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Economic Aspects of Damages and Specific Performance Compared

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I INTRODUCTION

In *Co-operative Insurance Society v Argyll Stores (Holdings)*[1] the plaintiffs granted the defendants a lease of one of the units in a shopping centre for 35 years to operate a supermarket. The supermarket was the largest shop in the centre and a great attraction. After a few years the defendants decided to close 27 unprofitable supermarkets. Following the decision and in breach of the contract, the defendants closed the supermarket in the plaintiffs' shopping centre. The plaintiffs sought specific performance of the agreement, which the Court of Appeal by majority decided to grant. The House of Lords reversed the decision, holding that the plaintiffs' sole remedy is in damages. Lord Hoffmann, who gave the leading speech, listed a number of reasons for the denial of specific performance. These included the difficulty of supervision, the heavy-handed nature of the enforcement mechanism and that the carrying on of business under a potential threat of contempt is oppressive. These are basically non-economic reasons for denying specific performance and are not within the scope of this chapter.[2]

However, Lord Hoffmann's speech referred also to economic elements that support the denial of specific performance, namely that the court will not order the defendant to carry on with a losing business and that the 'plaintiff will enrich himself at the defendant's expense' if an order for specific performance will cause the defendant a loss that is heavier that the

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1 [1998] AC 1, [1997] 2 WLR 898 (HL).

2 There are additional non-economic grounds affecting the choice of remedy for breach, such as undue interference with personal liberty, because of which specific performance is unavailable in a contract of personal service. This non-economic ground is similarly not within the ambit of this chapter.

loss that the plaintiff would suffer from non-performance.[3] I shall revert to these points below.[4] At this stage, I would like to emphasise the point that the plaintiffs in the *Co-operative Insurance Society* struggled to get specific performance, a costly endeavour which they lost, when there was no difficulty in getting damages. Obviously they must have assumed that specific performance would be much more advantageous.

It is also important to note that the denial of specific performance and the award of damages in lieu actually constitute a forced sale of the plaintiff's right of performance. In this respect it does not differ from the denial of a remedy, such as an injunction, that is designed to enforce a proprietary right. The award of damages in lieu of specific enforcement constitutes a forced sale of the claimant's property[5] or contractual right.

The following section deals with the indifference principle and examines the reasons for the discrepancy between the assumption which underlies the law of damages and the realities of the law of remedies.

II THE ELUSIVE INDIFFERENCE PRINCIPLE

'The rule of common law' regarding the award of damages for breach of contract is that the aggrieved party

> is, so far as money can do it, to be placed in the same situation with respect to damages as if the contract had been performed.

This classical statement, by Parke B in *Robinson v Harman*,[6] has been quoted innumerable times and can be found in practically every book on contract, as well as in every book on damages. This statement does not describe a rule of law, but rather depicts the purpose or aim of damages.[7] Needless to say, the purpose of specific performance is identical, though it is reached by a different route, namely by causing the contract to be performed.

[3] [1997] 2 WLR 898 (HL) 906 (Lord Hoffmann).

[4] Text accompanying nn 44 and 63.

[5] Cf *Jaggard v Sawyer* [1995] 1 WLR 269 (CA), discussed in text to n 59. See also the cases referred to in n 62.

[6] (1848) 1 Exch 850 (Exch) 855.

[7] This point has been generally recognised. See J Beatson, *Anson's Law of Contract* (Oxford University Press, 28th edn, 2002) 596; A Burrows, *Remedies for Torts and Breach of Contract* (Oxford University Press, 3rd edn, 2004) 33. In a recent article it has been suggested that the award of damages should not be viewed simply as an alternative to performance. Rather, it is intended to protect another interest, which presumably is narrower than the performance interest, namely the compensation interest: C Webb, 'Performance and Compensation: An Analysis of Contract Damages and Contractual Obligation' (2006) *OJLS* 26. This is an interesting idea. I shall nevertheless assume that the award of damages is meant to serve as a substitute to performance, though, as this article indicates, this purpose is often not achieved. Moreover, examples are conceivable in which damages exceed the value of the performance interest as well as the actual loss to the plaintiff. Examples of this possibility are discussed below.

Another way of describing the fundamental idea reflected by Parke B's statement is by the so-called indifference principle, coined by Melvin Eisenberg.[8] Under this principle, 'the remedial regime for breach of bargain contracts should make promisees indifferent between performance and legal relief'.[9]

The indifference principle reflects the very idea of placing the aggrieved party 'in the same situation . . . as if the contract had been performed'. The difference between the two relates to the pertinent point of view. The requirement to place the party in the situation he would have been in had the contract been performed reflects the legal system's point of view. It is a direction to the court to apply rules that would lead to this result. The indifference principle reflects the point of view of the aggrieved party. If the legal rules achieve their purpose, then as a consequence the aggrieved party will become indifferent between performance and damages.

Situations are conceivable in which this might indeed happen. The paradigmatic case is a contract to supply goods for which there are perfect substitutes that are readily obtainable on the market. Thus, suppose that X contracts with Y to purchase 50 tons of coal at a price of $100 per ton. When the date of performance arrives, the market price of coal has risen to $130 per ton and Y reneges. X may indeed be indifferent between specific performance and damages that will reflect the difference between the contract price and the market price.

It should be emphasised that Parke B's statement is not concerned with comparing the *remedy* of specific performance to that of damages. It compares the value of the *actual performance* under the contract which, because of the breach, did not occur with the remedy of damages. The indifference principle makes a similar comparison except that it is not confined to the remedy of damages. It seeks a remedial regime, which may include specific performance that will render the aggrieved party indifferent between the actual performance and the remedy that the legal system provides him with.[10]

Viewed in this light, it seems almost certain that in the above paradigmatic case X would prefer actual performance to damages that merely reflect the difference in price. If the party in breach is not willing to offer him the proper amount of damages on the date on which performance was due, he will have to bring an action in court. Needless to say, in addition to the risks of litigation, the action requires time and energy and entails costs. The indifference principle will be satisfied only if these elements are adequately reflected in the amount that X will eventually recover.

[8] MA Eisenberg, 'Actual and Virtual Specific Performance, the Theory of Efficient Breach, and the Indifference Principle in Contract Law' (2005) 93 *California Law Review* 975.
[9] *Ibid*, 977.
[10] *Ibid*.

The present article is mainly concerned not with comparing the *remedy* with the *agreed performance* that did not occur but with comparing the remedy of *damages* to that of *specific performance*. Viewed in this light, it may seem that in the paradigmatic case described above there is little difference between damages and specific performance, so that the purchaser will be indifferent between these two possibilities. But even this may depend on the circumstances. Thus, if the purchaser in the above example is in urgent need of the coal on the date of performance, he may find that damages are preferable. He could terminate the contract, obtain the coal from another source and claim damages. On the other hand, if his need for the coal is not urgent, he may be indifferent between damages and specific performance. It is thus clear that, even in instances in which the economic value of the two remedies, measured objectively, seem equal, there may be subjective elements that would lead the aggrieved party to prefer the one over the other.

There are other important reasons that lead to a difference in the economic value of the remedies. They are based on policy considerations that conflict with the aspiration to place the aggrieved party in the same situation as if the contract had been performed. Obviously, if these policy considerations lead to rules that affect both remedies in precisely the same way, they will retain the same value in relation to one another. This, however, is not necessarily what happens.

In the discussion that follows I shall examine the concept of subjective value and the extent to which it is obtainable by either specific performance or damages.

III SPECIFIC PERFORMANCE AND THE SUBJECTIVE INTEREST

An award of specific performance includes the following aspects:

1. It grants the plaintiff the subjective value of that which was promised to him, but imposes on him the subjective cost of his performance.
2. It imposes on the defendant the subjective cost of the required performance, but grants him the subjective benefit of the aggrieved party's performance.
3. It saves the need to appraise the value of the performance that was due.[11]
4. It absolves the plaintiff from the restrictions imposed by the rules on damages, namely:
   a elements for which compensation is not available;
   b issues of remoteness; and

[11] This aspect of specific performance is mainly procedural and will not be discussed in detail.

c the burden of mitigation.[12]

5. Specific performance may benefit third parties for whom damages may not be available.
6. Specific performance does not normally solve the loss inherent in delay in performance, a loss for which only an award of damages can compensate.[13]

As indicated by features 1 and 2 above, specific performance grants the parties their subjective interest in what they get under the contract and imposes upon them the subjective cost of their performance,[14] subject to an important qualification relating to the time of performance (feature 6 above). Subjective value is the value that each party attributes to performance that the other party promised to him, on the date on which performance takes place. Subjective cost is the cost that the party attributes to the performance that is due from him on the date that he has to perform.[15] On the other hand, damages are usually measured objectively—a point that is further examined below[16]—though, as a result of modern developments, the claimant's subjective position is in some instances taken into account.[17]

An examination of the subjective loss, which is the real loss, caused by the breach requires a distinction to be drawn between the case in which an exact substitute for the unperformed obligation can be found at a price that can be objectively determined and the case in which such a substitute is not readily available. Broadly speaking, in the first category the

12 The effect of contributory negligence on contractual liability raises issues that bear some similarity to mitigation. Thus, if the claimant failed to take measures to protect himself against potential breach, when such breach was likely to occur, it can be argued that he was negligent and that his negligence contributed to the loss. Yet the question hardly arises. A conspicuous example in which it could conceivably arise is in the case of anticipatory breach, but even in such an instance the issue is framed as one of mitigation; see Burrows, above n 7, 128. In view of the narrow role of contributory negligence in contract, I shall not discuss it in the present chapter. For our purposes it suffices to say that if the role of this defence is eventually extended, its effect on the choice of remedy for breach (damages or specific performance) will be similar to that of mitigation.

13 A question may also arise with regard to defective performance, which at least in theory can be remedied by an order to correct the defect (actually an order for specific performance).

14 Consequently, from the point of view of the aggrieved party, specific performance entails not only advantages but may impose upon him considerable burden. This is also conspicuous in (4)(c) above in the context of mitigation.

15 On subjective value, see DR Harris, AI Ogus and J Phillips 'Contractual Remedies and the Consumer Surplus' (1979) 95 *LQR* 581. Subjective valuation in other contexts is discussed in M Garner, 'The Role of Subjective Benefit in the Law of Unjust Enrichment' (1990) 10 *OJLS* 42; A Burrows, *The Law of Restitution*, (London, Butterworths 2nd edn, 2002) 23–4; G Virgo, *Principles of the Law of Restitution* (Oxford University Press, 2nd edn, 2005) 88–9.

16 Subjective measurement is common in cases of death and bodily injury in which recovery for loss of earnings is based on that of the particular victim. A similar approach is reflected in the so-called thin skull principle. However, issues of bodily injury do not usually arise in a contractual context in which the claim is usually for economic loss.

17 See the discussion at n 85 with regard to mitigation.

subjective value loses its significance and the objective price becomes the dominant factor. Let us examine the following illustration:

1. P agrees on 1 January to purchase a new car from V for $10,000, delivery and payment is to be made on 1 February. Let us also assume that the value of the car to P (subjective value) is $12,000, namely he would be willing to pay up to this amount to acquire it. V breaches the contract and refuses to sell the car to P. If, on 1 February, such a car is available on the market for $10,500, P's loss is mere $500. In a sense, it can be said that performance would have yielded P a (subjective) benefit of $2,000, but since in reality he can obtain an equal car for $10,500, the subjective loss disappears and the objective loss reflects the damage suffered.

The situation is completely different if a perfect substitute cannot be found or if, for some reason, its acquisition is regarded as unreasonable. This possibility is demonstrated by the following illustration, which is based on *Ruxley Electronics & Constructions Ltd v Forsyth*:[18]

2. V undertook to build a swimming pool in P's garden with a diving area 7 feet 6 inches deep at a price of £18,000. In breach of the contract, the diving area was only 6 feet deep. The pool as built was suitable for diving. The breach had no effect on the value of the pool. Hence, there was no objective loss. In other words, according to objective valuation, P got a performance the value of which equalled that of the agreed performance. However, a subjective valuation may lead to a completely different result. P may consider that the value to him of the pool as built is a mere £10,000, or even nil. This subjective valuation means that if he would have been offered a pool with a diving area that is only 6 feet deep he would not have been willing to pay more than £10,000 for it or would not have taken it even for free (subjective value nil).

In the case of *Ruxley* the House of Lords regarded the loss as non-financial and awarded the plaintiff £2,500 for loss of amenities.[19] But the loss is non-financial only if we adopt an objective measurement. Viewed from the plaintiff's point of view, it is conceivable that it could be appraised in monetary terms. Thus, suppose that the depth of the pool is sufficiently important to him and he has sufficient resources to go to another contractor and have him replace the existing pool with one having a deeper diving area. Clearly the loss would then be financial.[20] This shows that the so-called loss of amenities can sometimes turn into financial loss.

[18] [1996] 1 AC 344 (HL).

[19] The case is regarded as an important step towards recognition of the performance interest. See also *Farley v Skinner* [2002] 2 AC 732 (HL); *Hamilton Jones v David & Snape* [2004] 1 WLR 924 (Ch).

[20] The plaintiff in *Ruxley* was willing to give an undertaking that he will replace the pool if the damages awarded to him suffice for this purpose. But this is not exactly the same as doing it in any event.

At this stage, it suffices to point out that no attempt was made in *Ruxley* to appraise the plaintiff's subjective loss or to provide means to remedy it. A possible explanation lies in the difficulty in evaluating this loss. Often the only way of appraising a subjective loss is by relying upon the plaintiff's word. It is clear that courts are unlikely to accept this method of assessment. At best, they may adopt what may be termed 'reasonable value', which is not necessarily equal to the plaintiff's subjective valuation of his loss.

Let us now revert to the rule in *Robinson v Harman*,[21] under which the award of damages is expected to place the plaintiff in the same situation as if the contract had been performed. It is obvious that the plaintiff will not be so placed if damages do not reflect his subjective valuation of the performance that was due to him. A possible solution would be by way of specific performance. This remedy satisfies the plaintiff's subjective interest, subject to one qualification relating to the element of time, since as a practical matter specific performance will in all probability cause the contract to be performed at a later date than agreed upon.[22] In all other respects it meets the subjective interest of the aggrieved party. However, satisfying this interest is not the only consideration. In the case of *Ruxley*, specific performance would be rather harsh on the defendant and would entail considerable economic waste[23] as the existing pool would have to be destroyed and a new one built in its place. These considerations are generally not taken into account in the context of damages, but they are not disregarded in relation to specific performance. Let us now examine these points in addition to some other elements relating to the remedies for breach.

IV THE OBJECTIVE MEASUREMENT OF DAMAGES

The principle enunciated in *Robinson v Harman*,[24] under which the aggrieved party

> is, so far as money can do it, to be placed in the same situation with respect to damages as if the contract had been performed

requires that the award of damages be based on the actual (subjective) loss that was caused by the breach. But, as already pointed out, an objective assessment of damages[25] is often adopted in preference to the subjective

21 See n 6.

22 This is an important feature which will be examined below.

23 In fact, in *Ruxley* the plaintiff did not seek specific performance possibly because it was considered that it was unlikely to have been granted.

24 See n 6.

25 On the objective and subjective measurement, see G Treitel, *Remedies for Breach of Contract—A Comparative Account* (Oxford, Clarendon Press, 1991) 111. The terms used by Treitel are 'abstract' (in my terminology 'objective') and 'concrete' (namely 'subjective') assessment.

approach and the principle of *Robinson v Harman* is tacitly rejected. This difference between the objective measure, which characterises the remedy of damages, and the subjective interest, which is protected by specific performance, has a significant bearing upon the economic value of these remedies to the parties involved.

There are a number of reasons that can lead to the adoption of an objective assessment of damages, one of which has already been mentioned: namely, the difficulty that often arises in appraising the subjective loss. In addition, in the calculation of damages certain elements of the loss to the subjective interest, such as hurt feelings, anger, stress and tension caused by the breach, are not taken into account except in some specific situations. The rules on remoteness and mitigation further strengthen the objective tendency of the law of damages. Thus, in the seminal case of *Hadley v Baxendale*[26] the plaintiff, a mill owner, suffered considerable losses because the carriers who undertook to deliver a broken crankshaft to the makers delayed its delivery. Consequently the mill could be restarted only after considerable delay. The claim for loss of profits during the period of delay (the actual or subjective loss) was dismissed on the ground that the significance of prompt delivery was not communicated to the carriers. The actual loss was therefore considered to be too remote and was therefore disregarded. The assessment of damages was objective, namely based on the loss that could have been reasonably expected by the defendant to occur by the delay that happened.

A similar result was reached in *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd*,[27] in which the defendants agreed to sell the plaintiffs a new boiler but supplied it after a delay of some five months. In their claim for loss of profits during this delay the plaintiffs were allowed the normal profits that were usually derived from the use of such a boiler in their business. But the claim for the additional loss that was actually suffered by the plaintiffs from their inability to take advantage of the particularly lucrative contracts they had with third parties was denied as being too remote.

The rules on remoteness thus tend to lead to an objective calculation of damages, namely the recovery for those losses that were foreseeable by a reasonable person as arising naturally in the usual course of things from the breach. However, it should be pointed out that while specific performance generally grants the plaintiff the subjective benefit of that which was promised to him even if this benefit is regarded for the purpose of damages as too remote, in this particular context specific performance is unlikely to achieve such a result because the loss was caused by delay and

[26] (1854) 9 Exch 341, 156 ER 145 (Exch).
[27] [1949] 2 KB 528 (CA).

as a practical matter it is hardly ever possible for this remedy to bring about timely performance.[28]

Rules on mitigation are also likely to lead to an objective measurement of the loss. Thus, suppose that P contracts to buy certain goods from V at a price of $100. On the date on which the goods ought to have been delivered V breaches the contract and declines to supply them.[29] Two months later P purchases similar goods for $150. His actual (subjective) loss is $50, but if it can be shown that P could have acquired the goods for $120 shortly after the breach and that it was reasonable to do so, his recovery will be limited to $20. This is the objective loss, namely the loss that would have been suffered by a reasonable person in that situation.

The parties can of course avoid the objective measurement of damages and opt for rules that grant the aggrieved party his real (subjective) loss. They can provide for liquidated damages in an amount reflecting the real loss. Thus, for example, in the case of *Ruxley*, the parties could have stipulated in the contract that if the diving area of the pool fails by more than one inch to reach the agreed depth, the contractor will have to pay damages in an amount equal to the construction of a new pool. This presumably is not a penalty clause since it reflects a genuine interest even though some may regard it as idiosyncratic. The parties can similarly change the rules regarding remoteness by pointing out in the contract that in a case of breach certain losses, which would otherwise be considered too remote, might ensue. In fact, this possibility is embodied in the second limb of *Hadley v Baxendale*.[30] However, in the absence of such a provision in the contract, the general contract rules, sometimes termed 'default rules', apply and they lead to objective measurement of the loss.

The examples discussed above were concerned with situations in which the actual (subjective) loss was higher than the loss measured in abstract (objectively). This is not necessarily always the case. Many instances are

[28] See also feature (6) above.

[29] If the breach occurred at an earlier date, the question may arise whether the market price of the goods should be that which obtained at the date of the breach rather than that which obtained at the date on which delivery ought to have been made. For a discussion of this issue, see PS Atiyah, JN Adams and H MacQueen, *The Sale of Goods* (Harlow, Longman, 10th edn, 2000) 534–6. The date of breach rule became the focal point in *Golden Strait Corp v Nippon Yusen Kubishika Kaisha ('The Golden Victory')* [2007] 2 WLR 691 (HL), in which the House of Lords held by majority that in calculating damages for wrongful repudiation of a charterparty events occurring after the breach are to be taken into account. In this context it suffices to point out that the owners' loss in this case consisted of the difference between the charter rate and the market rate, namely loss of future revenues due to be paid periodically over a considerable period of time. The normal rule is that liability for loss or partial loss of such future periodical payments 'crystallises' at the time of the breach. The majority decision actually mitigates the 'crystallising' rule by holding that events which would have affected the amount of the periodical payments due after the breach and which occurred at the time that these payment would have become due are to be taken into account. For a detailed discussion of this case, see D McLauchlan, 'Some Issues in the Assessment of Expectation Damages', this volume.

[30] See n 26.

conceivable in which an objective appraisal of the loss will yield the plaintiff damages in an amount exceeding his real (subjective) loss. Thus, suppose that, in the above example in which P agreed to buy goods from V, P bought the goods from a third party six months after the breach at a price of $90. If the loss is assessed objectively, P will recover the difference in price on the relevant date, namely the date on which delivery ought to have been made,[31] although he may not have suffered any real (subjective) loss.[32] It is obvious that in this type of situation the aggrieved party would prefer damages to specific performance, even if specific performance would have been available, and, since the aggrieved party has a choice, he can give up the prospect of specific performance and opt for damages.

V LOSING CONTRACTS, WASTEFUL PERFORMANCE AND TOLERATED BREACH

At the time of forming the contract the parties make their own cost–benefit calculations. However, at a later stage a party may find that he miscalculated or that subsequent developments led to a change in the subjective value of either the cost or the benefits as were originally envisaged.

I discussed above an example in which P agreed to purchase a new car for $10,000, the value of which to P at the time of the contract (subjective value) was $12,000. Suppose now that shortly afterwards P suffered a severe financial loss. Consequently the performance due from him, namely

[31] S 51(3) of the Sale of Goods Act 1979. The section provides that the measure of damages 'is prima facie to be ascertained by the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered'. Although the section speaks of a prima facie rule, it is assumed that the fact that the aggrieved party acquired the goods at a later date for a lower price will not be take into account. Cf the rules regarding contracts for resale by the aggrieved party: Atiyah et al, above n 29, 536–9.

[32] There is vast literature that shows that compensatory damages usually undercompensate the aggrieved party. See Eisenberg, above n 8. However, there are numerous situations in which such damages over compensate the plaintiff: see, eg *Inverugie Investment v Hackett* [1995] 1 WLR 713 (PC), in which the defendants, who were the owners of a hotel, wrongfully ejected their lessee (the plaintiff). The average occupancy of the hotel was about 35–40%. The plaintiff obtained an order for possession and brought an action for mesne profits in respect of the period during which the hotel was in the defendants' possession. The Privy Council applied the so-called 'user principle' and held the defendants liable to pay damages for trespass in an amount equal to the rent of all the hotel apartments they wrongfully occupied. The fact that in all probability the plaintiff would not have been able to rent them all during the relevant period was held to be of no moment. Similarly disregarded was the fact that the defendants were merely able to let 35–40% of the apartments. They had to pay rent for all of them. The Privy Council thus applied an objective measurement of the loss (the 'user principle') which yielded an award that greatly exceeded the real (subjective) loss, and the Privy Council clearly recognised this (*ibid*, 718). Recovery in this case was in torts, but this was also a case of breach of contract. The case can be explained as based on recovery of profits, but the award clearly exceeded the amount of profits actually gained by the defendants. For a discussion of the damages aspect as well as the recovery of profits aspect in this case, see D Friedmann, 'Restitution for Wrongs: The Measure of Recovery' (2001) 79 *Texas Law Review* 1879, 1885–7.

the payment of $10,000, becomes from his point of view much more valuable. When this performance is expressed in monetary terms, the change is best reflected by his willingness to pay less for that which was promised to him. We may thus assume that the subjective value of the car to him was reduced to a mere $5,000. If the other party commits a fundamental breach, it will be in P's interest to terminate the contract. Indeed, if, by this time, the price of such a car went up to $10,500, P would be able to claim damages reflecting the objective loss, namely the increase of $500 in the car's price, even though he is no longer interested in it. This is just another example in which an objective measurement of the loss is more favourable to the plaintiff than a subjective evaluation. In this case the result can be justified by the fact that the contract relates to a saleable commodity. If P is not interested in keeping the car, he can, at least in theory, sell it for $10,500 and thus gain the difference between the contract price and the market price.[33]

There is thus a fundamental difference between the case in which the other party's performance is saleable and the case in which it is not. Broadly speaking, when the performance of one party is saleable the subjective value that the other party places on it is of little moment as long as the subjective value of the performance is lower than the price obtainable by its sale.[34] The issue becomes more complex where the promised performance is not saleable. Let us examine the following illustrations:

3. V contracts to sell P a piece of property for $10,000. The value of this property to P (subjective value) is $12,000. Shortly afterwards T, who for some idiosyncratic reason is greatly interested in this property, offers V $50,000 for it.
4. P undertakes to build a four-storey building on a plot owned by D for $500,000. The expected profits of P are 15% of the cost, namely $75,000. Shortly afterwards a change in the zoning laws makes it possible to build up to thirty stories on this site. Had the four-storey building been constructed, it would have been advantageous to pull it down in order to permit the construction of the higher building.[35]

Illustration 3 deals with saleable property. If, after a contract has been formed, a third party (T) is willing to pay an exceptionally high price for

[33] The use of the concept of market price in this context is somewhat problematic. Even for a commodity that is readily available there is practically always a margin between buying and selling, which for certain commodities may be very substantial. A person who bought a new car would find it almost impossible to sell it the next day for the price he paid for it.

[34] The case in which the subjective value is higher than the price obtainable for the performance is discussed below, text following n 64.

[35] This illustration is adapted from the one that I gave in D Friedmann, 'Restitution of Benefits Obtained through the Appropriation of Property or the Commission of a Wrong' (1980) 80 *Columbia Law Review* 504, 525.

the property to which the contract relates, the question arises to whom does this windfall belong? The topic has been long debated and has become the subject of voluminous literature.[36] It has also been related to the availability of specific performance,[37] though I do not think that the topics are inextricably linked since it is conceivable that restitution of gains by the breach will be allowed even if specific performance is for some reason unavailable.[38] For our purposes, it should be noted that from the point of view of the vendor (V) in illustration 3 the contract became a losing contract. Originally he valued the property at an amount less than $10,000. However, once the new potential buyer arrives, the sale at $10,000 must be viewed as entailing a serious loss, at least in the sense of preventing the realisation of a large profit. The crucial point is that this additional gain does not disappear but inures to the benefit of the other party (provided, of course, that we assume that either specific performance or restitution of gains will be allowed[39] and that the sale to T could be made by V just as it could have been made by P). In other words, the combined cost–benefit of both parties indicates that there is no loss at all. At most it can be said that the all the additional benefits that accrued after the formation of the contract were gained by the purchaser.

Illustration 4 presents a wholly different situation. It is similar to illustration 3 only in one respect, namely that performance is beneficial to one party and entails a loss to the other. The loss in illustration 4 may seem more severe than the one in illustration 3 since in illustration 4 it entails not merely loss of an additional potential gain but actual out-of-pocket

36 The above example is based on the paradigmatic case of 'efficient breach' except that it usually relates to goods or commodities (movable) regarding which specific performance is usually unavailable. The proponents of this theory justify a breach and would limit the aggrieved party's recovery to damages (which apparently do not take into account the possibility that the same sale could be made by the aggrieved party). On the subject of efficient breach, see R Posner, *Economic Analysis of Law* (New York, Aspen Publishers, 6th edn, 2003); A Schwartz, 'The Case for Specific Performance' (1979–80) 89 *Yale Law Journal* 271, 281; D Friedmann, 'The Efficient Breach Fallacy', (1989) 18 *Journal of Legal Studies* 1; IR Macneil, 'Efficient Breach of Contract: Circles in the Sky', (1982) 68 *Virginia Law Review* 947, 961; J Gordley, 'A Perennial Misstep: From Cajetan to Fuller and Perdue to "Efficient Breach"' [2001] *Issues in Legal Scholarship* Symposium: Fuller and Perdue; R Craswell, 'Contract Remedies, Renegotiation, and the Theory of Efficient Breach' (1988) 61 *Southern California Law Review* 629, 636; R O'Dair, 'Restitutionary Damages for Breach of Contract and the Theory of Efficient Breach: Some Reflections' (1993) 46(2) *Current Legal Problems* 113; L Smith, 'Disgorgement of the Profits of Breach of Contract: Property, Contract and Efficient Breach' (1994) 24 *Canadian Business Law Journal* 121. For an excellent recent discussion, see Eisenberg, above n 8.

37 Cf Schwartz, *ibid*; SM Waddams, 'The Choice of Remedy for Breach of Contract' in J Beatson and D Friedmann (eds), *Good Faith and Fault in Contract Law* (Oxford, Clarendon Press, 1995) 471.

38 See the examples discussed in Friedmann, above n 35, 520–1, in which employees whose services are unique or extraordinary accept, in breach of their contract, a more lucrative employment. In some of these instances an injunction may be granted. Specific performance is unavailable, but in my view restitution of gains in such situations is conceivable.

39 The award of damages may lead to a similar result if the purchaser's loss will be calculated on the basis of the sale to the third party.

loss (payment for a building that will have to be pulled down). But this is not the crucial point. The decisive factor is that the loss to one party greatly exceeds the benefit to the other. The illustration assumes that the profits that P will derive from performance amount to $75,000 while the loss to D will exceed $500,000 (the cost of the building plus the cost of pulling it down). It may well be that by performing the contract P would have gained some additional advantages that are not reflected in his expected profits, such as enhanced reputation, for which he is unlikely to recover damages.[40] But, even if we take this element into account, it is clear that performance would lead to sheer economic waste. A possible test that identifies this type of situation is to assume that the parties (in the above example, P and D) become a single entity, P-D (say, by corporate merger).[41] It is obvious that in this example the four-storey building will not be erected. The contract has thus become a wasteful contract.

It is possible to generalise that in the case of a wasteful contract, namely where the loss to one party that will result from its performance exceeds the benefit which the other party will derive from it, a breach is acceptable, even though it is not condoned. Such a breach can be described as *tolerated breach*, in which case there is no room for specific performance, nor is there any justification for an award of restitution of gains. The gains in this instance are actually in the form of a loss or expenses saved. In the above example, by breaching the contract the landowner (D) avoids the loss that performance would have imposed upon him (the cost of the building plus the cost of pulling it down). In this illustration there is another type of gain, namely that which derives from the building of a thirty-storey construction on the plot owned by D. But the contractor (P) is not entitled to a share in these profits. His contract gave him no right in the land or in gains that it may yield.[42]

The problems posed by a wasteful performance did not escape attention and it has been suggested that, if specific performance were available, the party who wished to escape its consequences could buy himself out. Thus, for example, in illustration 4 the landowner could 'purchase' a release from the contract by offering the contractor say $250,000, a sum which is between his expected loss from performance and the contractor's gain.[43]

[40] Performance by a professional seller or provider of services often brings him some gain by way of reputation and may strengthen his position in the market. This is highly conspicuous in such professions as actors, artists, architects and lawyers, but it also exists at least to some extent in many other professions. Cf WJ Gordon and T Frenkel, 'Enforcing Coasian Bribes for Non-price Benefits: A New Role for Restitution' (1994) 67 *Southern California Law Review* 1519.

[41] Regarding this test, see Friedmann, above n 36, 9–10.

[42] This point as well as those related to limited privilege and good faith are discussed in my article, Friedmann, above n 35, 525–6.

[43] Cf the theory of efficient termination developed by Paul Mahoney, under which it is sometimes more efficient to terminate a contract than to perform it: 'Efficient termination is possible when the amount of money, Y, that [the promisor] would pay to escape performance at

However, the reaching of such a release agreement may be difficult and in any event the payment of an amount so greatly exceeding the aggrieved party's loss is likely to be regarded as extortionate. Indeed, this very point was raised by Lord Hoffmann in *Co-operative Insurance Society v Argyll Stores (Holdings)*, discussed at the very beginning of this chapter.[44] He quoted a statement by Lord Westbury under which the court should not grant a mandatory injunction that will, 'deliver over the defendants to the plaintiff bound hand and foot, in order to be made subject to extortionate demand that he may by possibility make . . .'

Lord Hoffmann also referred to the view that the court will not order the defendant to carry on with a losing business,[45] and added that the 'plaintiff will enrich himself at the defendant's expense' if an order for specific performance will cause the defendant a loss that is heavier that the loss that the plaintiff would suffer from non-performance.

Not all these arguments point in the same direction. Thus the mere fact that the defendant is required to carry on with a losing business does not mean that the performance of the contract is wasteful. If the loss from the defendant's business is lower than the gain that will be derived by the plaintiff from its continued operation, then it may make sense to keep it going, though there may be other, non-economic reasons that would justify denial of a mandatory injunction.[46]

There are additional concepts that can be applied to the tolerated breach. One is that of incomplete privilege developed by Professor Bohlen in the field of torts.[47] This concept asserts that a person is entitled to infringe another's property rights in order to avert bodily injury or more serious damage to himself. The invader is, however, required to compensate the party whose rights were infringed for the loss suffered. This approach can a fortiori apply to contractual rights and lead to the recognition of a qualified right to terminate subject to the payment of damages. As already indicated, such a right has to be confined to

a particular point in time is greater than the amount of money, Z, that the promisee . . . would accept in lieu of performance. In that situation there is a potential gain of Y–Z from terminating the contract': PG Mahoney, 'Contract Remedies and Option Pricing' (1995) 24 *Journal of Legal Studies* 139, 141. See also Eisenberg, above n 8, 1000; cf L Kaplow and S Shavell, 'Fairness versus Welfare' (2001) 114 *Harvard Law Review* 961, 1120–30.

44 Above text to n 1.

45 The reference was to *Braddon Towers Ltd v International Stores Ltd* [1987] 1 EGLR 209, 213 that speaks of a practice not to grant mandatory injunction requiring persons to carry on business (without adding the element that the business is suffering losses). Cf also Burrows, above n 7, 541.

46 Indeed, in such a case it is conceivable that damages to the plaintiff will be higher than the loss suffered by the defendant from carrying on with the business.

47 FH Bohlen, 'Incomplete Privilege to Inflict Intentional Invasions of Property and Personality' (1926) 39 *Harvard Law Review* 307. The article is based on an analysis of *Vincent v Lake Erie* 124 NW 221 (Minn SC 1910). For a discussion of this case, see also E Weinrib, *The Idea of Private Law* (Cambridge, MA, Harvard University Press, 1995) 196–203 and Friedmann, above n 35, 540–6.

situations in which the loss to one party from the performance exceeds the benefits that the other party is likely to derive from it.

Indeed, there are legal systems that expressly recognise a unilateral right to terminate such a contract subject to payment for work done, expenses and lost profits. Thus Article 1794 of the French civil code provides:

> The master can terminate at will an agreement for work to be done (*marché à forfait*) although the work had already begun, by compensating the contractor for all his expenses, all his work, and all that he would have gained in the enterprise.[48]

Anglo-American law has not gone so far as to give an explicit right of termination, though the parties are of course free to include in the contract a provision allowing such termination. But in the absence of such a provision there is no default rule that permits one party unilaterally to bring the contract to an end. The matter is usually relegated to the law of remedies. The contractor is unlikely to get specific performance of his contract and his claim for damages will be subjected to the rules on mitigation. Thus it has been decided in a number of American leading cases that the rules on mitigation preclude the recovery by a contractor of the full contractual price or expenses incurred after he learned that the other party no longer needs his performance.[49] Mark Gergen pointed out that there are only a handful cases in which a contractor continues work and sues for the full contract price after the other party tells him to stop.[50] This is understandable. Normally a party will not continue to make expenditures when he knows that the other party is unwilling to pay for them and the only way to get paid is via an action in court. Yet the aggrieved party may be able to recover the contract price if he continued work to avoid uncompensated loss.[51]

The well-known decision of the House of Lords in *White & Carter (Councils) Ltd v McGregor*[52] is seemingly not in line with this approach. In that case, the plaintiff agreed with the defendant, a garage proprietor, to display his advertisement for three years. The defendant repudiated the contract on the very date it was made. The plaintiff disregarded the repudiation, displayed the advertisement and claimed the amount due under the contract. The House of Lords by a majority upheld the claim. It is not clear, however, whether in that case there was a substantial divergence between the agreed sum and an award of damages. Such a divergence is likely to occur if performance entails considerable costs, as,

[48] A similar provision is included in the German civil code: BGB §649.

[49] *Rockingham County v Luten Bridge Co* 35 F 2d 301 (4th Cir 1929); *Clark v Marsiglia* 1 Denio 317 (NY 1845).

[50] MP Gergen, 'Exit and Loyalty in Contract Disputes' in N Cohen and E McKendrick (eds), *Comparative Remedies for Breach of Contract* (Oxford, Hart Publishing, 2005) 75, 86.

[51] *Ibid*, 86–7, referring to *O'Hare v Peacock Dairies Inc* 79 P 2d 433 (1938) and other cases.

[52] [1962] AC 413 (HL).

for example, in the case of agreement to construct a building, or if the plaintiff could have mitigated his loss. In *White & Carter* the amount due under the contract, which the plaintiff recovered, was fairly modest, namely £187 4s, and it is not clear whether damages would have been substantially lower.[53] Moreover, Lord Reid, who was one of the majority judges, stated that a different result would have been reached if the aggrieved party had 'no substantial or legitimate interest' in continuing performance.[54] This statement is generally taken to form part of the *White & Carter* rule.[55] Consequently *White & Carter* is of very limited application. It has hardly been followed and often distinguished.[56]

The rule under which the aggrieved party, who continues to work after the breach, can recover the contract price only if he has a substantial or legitimate interest in completing performance leads us to the requirement of good faith. An important aspect of good faith is reflected in the imposition of certain restraints upon self-interest in deference to a much heavier interest of another party. A legal right or power is not to be used excessively or in an oppressive manner, or for a purpose for which it was not intended. Excessive use means use which exceeds that required for the protection of one's legitimate interest while imposing disproportionate loss on another party.[57] English law has not adopted a general doctrine of good faith. The function that this doctrine fulfils in other legal systems has in English law been relegated to the law of remedies.[58] The court will generally deny a remedy that imposes upon the defendant a burden or a loss that greatly exceeds the benefit that it is likely to grant the plaintiff. Conspicuous examples can be found even in the field of property. Thus, in *Jaggard v Sawyer*[59] the plaintiff bought a house that was part of a residential development served by a private cul de sac. Each plot, together with the roadway in front of it, had been conveyed subject to a covenant not to use any part of the unbuilt land other than as a private garden. The defendants also bought a house served by this cul de sac and subsequently bought a plot of land contiguous to their property and started to build a house on it. The only way to reach the new house was via the cul de sac, but this would involve a continuing trespass and breach of the covenant. Nevertheless Judge Jack declined to grant an injunction and awarded damages in lieu. The plaintiff claimed that the decision grants the defendants 'a right of way in perpetuity over my land for a once and for all

53 G Treitel, *The Law of Contract* (London, Sweet & Maxwell, 11th edn, 2003) 118.
54 *Ibid*, 431. Cf also the American approach, nn 49–50 and accompanying text.
55 See the detailed analysis in Treitel, above n 53, 116–19.
56 Burrows, above n 7, 435–40.
57 D Friedmann, 'Good Faith and Remedies for Breach of Contract' in Beatson and Friedmann, above n 37, 399, 400–1.
58 *Ibid*.
59 [1995] 1 WLR 269 (CA).

payment' and 'effectively expropriates my property . . .'.[60] Despite this, the decision was affirmed by the Court of Appeal in view of the relatively small loss suffered by the plaintiff and the huge loss that an injunction would have imposed upon the defendants.[61] A doctrine of good faith might have conceivably required the plaintiff to sell the defendants a right of way. No such doctrine is recognised by English law. Yet, a result similar to a forced sale was reached via the law of remedies.[62]

In the contractual context it can be said that, if in the case of a wasteful contract the losing party is asked to pay for his release an amount based on his potential loss, the demand is not in good faith and is in fact extortionate. The reason is that the contract is intended to grant the party his performance interest. This interest does not encompass a right to exploit the other party's loss. Hence, if a party tries to use his right to performance in order to take advantage of the other party's expected loss, he abuses his contractual right. Such use of a legal right for a purpose for which it was not intended is a breach of the duty of good faith. This is also the explanation of Lord Hoffmann's seemingly paradoxical statement in *Co-operative Insurance Society*,[63] under which specific performance may enable the aggrieved party to enrich himself at the defendant's expense. This seemingly paradoxical statement can be correct under the following conditions: (i) the contract became a wasteful contract; and (ii) the aggrieved party receives payment exceeding his loss in order to release the other party. But there is no unjust enrichment if the aggrieved party merely gets what was promised to him. Thus, suppose that specific performance is ordered in circumstances like those of *Co-operative Insurance Society* and as a result the plaintiff (the landlord) gains £100 per annum while the defendant suffers a loss of £150 per annum from carrying on with his losing business. It is arguable that in this case specific performance is unjustified and makes no economic sense. It is also arguable that the plaintiff was not in good faith in insisting on specific performance. But there is no unjust enrichment. The plaintiff got the performance to which he was entitled under the contract. This cannot be considered unjust enrichment. An argument of unjust enrichment could be made if the defendant bought his release from the contract by paying an exorbitant price of £140. However, in *Co-operative Insurance Society* there has been no attempt to compare the loss that would have been suffered by the defendants had they carried on with their business with the loss suffered by the plaintiffs from the breach.

60 *Ibid*, 286.

61 On the award of damages in lieu of injunction, see generally Burrows, above n 7, 362–7.

62 Cf also *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 1 WLR 798 (Ch); *Woolerton and Wilson Ltd v Richard Costain Ltd* [1970] WLR 411 (Ch) discussed in Friedmann, above n 57, 404.

63 See text following n 1.

Another point that deserves to be mentioned in the context of both *Jaggard* and *Ruxley*[64] relates to the measure of recovery. Both represent a forced sale of a protected interest. In *Jaggard* it was a propriety interest and in *Ruxley* it was a contractual right to the other party's performance. In *Jaggard* recovery was clearly based on an objective measure, namely an amount that 'the defendants might reasonably have paid for a right of way and the release of the covenant'.[65] There is obviously no room to award such an exorbitant amount as the defendants might have been compelled to pay in their predicament, but there is every reason to believe that the plaintiff valued the right of way and the covenant at an amount well above the market price. The recovery of an amount that 'the defendants might reasonably have paid' points to an objective measurement of a price that might have been agreed between a willing ('reasonable') seller and a 'reasonable' buyer. The fact that the plaintiff's subjective valuation of that which was taken from her was higher than the objective value was disregarded. In contrast, the plaintiff in *Ruxley* was awarded £2,500 for loss of amenities. This amount exceeds the objective loss, which was assumed to be nil since the value of the pool as supplied was equal to that which was promised. The award of £2,500 may thus be regarded as partial compensation for the plaintiff's subjective loss.

We may thus conclude that enforcement will be denied where it entails a loss to one party that exceeds the benefit to the other. The question is how the benefit to the plaintiff should be measured. The answer seems to be that there is a strong tendency to measure it objectively, namely by finding a 'reasonable' price or a price that 'reasonable' parties would have agreed upon. One reason for this approach lies in the difficulty in ascertaining the subjective value that a party places on a particular interest, though in a contractual context a party can at the time when the contract is formed define this interest and presumably can also put a price tag on it. The other reason is probably that courts are unwilling to offer protection to a subjective valuation that is out of proportion to an objective valuation unless the contract clearly points out that a subjective measure should be adopted.

VI TOLERATED BREACH V EFFICIENT BREACH

The concepts of tolerated breach introduced above (as well as that of wasteful performance, to which it is related) may seem similar to that of efficient breach, to which I object.[66] Admittedly, in some instances both

[64] See nn 18–20 and accompanying text.
[65] See n 59, 275. A similar approach was adopted in *Wrotham Park*, above n 62.
[66] Friedmann, above n 36.

may lead to similar results. Nevertheless there are fundamental differences. The efficient breach theory examines the situation from the point of view of the party in breach. If his gains from the breach exceed the amount of damages that will be awarded to the aggrieved party, then the breach is efficient. Thus, in illustration 3 discussed above, in which V contracts to sell P a piece of property for $10,000 and shortly afterwards T offers V $50,000 for it, the breach is considered 'efficient' if we assume that the damages which V will be required to pay are less than his gain from the sale to V. On the other hand, the wasteful performance approach examines the situation from the point of view of both parties and, as already indicated, in this example performance of the contract is not wasteful and its breach is not a tolerated one.

Another difference between the tolerated breach approach and that of efficient breach is that the test of efficient breach is based upon a comparison between the gains derived by the breach and the award of damages while the test of wasteful performance (and that of tolerated breach) is based on comparison between actual losses and actual gains derived from the performance of the contract, including losses and gains that may be disregarded by the law of damages.

Finally, the theory of efficient breach assumes that the decision whether to perform or breach is that of the party involved and that the only consequence of the breach is liability in damages. In other words, the party who lost interest in the contract has a 'right' to breach it subject to the payment of damages. The theory of wasteful contract does not recognise such a right to breach the contract. Under this approach the discretion is that of the court that can order specific performance or restitution of profits gained by the breach. Only if the court is convinced that the breach was 'tolerated' will it limit the liability of the party in breach to the payment of damages.

VII SPECIFIC PERFORMANCE AND THE LIMITATIONS UPON THE AWARD OF DAMAGES

I examined above the effect of high subjective value upon specific performance and damages. Broadly speaking, specific performance grants the plaintiff the subjective value that he places upon the promised performance while damages will probably be assessed objectively. However, where for some reason the value that the plaintiff places upon the promised performance (the subjective value) greatly exceeds the objective value, such a subjective value may be disregarded not only for the purpose of damages but also for the purpose of specific performance. Consequently specific performance may be denied if it imposes upon the defendant a loss that greatly exceeds the benefit to the plaintiff (measured objectively) even if the

plaintiff places a very high (subjective) value on receiving it unless the contract specifically clarifies that the plaintiff's subjective value be respected. Thus, it can be safely assumed that in the case of *Ruxley*[67] specific performance, which would have required the defendants to replace the existing pool by a new pool at a very high cost, would have been denied.

Let us now examine a number of other limitations on the award of damages and their conceivable effect on specific performance.

A Types of Losses for Which Damages are Not Allowed

The award of damages generally includes economic losses; damages are generally not recoverable for 'any distress, frustration, anxiety, displeasure, vexation, tension and aggravation' caused by breach of contract.[68] Thus, a person who is wrongfully not admitted or expelled from a trade union, club or association may have a right to claim damages.[69] He may find, though, that the damages fall short of compensating him for his non-economic sufferings. Enforcement of the contract, to the extent that it is available and practical, will redress such grievances. A similar result ensues regarding other limitations on the recovery of damages, such as injury to reputation for which recovery was once disallowed,[70] though in modern times this rule has been greatly eroded.[71]

B Date of Assessment and Remoteness[72]

Damages will not be awarded for loss that is too remote. It is, however, obvious that if specific performance is granted the plaintiff will enjoy all the ensuing advantages even if those advantages would not have been taken into account in the assessment of damages. This point can be demonstrated by the following illustration:

5. P contracts to purchase a house from V for $50,000. P has a plot of land contiguous to this house. The acquisition of the house will enable P to combine the two plots and add to the value of P's present plot some $15,000. V declines to perform. The value of the house on the date of the

[67] See n 18 and accompanying text.

[68] *Watts v Morrow* [1991] 1 WLR 141 (CA) 1445 (Bingham LJ); Beatson, above n 7, 593–4, who also discusses instances to which the rule that limits recovery does not apply.

[69] Cf *Bonsor v Musician's Union* [1956] AC 104 (HL).

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

[71] *Malik v Bank of Credit & Commerce International SA* [1998] 1 AC 20 (HL), and the discussion in Beatson, above n 7, 594–5.

breach is $60,000. P files an action in court. The evidence shows that the value of the house is $80,000. Judgment is rendered one month after the hearings at which time the value of the house is $85,000.

In this type of situation the purchaser is usually entitled to specific performance. Performance will grant P the subjective value that he attributes to the house, which may be well above $85,000. But even if the value is assessed objectively it will be $85,000 plus the increase value of his adjacent plot, namely $15,000. Let us now assume that under the circumstances an order of specific performance is problematic[73] and the court considers awarding damages in lieu. How are damages to be assessed? Under the common law the decisive date for assessment is prima facie the date of the breach.[74] However, in *Wroth v Tyler*[75] Megarry J held that when damages are awarded in lieu of specific performance in accordance with Lord Cairns' Act they should 'constitute a true substitute for specific performance'.[76] Consequently the assessment of such damages can be made by reference to the date of judgment, a result which in *Wroth v Tyler* and in illustration 5 above is much more favourable to the claimant. It should however be pointed out that though damages so assessed are in economic terms very close to specific performance, there remain some important differences. First, specific performance grants the claimant the subjective value that he places on the performance while damages are based on an objective (market value) assessment. Second, damages assessed by reference to the date of judgment are actually assessed by reference to the date on which the relevant evidence as to the value was heard. Fluctuation in value between this date and the date on which the judgment is rendered cannot as a practical matter be taken into account. On the other hand specific performance grants the plaintiff the value of that which was promised to him on the date on which performance is actually carried out.

An additional question relates to remoteness. Damages are not awarded for a loss that is too remote. Thus in illustration 5 it is assumed that the acquisition of the property promised under the contract will enhance the value of another piece of property owned by the purchaser. If the vendor does not perform, the loss resulting from the failure to realise this gain may well be regarded as too remote.[77] In *Wroth v Tyler* Megarry J quoted

72 See also text to n 26.

73 Cf *Wroth v Tyler* [1974] Ch 165 (Ch), [1973] 1 All ER 897 (specific performance denied on the ground that, in order to perform, the defendant would have to take legal action against another party—in this case his wife).

74 Treitel, above n 53, 959.

75 See n 73.

76 [1974] Ch 30 (Ch) 58. See also the discussion in Treitel, above n 53, who points out that the purpose of common law damages is similar, namely to put the plaintiff in the same position as if the contract has been performed. Cf also *Johnson v Agnew* [1980] AC 367 (HL).

77 It is unlikely to be within the first limb of *Hadley v Baxendale* and is assumed that there were no factors that could bring it within the second limb of *Hadley*.

a statement by Fry J to the effect that 'damages cannot be adequate substitute for an injunction unless they cover the whole area which have been covered by the injunction . . .'.[78] Nevertheless it seems that even if the damages are awarded in lieu of specific performance they will not include losses that are considered too remote.[79] It is obvious, however, that if specific performance is ordered the plaintiff will obtain any additional gain that performance entails. The fact that the additional gain is considered to be too remote for the purpose of damages does not change the reality of its existence and the ability of specific performance to lead to its acquisition.

In this context let us revert to *Co-operative Insurance Society v Argyll Stores (Holdings)*,[80] in which the owners of the supermarket decided, in breach of their contract, to close the supermarket that operated in the plaintiffs' shopping centre. Two types of losses can be envisaged. One is the direct loss of the defendants' rent and the other is the consequential loss reflected in the effect on other stores in this shopping centre. Such an effect may reduce the rent receivable from other stores either if the rent is payable as a percentage of their revenue or because they may suffer losses that will cause them to close. Specific performance would have prevented both types of losses. Damages are clearly available for the loss of the defendants' rent. Recovery of the consequential losses is more problematic and depends on whether they are within the second limb of *Hadley v Baxendale*, namely within the contemplation of the parties.[81]

It is therefore submitted that in the appropriate case the existence of losses that are too remote for the purpose of damages but would be remedied by performance should be taken into account in deciding whether specific performance is to be granted.

C Mitigation[82]

The rule on mitigation imposes a burden upon the aggrieved party. If he does not comply he will be deprived of his right to recover damages for losses that he could by acting reasonably have avoided. The rule may thus lead to an award that falls short of the loss actually suffered.[83] The rule on mitigation is related to the one on the date by reference to which damages are to be assessed. The normal way by which mitigation is carried out is by making a substitute transaction and the question is when ought this

[78] *Fritz v Hobson* (1880) 14 Ch D 542 (Ch) 556–7.

[79] See the references in n 76.

[80] See n 1 and accompanying text.

[81] However, mitigation of the loss by getting another tenant would reduce both the direct loss as well as the consequential one. See text following n 94.

[82] See also text to n 29.

[83] The defense of contributory negligence, to the extent that it is available in contractual context, has a similar effect. See also n 12.

transaction to be made? The rule of the law of damages is that it ought to be made as soon as possible after the fundamental breach has occurred.[84] Thus, if the party in breach of the contract does not supply goods on the date agreed upon, the aggrieved party is expected to mitigate the loss by purchasing such goods from a different source without delay. If he fails to do so and purchases the goods after many months at a time when their price has substantially increased, he will not be compensated for the subsequent increase in their price. The result may be explained by reference to either the rule regarding the date relevant for the computation of the loss or the rule on mitigation. It is clear that they are interrelated. Hence, if it is impossible or impractical to make an alternative transaction, for example because such goods are unavailable or because the claimant lack the funds needed for the transaction,[85] damages may be assessed by reference to a later date conceivably even the date of the judgment.[86]

While the claim for damages is subject to the burden of mitigation,[87] specific performance is not. The reason seems self-evident. The claimant who seeks performance cannot be expected to make an alternative transaction. In fact, if he makes another similar transaction he may be entitled to claim that this is an additional transaction and not one made in substitution to the original transaction.[88]

The issue of mitigation arose in *White & Carter (Councils) Ltd v McGregor*,[89] which was concerned not with the equitable remedy of specific performance but with an action for the agreed sum, namely a common law action for performance. In that case the plaintiffs performed their part of the contract although they were aware that the defendants ceased to be interested in it. In the House of Lords, the dissenting justices[90] considered that recovery of the agreed sum was not in line with the requirement of mitigation.[91] It should, however, be noticed that strictly speaking we are not concerned with mitigation. The rule on mitigation

[84] I shall not examine the specific rule that may apply in the case of anticipatory breach, discussed in Burrows, above n 7, 128.

[85] *Wroth v Tyler*, above n 73. In *Owners of Dredger Liesbosch v Owners of Steamship Edison ('The Liesbosch')* [1933] AC 449 (HL) the House of Lords held that loss resulting from the plaintiff's lack of financial resources is irrecoverable. But this is no longer the law: *Langden v O'Connor* [2004] 1 AC 1067 (HL); Burrows, above n 7, 144–7. Hence damages will not be reduced on the ground that the claimant should have mitigated the loss if his financial position did not enable him to do so. The change in the law reflects a movement from an objective assessment of damages, which assumed that money is always available, to a subjective approach the looks at the particular claimant who may not be able to raise the funds needed to mitigate the loss.

[86] Regarding this possibility, see text following n 76.

[87] I describe the requirement of mitigation as 'burden'. The term 'duty' to describe it is misnomer: Beatson, above n 7, 615–16.

[88] A person who contracted to purchase a house can, if the contract is breached, buy another house and yet insist on the performance of the original contract.

[89] See n 52 and accompanying text.

[90] Lord Morton and Lord Keith: [1962] AC 413 (HL) 462.

[91] See also Burrows, above n 7, 435–40.

requires the aggrieved party to act in order to reduce the losses that result from the breach. In the *White & Carter* situation the breach, namely the repudiation of the contract, did not cause any loss. The loss was caused by the performance of the contract, not by its breach.

Nevertheless the issues are close. The idea that is common to both is that the aggrieved party should at least to some extent take the interest of the other party into account and that he ought not to impose on the party in breach expenses that do not serve the interest of the aggrieved party. Both reflect the concept of good faith which, as we have seen, imposes some restrictions on the use of legal rights in deference to the interests of the other party.[92] The rule on mitigation limits the aggrieved party's right to damages. The rule under which the aggrieved party may not insist on performance in the case of a wasteful contract,[93] namely where the loss to the party in breach that will result from performance exceeds the benefit to the aggrieved party and limits the right of performance of this party as well as his right to keep the wasteful contract open.

In this respect, the possibility of mitigation has to be taken into account in assessing the value of performance to the aggrieved party. Let us revert once again to *Co-operative Insurance Society v Argyll Stores (Holdings)*.[94] The benefit that the aggrieved party was expected to derive from the defendants' performance consisted mainly of the rent payable by them as well as the effect of their supermarket on other stores in the shopping centre. If, however, it is possible to find another tenant,[95] both losses may be considerably reduced or even disappear. In such a case the value of the contract to the aggrieved party is merely the value of the defendants' performance less the value of the new tenants' performance. If the outcome of this calculation is less than the loss that the defendants would have suffered from their performance of the contract, then the performance of the contract with the defendants became wasteful and should not have been carried out.

D Third Parties' Interests

Where a third party acquired rights under the contract,[96] he may be entitled to contractual remedies in case of a breach,[97] though many contracts affect

[92] See text to n 57.

[93] Regarding wasteful contracts, see text to n 40 *et seq*.

[94] See n 1 and accompanying text.

[95] In fact it is clear from the decision that another tenant was found and that the lease was assigned to him.

[96] The Contracts (Rights of Third Parties Act) 1999.

[97] N Cohen, 'Remedies for Breach through the Lens of the Third Party Beneficiary' in N Cohen and E McKendrick (eds), *Comparative Remedies for Breach of Contract* (Oxford, Hart Publishing, 2005) 157.

third parties without conferring upon them any legal rights. Where such a contract is breached the question arises whether the other party to the contract can recover damages for the loss suffered by the third party.[98] The issue is complex and is not within the ambit of this chapter.[99] For our purposes, it suffices to refer to Lord Millett's statement that 'the general rule of English law is that in an action for breach of contract a plaintiff can only recover substantial damages for the loss that he himself sustained'.[100] This rule is subject to exceptions, described by Lord Millett as 'apparent', adding: 'I say "apparent" exceptions for I regard most of them as explicable in a manner consistent with the rule'.[101]

Specific performance will obviously grant the third party that which is beyond the reach of damages. This technique of protecting the third party was utilised even before the introduction of legislation on contract for the benefit of third parties.[102] Such a technique may not be needed in instances in which the third party acquired rights under the contract by virtue of the new legislation[103] or in jurisdictions in which his right to sue under the contract is recognised. But specific performance is likely to protect the interests of third parties even where the contract did not intend to confer upon them legal rights. Let us revert once again to *Co-operative Insurance Society v Argyll Stores (Holdings)*,[104] in which the owners of the supermarket, in breach of their contract with the shopping centre owners, closed the supermarket and left the shopping centre. It is clear that the parties to the contract did not intend to confer legal rights on other shop owners, but it may be assumed that the supermarket attracted clients to the area and had thus affected other business in the centre, and also that the owners of the shopping centre had an interest in the success of the other businesses. Specific performance would thus have protected the interest of those third parties to whom the remedy of damages was not available.

This means that if the effect on third parties is taken into account then the economic benefits of specific performance may be higher than that reflected by its economic value to the claimant. It is unlikely, however, that this element will be taken into account.[105]

98 If such recovery is possible, the damages reflecting this loss will presumably be held in trust for the third party. Cf *Albacruz (Cargo Owners) v Albazero (Owners) ('The Albazero')* [1977] AC 774 (HL), *Hepburn v A Tomlinson (Hauliers) Ltd* [1966] AC 451 (HL).

99 For a detailed discussion, see H Unberath, *Transferred Loss—Claiming Third Party Loss in Contract Law* (Oxford, Hart Publishing, 2003).

100 *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 AC 518 (HL).

101 *Ibid*.

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

103 See n 96.

104 See n 1.

105 It is also conceivable that performance will be detrimental to third parties, an element which is unlikely to be taken into account. However, where performance is beneficial to third parties, the claimant is often interested in granting them this benefit.

VIII CONCLUSIONS

The following points can be made by way of conclusion:

1. Specific performance grants the plaintiff the subjective value of that which was promised to him, but imposes on him the subjective cost of his performance. Damages are generally based on objective assessment; subjective elements are taken into account only in some specific situations. In addition, specific performance will ordinarily remedy those elements like distress, vexation and aggravation for which monetary compensation is not available in cases of breach of contract.[106]
2. Specific performance is thus more advantageous to the claimant if the subjective value that he places upon the performance promised to him exceeds its objective value and if a substitute for the promised performance cannot be obtained for a price equal to the objective value.
3. There are, however, situations in which the subjective loss to the claimant is lower than the loss objectively assessed for the purpose of damages. In these instances damages are more advantageous to the plaintiff since they grant him compensation in an amount that exceeds his real loss. A typical example is that in which damages are assessed by reference to the date of the breach when the price of the property, promised under the contract, subsequently declined.[107]
4. Specific performance protects the claimant from losses that under the law of damages are considered too remote.
5. The award of damages is always subject to the burden of mitigation. The effect of mitigation upon specific performance is more complex. In some instances the mere possibility of mitigation is regarded as irrelevant and will have no effect on the right to specific performance. In these instances specific performance will fully compensate the claimant and the defendant will bear his full cost of performance even though the claimant could have mitigated the loss. But there are situations in which the fact that the claimant could have mitigated the loss will lead to a denial of specific performance.
6. Specific performance may benefit third parties for whom damages may not be available.
7. Where performance of the contract imposes on one party costs that exceed the benefit that the other party will gain from such performance there is no room for specific performance. The contract is a wasteful contract and its breach is tolerated. In this type of situation there is also no room for restitution of the benefits (acquired by way of loss avoidance) that the party in breach gained by the non-performance of the contract.

[106] See n 68.
[107] See n 32 and accompanying text.