.[309] And in *Re Corby Group*, the Court held that a tortfeasor that commits private nuisance is not liable for personal injuries because the reason for the duty is the claimant's interest in the use and enjoyment of her land, not the wellbeing of its occupiers.[310] It is also the reason a negligent valuer of collateral for a loan is not usually liable for any loss greater than the difference between the actual and assessed value of the collateral.[311]

The idea is that there is a two-staged process. First, the claimant must *actually* have an interest which cannot be remedied by damages. That is because the court is concerned with whether damages would restore the claimant, not a notional third party with counterfactual interests, to the same position that she would have been in had the defendant conformed to her obligation. Second, the interest which cannot be remedied by damages must be within the set of interests recognised as reasons for the obligation. That is because an interest which is not recognised as a reason for an obligation cannot operate on the defendant as a reason to restore the claimant to the position she would have been in had the defendant conformed to her obligation.

4.3 A framework for understanding the AODR

If damages are inadequate when they are not as good as a specific order at restoring the claimant to the position that she would have been in, relative to her legitimate interests, had the defendant conformed to her obligation, there are at least three reasons damages might be inadequate:

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[309] *Gorris v Scott* (1874) LR 9 Exch 125; *Council of the Shire of Sutherland v Heyman* (1985) 157 CLR 424.

[310] *Re Corby Group Litigation* [2009] 4 All ER 44. See also: *Hunter v Canary Wharf* [1997] AC 655; *Farley v Skinner* [2001] 3 WLR 899.

[311] *South Australian Asset Management Corporation & Ors v Eagle Star Insurance Co Ltd* [1997] AC 191.

(a) the harm to the legitimate interests of the claimant is incapable of being remedied by monies ('factually irreparable harm');

(b) the harm to the legitimate interests of the defendant can be remedied by monies, but the court cannot order damages for some or all of that harm ('legally irreparable harm'); and

(c) the harm to the legitimate interests of the defendant can be remedied by monies, and the court can order damages for that harm, but the order could not be enforced ('practically irreparable harm').

4.3.1 Factually irreparable harm

Damages are inadequate when the claimant has a non-economic interest recognised as a reason for the defendant's duty that cannot be satisfied by monies because damages would not restore her to the position she would have been in had the duty been performed. So, though damages might allow an art collector to acquire a substitute painting for that for which she had contracted, it will not have the same attributes for which the collector valued the original painting.[312] However, that the claimant has a non-economic interest in the defendant conforming to her obligation will not make damages inadequate when there are substitutes which meet the claimant's interests, though the defendant's performance is otherwise unique. So, in *Pearne* the court refused specific delivery of fourteen slaves because they were valued for their labour, not their unique physical or psychological attributes, such that others were just as good for the slaveowner.[313]

[312] *Lowther* (n 272).

[313] *Pearne*, (n 167). See also: *Stena Nautica (No 2)* (n 113).

Damages will, of course, be adequate when the claimant values the performance only for economic reasons. That is because damages would restore her to the position she would have been in had the obligation been performed. This distinguishes *Cohen* and *Dowling* from *Phillip* and *Lowther* because, in the former cases, the claimants desired delivery of a Hepplewhite chair and painting for resale in trade, but in the latter cases the claimant desired the Adam-style door and painting for their home and collections respectively.[314] *Thorn v Public Work Commissioners* is explained on the basis that the public authority had promised to sell all the stones of a certain description removed from the Old Westminster Bridge, meaning that the engineer acquired a right to the title to the stones once they were removed from the bridge, which could be enforced as of right.[315]

The secondary consequences for legitimate interests caused by the defendant's breach are also relevant in evaluating whether damages are adequate.[316] In *Land Rover*, a supplier was compelled to continue to provide customised chassis to a luxury vehicle manufacturer until it could re-source from another supplier because it could not fulfill contracts with customers, causing 'incalculable loss to its market position, and… its goodwill.'[317] That is because refusal of the order would have had implications for the strategic position of its business, distribution channels, scaled economies and commercial reputation. Even if these interests were only valued for economic reasons, these losses might have been too remote to be recovered,[318] such that damages would have been inadequate. This, of course, depends on the claimant's business and industry. So, if a loss

[314] *Lowther* (n 272); *Dowling* (n 272); *Cohen* (n 185); *Phillip* (n 271).

[315] *Thorn v Public Works Cmsrs* (1863) 32 Beav 490. See also: *Pooley* (n 29).

[316] *Bristol Missing Link Ltd v Bristol City Council* [2015] EWHC 876, [56]-[59]. See also: *Corruplast* (n 279); *Smithkline* (n 288); *OpenView Security Solutions v Merton* [2015] EWHC 2694.

[317] *Land Rover* (n 55).

[318] *Bristol Missing Link* (n 316), [56]-[59]. Section 4.3.2.

of market share for a small business in a fragmented industry has no implications for the business aside from the loss of future sales, damages would likely be adequate.[319]

This also explains why damages can be inadequate when the subject matter of the contract is not unique and there are market shortages. In *Sky Petroleum* Goulding J restrained a petroleum supplier from not supplying a service station under a supply contract for a time because, during the Iran Oil Crisis, no petroleum could have been bought from other suppliers in the market at commercial rates.[320] The business would have failed before final judgment if the order was refused. That means that damages could not have restored it to the same position it would have been in had the defendant conformed to its obligations. This condition will also be satisfied when there is some lesser harm to the interests of the business, if it cannot be restored to the position it would have been in had the defendant conformed to her obligation.[321]

4.3.2 Legally irreparable harm

Justice Walker held in *Peaudouce* that it is 'wrong in principle' to conclude that damages are inadequate because the claimant would suffer loss irrecoverable in damages.[322] This is wrong.[323] Damages will be inadequate when a breach would harm legitimate interests of the claimant that could be remedied by monies, but for which the court cannot order full compensation. That is because damages would not put the claimant in the position that she would have been in had the defendant conformed to her obligation.

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[319] *Garden Cottage Foods* (n 288).

[320] *Sky Petroleum* (n 55); *Worldwide Dryers* (n 55).

[321] *Land Rover* (n 55); *Vibrant Doors* (n 55).

[322] *Peaudouce* (n 8), 692.

[323] *Smithkline* (n 288), [18]; *Beswick* (n 6); *Corruplast* (n 279).

An order of damages will be inadequate when the claimant has disabled herself from claiming damages for all or some of the economic loss that the claimant would suffer because of the defendant's breach of duty. For example, in *AB* and *Bath* the Court of Appeal held that damages will be inadequate where a clause limits the extent of liability of the defendant, or the heads of loss which might be claimed.[324] That is because, even if the claimant has suffered only economic loss, damages could not restore the claimant to the position that she would have been in had the defendant conformed to her obligations.

However, damages cannot be inadequate just because damages would be nominal. That is because the defendant's breach of obligation might not have caused harm to any non-economic interest of the claimant, and the claimant might be economically no worse off because of the breach. So, in *Peel* Morgan J held nominal damages would be adequate for a lessee's threatened breach of covenant not to remove certain removable trade fixtures from land because the lessor had no right to, or security interest in, the trade fixtures, and the lessee wanted to sell them to pay rent to the lessor and reinvest in its business.[325]

In *Beswick*,[326] damages were inadequate because the reason for N's obligation to H to pay W an annuity after H's death was the advancement of W. Given that contracting parties are able to decide the purpose of their duties, and there was no second-order reason excluding this interest from those which English law recognises as reasons for contractual obligations, H's interest in W's advancement was a reason for N's obligation to perform for H. As this interest could not be satisfied in damages, they were inadequate. This is distinguishable from *Peaudouce*.[327] D was obliged not to infringe on C's patent because C

[324] *AB v CD* (n 181), [27]; *Bath* (n 181), [15].

[325] *Peel Land* (n 274).

[326] *Beswick* (n 6), discussed in Section 4.1.5.

[327] *Peaudouce* (n 8), discussed in Section 4.1.5.

had acquired the exclusive right to exploit the patented invention for its own economic gain. That D's infringement of C's patent caused loss to X_n did not diminish C's ability to exploit the invention for its own gain. As C's interest in advancing X_n was not a reason for D's obligation, it was not a reason for damages to be inadequate.

Cases on remote losses are more difficult to reconcile because the concept is used to refer to at least two categories of principles with different normative justifications. First, if the loss is a harm to an interest which is not recognised as a reason for the obligation, the defendant is not responsible for that loss, so it cannot be a reason to conclude that damages would be inadequate. So, in *Polaroid*, C's interest in film processing for traditional cameras was not a reason for D's obligation not to infringe on C's patent in manufacturing instant photographic cameras. That is because an interest in earning revenues on a process applied to substitute products unrelated to the patented invention is not a reason for the patent-holder's right to the invention. And so, C's irrecoverable losses to its film processing activities did not make damages inadequate.[328] However, this can be reconciled with *Corruplast* in which losses on the exploitation of a patented invention that would be incurred after the patent expired because a competitor established a bridgehead in the market through infringing on the patent before its expiration were held not to be too remote. That is because the interest of an inventor in enjoying a competitive advantage following the expiration of a patent by establishing a strong market position with limited competition over the life of the patent is recognised as a reason to impose an obligation on third parties not to infringe on the rights of the patent-holder to the invention.[329]

Second, some cases on remoteness can only be justified, if at all, on the basis that it would be 'unfair' for the defendant to be burdened with losses which were not within

[328] *Polaroid* (n 8).

[329] *Corruplast* (n 279).

her reasonable contemplation or foresight. In *OpenView Security*, Stuart-Smith J held in *obiter* that to allow these remote losses to be a reason to conclude that damages are inadequate would contradict the policy underpinning this rule of remoteness. [330] That is not right. If these losses are not recoverable because it would be 'unfair' to burden the defendant with them, that such a *distribution* would be unfair is not a reason not to consider those losses in assessing whether an order should be made that would *avoid* those losses. Remote losses which the defendant caused, and for which she is responsible, should make damages inadequate because damages would not restore the claimant to the position that she would have been in had the defendant conformed to her obligation.

It might be thought that remoteness in contract should be treated differently following *The Achilleas*. That is because Lords Hoffmann and Hope held remoteness in contract is based on an implied agreement: the defendant is not liable for damages for categories of loss for which she did not assume responsibility.[331] This does not change the position. The interest of the claimant for which she cannot recover is still a reason for the obligation. That which has changed is that the parties are treated as having agreed that they would not be liable for certain categories of losses. If so, remote losses in contract claims should be treated no differently from losses that cannot be recovered under limitation of liability clauses, such that they would remain a reason to consider damages inadequate.

4.3.3 Practically irreparable harm

Damages will be inadequate where they cannot be practically enforced against the defendant. That is because an order that the defendant pay damages that will never be paid

[330] *OpenView* (n 316).

[331] *Transfield Shipping Inc v Mercator Shipping Inc ('The Achilleas')* [2008] UKHL 48.

cannot put the claimant in the position that she would have been in had the defendant conformed to her obligation. So, in *The Laemthong Glory* Cooke J considered that an order of damages was inadequate because it could not be enforced against the receivers, because the receivers, and their assets, were in Yemen, in which English judgments were unlikely to be enforced.[332]

That the defendant cannot pay damages is also a reason that damages might be inadequate. That is because damages that will never be paid cannot restore the claimant to the position that she would have been in had the defendant conformed to her duties.[333] However, impecuniosity will often be excluded as a relevant consideration because it would conflict with insolvency law policies on the equal treatment of creditors.[334] That is because to make specific enforcement of duties available to a class of creditors because their rights can be specifically enforced and the debtor is, or might become, insolvent, when damages would otherwise be adequate, privileges that class over other classes whose duties are not specifically enforceable, when there is no reason to do so.[335]

This limited exception is justified by the need to ensure that creditors of an insolvent estate are given equal treatment in distributing its assets. But when the reason for the exception does not apply, impecuniosity is relevant in determining the adequacy of damages. This will arise in two cases: (i) when the defendant's performance does not reduce the rights available for distribution among creditors; and (ii) when the claimant's right does not form part of the insolvent estate available for distribution among

[332] *Laemthong Glory* [2004] EWHC 2738 (Comm); *The Seahawk* [1986] 1 WLR 657.

[333] *Evans Marshall* (n 6); *American Cyanamid* (n 285); *Fellowes* (n 285), 134, 140; *Oro Chief* (n 285).

[334] *Anders Utkilens* (n 286), 674 (Goulding J).

[335] *Mac-Jordan Construction Ltd v Brookmount Erostin Ltd* [1992] BCLC 350, 360.

creditors.[336] This latter principle explains why the court will order specific delivery of ordinary chattels in the hands of a debtor,[337] unless it is satisfied that the liquidator or debtor will pay to the claimant the full value of damages before dealing with the chattel.[338]

4.4 Uncertainty

Difficulty in assessing damages is not, on its own, a sufficient reason to conclude that damages are inadequate.[339] That is because, if the court is reasonably satisfied that damages would restore the claimant to the position she would have been in had the defendant conformed to her duties, that assessing damages would be costly or inconvenient does not justify a specific order that entails a greater invasion of the defendant's degrees of freedom. That is because the value of personal freedom that justifies the rule is not predicated on the convenience of the claimant or the courts.

This explains why, in *Bronx Engineering,* the court held that the ease of a vendor establishing the loss it would suffer from being prevented from selling the machine to a third party relative to the difficulty of a buyer in establishing its loss of profits from a delayed business expansion did not make damages inadequate when it had 'no doubt' damages 'would be satisfactorily quantified'.[340] However, when the court is not satisfied damages would restore the claimant to the position she would have been in had the defendant conformed to the obligation, damages will be inadequate.[341] This is not an

[336] Burrows (n 7), 408-409, 495-496.

[337] *Blue Sky One Ltd v Mahan Air* [2009] EWHC 3314 (Comm), [309]; *X-Fab Semiconductor Foundries AG v Plessey Semi Conductors Ltd* [2014] EWHC 1574 (QB), [32].

[338] *Devon Cider* (n 173), [55]-[56].

[339] *Bronx Engineering* (n 222), 469.

[340] Ibid, 470.

[341] *Bath* (n 181), [16].

independent ground of inadequacy. It merely reflects that, in civil proceedings, the court need not meet a standard of moral certainty in its decision.[342] So, if the court is reasonably satisfied that harm will be factually,[343] legally[344] or practically irreparable,[345] even if not satisfied to a degree of moral certitude, damages will be considered inadequate.

Controversially, the court may be satisfied that damages are inadequate because the claimant has suffered a loss that *could* be compensated by damages, but which is so uncertain that it is not satisfied any order *would* compensate the claimant for her loss. However, this is no different in principle. That is because the court is not concerned about whether a loss could theoretically be compensated, but whether damages are as good as a specific order at restoring the claimant to the position that she would have been in had the defendant conformed to her obligation. So, in *Araci*, Elias LJ held that even though an assessment of damages could be made 'in principle', it would be so speculative that damages were inadequate.[346] This turns on whether, in the circumstances of the case, the court is 'sufficiently lacking in its confidence about its ability to fairly and adequately quantify damages' that it considers an order of damages would be inadequate.[347]

However, inability to quantify the exact loss does not make damages inadequate.[348] It is sufficient that the claimant is restored substantially to the position she would have been in had the defendant conformed to her duty, when exactness is impossible. This is

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[342] *H (Minors)* [1996] AC 563. See also: *Briginshaw v Briginshaw* (1938) 60 CLR 336.

[343] *Bristol Missing Link* (n 316), [56]-[59]; *OpenView* (n 316).

[344] *Garden Cottage Foods* (n 288); *Factortame* (n 276).

[345] *Laemthong* (n 332); *Seahawk* (n 332).

[346] *Araci* (n 94), [70].

[347] *Bath* (n 181), [16].

[348] *Fothergill* (n 111).

why in *Adderley* Leach VC was wrong to say that the fact that the future value of a bankrupt's debt could not be known with certainty was a reason for the court to conclude that damages were inadequate.[349] Expert evidence from an accountant with access to the debtor's records could establish the dividends which might be expected from the debtor's estate with sufficient certainty that damages would return the claimant to substantially the position she would have been in had the wrong not been committed. But the decision was ultimately right, because the vendor was under an obligation to transfer to the purchaser a specific right, and could not freely deal with it as his own, such that the debt was held on a constructive trust, which the purchaser could enforce as of right.[350]

5. Reformulating the AODR

Evaluating all proposals for reform of the AODR is beyond the scope of this thesis. That is because it is aimed at explaining and justifying the AODR in English law, not criticising proposals for reform. However, it is important to consider one reformulation that has received support in some academic writings and judgments. It is that:

> The standard question… 'Are damages an adequate remedy?' might perhaps, in the light of the authorities in recent years, be rewritten: 'Is it just, in all the circumstances, that a plaintiff should be confined to his remedy in damages?'[351]

This has been supported in several works on specific remedies.[352] However, it is not a correct description of the law. So, in *Argyll Stores*, Lord Hoffmann held it was 'orthodox doctrine' that specific performance or mandatory injunctions 'will not be ordered when

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[349] *Adderley* (n 30).

[350] Strictly, the application was made by the vendor, but Leach VC reasoned about whether the purchaser would be entitled to an order of specific performance, and then extended the remedy to the vendor on grounds of mutuality.

[351] *Evans Marshall* (n 6), 364.

[352] *Chitty* (n 77), 27-015; Jones and Goodhart (n 34), 22; Lawson (n 12), 211-13.

damages are an adequate remedy'.[353] And in *Makdessi,* Lords Neuberger and Sumption held that 'specific performance… should ordinarily be refused where damages would be an adequate remedy'.[354] It is also considered a condition precedent to the court's jurisdiction to order specific performance or mandatory injunctions,[355] meaning that it is not a mere consideration to be ranked with others in determining whether it is 'just in all the circumstances' that the claimant be confined to damages.

The reformulated test requires the court to make an 'all-things-considered' judgment on whether it would be 'just in all the circumstances' to confine the claimant to damages. However, that formulation does not state a criterion against which the 'justness' of the order is to be assessed. There are three types of concepts of justice that would likely be used as a criterion. First, it might be that 'justice' is determined according to the values instantiated within the relevant legal system. This would not achieve a result materially different from the application of traditional equitable principles which are themselves constructed from the values instantiated within the legal order.

Second, it might be thought that 'justice' is evaluated relative to social values. However, in a heterogeneous society, not all values are shared by all socio-economic groups. That means it is difficult to identify a set of values agreed by all, or even a majority, of its members at a level sufficiently reified to be able to guide judicial decision-making. But even if a set of values could be identified, it is not obvious that those values would be relevant to the determination, in any given case, of whether it would be 'just' to confine the claimant to damages. And if those values were relevant, there is no reason that the private rights of individuals should be determined by values held by the majority, because

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[353] *Argyll Stores* (n 2), 11.

[354] *Makdessi* (n 66), [30].

[355] *Rogers* (n 124); *Scott v Rayment* (1868) LR 7 Eq 112; *Price v Strange* [1978] Ch 337, 369.

a reason for having a legal order in a democratic state is to ensure the interests of minority groups are not dominated by the interests of majority groups. It also remains true that judges have no special competence in determining which values are so widespread in society such that they might be characterised as 'social values', or how those abstract values, which lack the formal precision of law, might be applied in a given case.[356] Even if all these objections can be defeated, there is no reason to believe these values would be consistent with the values which are instantiated within our existing legal order. If they were not, using social values to determine the availability of equitable specific remedies would make the law less intelligible and coherent, when other related bodies of law continue to be organised around existing legal values.

Third, it might be thought that the 'justness' of confining the claimant to damages is evaluated according to a particular theory of justice. But no such theory has been articulated by the proponents of the reformulation. Even if courts were to endorse a particular theory of justice, there would be no reason that the principles derived from that theory would be the same as, or consistent with, the traditional principles relating to equitable specific orders or other related bodies of law. It follows that unless the axiology of that theory of justice is constituted by the same values as those instantiated in the legal order, it would make the law less coherent.

Even if a suitable criterion could be identified, the reformulated test calls on the court to make an 'all-things-considered' judgment on whether it is 'just' to confine the claimant to damages, when the reasons bearing on that judgment are incommensurable. True it is that existing principles require the court to balance incommensurable reasons. For example, the court might be called on to consider whether the public interest in a life-saving drug being available in a domestic market defeats the claimant's interest in the

[356] Stevens (n 14), 312-314.

defendant not infringing her patent.[357] However, the balancing of incommensurable reasons is mainly limited to unusual or unavoidable cases. Expanding the types of reasons which bear on the court's decision, and requiring them to be balanced relative to an abstract value of 'justice', would increase the frequency of cases where the court would need to balance incommensurable reasons, and the number of incommensurable reasons in each case.

This 'all-things-considered' method of judicial decision-making is not consistent with the traditional equitable method to exercising discretion. In *Haywood v Cope*, Lord Romilly MR held:

> [T]he discretion of the court must be exercised according to fixed and settled rules; you cannot exercise a discretion by merely considering what… would be fair to be done; what one person may consider fair, another person may consider very unfair; you must have some settled rule and principle upon which to determine how that discretion is to be exercised.[358]

This means that if the conditions precedent to making a specific order have been met, and there is no legal reason to refuse to make the order, it should be made.[359] That is what it means to exercise judicial discretion according to fixed and settled principles. However, that does not mean that, in all cases, the outcome will be entirely certain. That is because the court must make evaluative judgments against imprecise juridical standards that turn on the factual circumstances of each case. But it does mean that the court does not have an unfettered discretion to make an 'all-things-considered' judgment on whether it would be 'just in all the circumstances' to confine the claimant to damages.

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[357] *Roussell-Uclaf v GD Searle Ltd and Anor* [1977] FSR 125.

[358] *Haywood v Cope* (1858) 25 Beav 140, 151.

[359] Burrows (n 7), 402.

However, there are two senses in which it is true that equitable specific remedies might be said to be 'discretionary' remedies. First, as equity developed, earlier courts had to decide whether to grant or refuse a specific order when there were undefeated reasons to both refuse and grant the order, such that there were several rationally eligible choices. However, over time, these compromises between competing reasons became settled principles of law, such that in most non-marginal cases, the court does not exercise a discretion, but makes an evaluative judgment against an indeterminate standard. That is why the standard of error required for appeals against evaluative judgments, not discretion, applies to orders of specific performance and injunctions.[360] Second, there remain unusual cases in which no settled principle resolves the competing undefeated reasons to grant or refuse a specific order, such that there are several rationally eligible choices. The judge must then evaluate her options relative to the juridical values that are instantiated in the legal order and arrive at a final decision. The ascription of normative weight to competing reasons relative to relevant juridical values to make a decision between two rationally eligible choices explains why equitable specific orders involve an exercise of discretion,

If the court was required in *all* cases to make an 'all-things-considered judgment' that balances incommensurable reasons relative to certain juridical values, the political and moral values of the individual judge would be used to resolve the conflict between incommensurable reasons in each case.[361] That is for two main reasons. First, in most cases there will be several juridical values which bear on the justice of granting or refusing an equitable specific order. However, unless the axiology of the theory of justice, which is the criterion against which the justness of confining the claimant to damages is assessed, is fully specified in advance of its decision, the court will be called on to construct from that

[360] *Birmingham City Council v Pardoe* [2016] EWHC 3119.

[361] For a philosophical analysis of the procedure for making 'all-things-considered' judgments: Ruth Chang, 'All Things Considered' (2004) 18(1) Phil Persp 1.

theory at least an ordinal ranking of the relevant juridical values. That extrapolation of the axiology of the abstract value of justice, however, will require the judge to have recourse to her political or moral values, because there would be no independent criterion instantiated within the legal order to determine the ordinal ranking of values in all possible cases. Second, in each case judges will need to determine the normative weight to be ascribed to relevant properties of the states of affairs in which the order is granted or refused relative to the relevant juridical values. However, there is no independent criterion that determines what normative weight should be ascribed to those properties. It follows that in ascribing normative weight, or balancing incommensurable reasons, the judge will have significant recourse to her own values to assess the extent to which those reasons realise the relevant juridical values instantiated within the legal order.

It may be true that there is less need for certainty in the formulation of rules which govern remedies. That is because the rules guide the decisions of judges, not the behaviour of citizens who already know what they should not do by reason of non-remedial substantive law. However, though the reformulated test will inevitably make the conditions under which equitable specific orders are available less certain, which is in itself undesirable, the main reasons for which it should be rejected are because: (i) it does not articulate a determinate criterion for ascertaining that which is 'just in all the circumstances'; and (ii) it requires the court to make an 'all-things-considered' judgment which reconciles incommensurable reasons in most cases; which allows the values of individual judges to exert an outsized influence on the adjudication of most cases. That is likely to cause divergence in the resolution of individual cases, because there is no reason to believe that each judge would share the same set of values. This would make the law unpredictable and formally unjust, because like cases would not be treated alike, even when there is no material difference. It is also inconsistent with the principles of democratic and responsible systems of government because it gives unelected officials that are not

responsible to, or representative of, the people the power to impose their own moral and political values on society.

6. Conclusion

Academics have described the AODR as 'arbitrary and irrational'[362] and so 'bedevilled' by uncertainty it should be rejected as a condition of ordering specific remedies.[363] That is because, before this work, there was no sustained effort to build an intelligible framework for the AODR.

Specific orders and compensatory damages are aimed at achieving the same remedial object: restoring the claimant as near as possible to the position she would have been in had the defendant conformed to her obligation. Specific orders aim to achieve this object through compelling the defendant to do that which she has most reason to do at the time the order is made. Orders of damages aim to achieve this object through ordering the defendant to pay the claimant a sum of monies which is aimed at restoring the claimant, as far as money can, to that same position.

The AODR refuses a specific order which responds to the same cause of action as an order of damages when damages would be 'as good' as a specific order at achieving that remedial object, when that specific order imposes a greater constraint on the defendant's degrees of freedom than the order of damages. That is because, in a liberal and democratic society, the freedom of citizens to determine the character of their own lives is an important political value.

[362] John Dawson, 'Specific Performance in France and Germany' (1955) 57 Mich LR 495, 532.

[363] Odudu and Virgo (n 260).

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