Author/s:
Barnett, K

Title:
A Critical Consideration of Substitutive Awards in Contract Law

Date:
2018-11

Citation:
Barnett, K. (2018). A Critical Consideration of Substitutive Awards in Contract Law. MODERN LAW REVIEW, 81 (6), pp.1064-1082. https://doi.org/10.1111/1468-2230.12382.

Persistent Link:
https://hdl.handle.net/11343/284988

REVIEW ARTICLE

A critical consideration of substitutive awards in contract law

Katy Barnett*

David Winterton, **Money Awards in Contract Law**, Oxford: Hart Publishing, 2015, xxxii + 335 pp, hb £55.00

Substitutive accounts of contract damages have burgeoned over the last twenty years. Although these accounts differ in their detail, in broad terms they conceptualise at least some forms of damages for breach of contract as providing a pecuniary substitute either for the claimant's 'performance interest',[1] or a purported right to performance.[2] Such damages are usually distinguished from damages which compensate for pecuniary losses flowing from the breach.

David Winterton's book, *Money Awards in Contract Law* is a thought-provoking and lucid addition to the literature postulating that there is a substitutive nature to damages

* Associate Professor, Melbourne Law School, University of Melbourne. Based on a commentary on Dr Winterton's paper, 'Two Conceptions of the Performance Interest' at the Legal Theory Workshop at Melbourne Law School on 1 September 2017. Thank you to Solène Rowan, Jeannie Paterson and the anonymous reviewer for their helpful comments. All errors are my own.

[1] See, eg, B. Coote, 'Contract Damages, *Ruxley*, and the Performance Interest' (1997) 56 *Cambridge Law Journal* 537; E. McKendrick, 'The Common Law at Work: the Saga of *Alfred McAlpine Construction Ltd* v *Panatown Ltd*' (2003) 3 *Oxford University Commonwealth Law Journal* 145; C. Webb, 'Performance and Compensation: An Analysis of Contract Damages and Contractual Obligation' (2006) 26 *Oxford Journal of Legal Studies* 41; D. Pearce and R. Halson, 'Damages for Breach of Contract: Compensation, Restitution and Vindication' (2008) 28 *Oxford Journal of Legal Studies* 73; S. Smith, 'Substitutionary Damages' in C. E. F. Rickett (ed), *Justifying Private Law Remedies* (Oxford: Hart Publishing, 2008) 93; J. Edelman, 'Money Awards of the Cost of Performance' (2010) 4 *Journal of Equity* 122.

[2] R. Stevens, 'Damages and the Right to Performance: A Golden Victory or Not?' in J. Neyers, R. Bronagh and S. Pitel (eds), *Exploring Contract Law* (Oxford: Hart Publishing, 2009); D Winterton, *Money Awards in Contract Law* (Oxford: Hart Publishing, 2015).

This is the author manuscript accepted for publication and has undergone full peer review but has not been through the copyediting, typesetting, pagination and proofreading process, which may lead to differences between this version and the Version of Record. Please cite this article as doi: 10.1111/1468-2230.12382.

awarded for breach of contract. It represents the best 'hard substitutivist' account thus far because, unlike other accounts, his analysis accommodates both contract damages measured according to difference in value and cost-of-cure under the substitutionary umbrella. The other significant observation made by Winterton is that any entitlement to substitutive awards must be subject to a condition that the party seeking those damages performs her part of the bargain. If she cannot perform, then she will not be entitled to a substitutive measure. This makes sense, particularly given that there is already a requirement that the claimant be ready and willing to perform in order to obtain an award of specific performance.[3] As a matter of fairness, it follows that if an award substitutes for specific performance, considerations of readiness and willingness should operate. (However, other considerations which may preclude an award of specific performance, such as continuous supervision[4] and compulsion of personal services,[5] will not be relevant to a substitutive money award.)

In Part I of the book, Winterton outlines the inadequacy of the orthodox understanding of contractual money awards. He notes that the starting point for understanding contract damages is the statement by Parke B in *Robinson* v *Harman*:

> The rule of the common law is, that where the party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed.[6]

He argues that there is indeterminacy about two aspects of this statement. First, the meaning of 'loss' is indeterminate. Typically, under orthodox accounts, 'loss' has been taken to mean simply the making good of a financial loss.[7] Secondly, it is unclear what it means to put someone 'in the same situation … as if the contract had been performed.' Winterton's thesis is that damages for breach of contract should be understood to encompass substitutes for performance, and not simply making good the financial losses which occur as a result of breach. Winterton argues that there are already contractual awards that do not compensate for

[3] *Green* v *Sommerville* (1979) 141 CLR 594.

[4] See, eg, *Cooperative Insurance Society Ltd* v *Argyll Stores (Holdings) Ltd* [1998] AC 1, 13–14.

[5] See, eg, *Giles & Co Ltd* v *Morris* [1972] 1 WLR 307, 318 *per* Megarry VC; *Tito* v *Waddell (No 2)* [1977] Ch 106, 321–323 *per* Megarry VC; *Posner* v *Scott-Lewis* [1997] Ch 25, 36.

[6] *Robinson* v *Harman* (1848) 1 Ex 850, 855; 154 ER 363, 365.

[7] See, eg, *Ford* v *White & Co* [1964] 1 WLR 885.

factual loss, including nominal damages and gain-based damages. But even in the context of loss-based awards, he argues that courts make substitutive awards in some circumstances: in the cases where awards are made in favour of third parties who are not party to the contract; in circumstances where awards are made by reference to a hypothetical release bargain; awards where the damages for breach exceed the promisee's factual loss; and awards where the damages for breach exceed the promisee's factual loss because of post-breach benefits. Winterton argues that these cases, and the difficulty of defining such terms as 'loss' or 'damages' in this context, illustrate that a new understanding of contract damages is required to understand why courts make these awards.

In Part II of the book, Winterton poses his new account of contractual money awards, in which he seeks to distinguish between two different kinds of awards. On the one hand, there are awards which seek to compensate for factual losses flowing from the breach, but on the other hand, Winterton argues, there are substitutive awards which seek to directly enforce the claimant's right to performance. It follows, of course, that in Winterton's view, English law recognises a right to performance, notwithstanding that common law courts prefer to award damages rather than specific performance. In fact, the presence of substitutive awards strengthens the argument that there is a recognition of the right to performance through damages which substitute for that right. He notes that substitutive awards are present in other areas of private law, including the action for an agreed sum, awards of damages in lieu of specific performance, and awards in equity which substitute for the beneficiary's right. Substitutive awards may be measured according to difference in value *or* cost-of-cure, whichever is the lesser. He also argues that there is an alternative substitutive measure when the cost of performance is unquantifiable or 'unreasonable', being the price of release from further performance, which explains the 'reasonable fee cases'.

In Part III of the book, Winterton explains how his new account of contractual money awards works in practice, particularly with regard to substitutionary awards for cost-of-cure, substitutionary awards in the three-party context, and in the sale of goods context. He also attempts to counter some potential objections relating to the principles outlined in the *Golden Victory* case (where the loss was limited because a later event, the breakout of war in Iraq, meant that the contract would never have been fully performed in any case). He also attempts to counter some potential objections relating to mitigation, and damages in lieu of specific performance. He concludes that his account is more coherent and doctrinally sound that

previous accounts, and that it may help defuse some claims that compensatory damages for breach of contract are not adequate, and that other measures should be introduced.

In reviewing Winterton's book, there are four issues I want to discuss in detail, first, the origins of the substitutive analysis of contract damages and the 'right to performance'; second, the way in which damages substituting for performance should be measured; third, the impact of mitigation on substitutive awards; and finally, the assertion that some substitutive awards reflect the price of 'release' from contractual performance.

THE 'RIGHT TO PERFORMANCE'

Winterton's account rests on the proposition that money awards for breach of contract substitute for an actual right to performance. The natural response to this is to say (à la Justice Oliver Wendell Holmes) that the remedies which are awarded do not in fact reflect the existence of a right to performance, and Winterton anticipates this. As I will discuss in greater detail, he argues that the existence of a right should not be determined by the means of enforcing that right, and that these are two separate questions.

In essence, the dispute is whether the remedy shapes the content and nature of any right. In my view, without a remedy, it is difficult to say that there is a right (*ubi jus ibi remedium*), and the choice of remedial response tells us something important about the way in which any putative right is perceived. There is a disjunct between the rhetoric expressed by Anglo-Australian courts (a 'right to performance' arises upon entry to a contract) and the reality reflected in the remedial responses of the court (there is a defeasible 'right to performance' only for those contracts where damages are inadequate, and otherwise there is only a 'right to damages substituting for performance').[8]

The rhetoric: there is a 'right to performance'

Winterton correctly observes that English courts often emphasise *pacta sunt servanda*. For example, in *The Hansa Nord*, Roskill LJ said 'contracts are made to be performed and not to be avoided.'[9] In other English cases, it has been stated that upon entry into a contract each

[8] I have expressed this view elsewhere: K. Barnett, 'Great Expectations: A Dissection of Expectation Damages in Contract in Australia and England' (2016) 33 JCL 1.

[9] *Cehave NV* v *Bremer Handelgesellschaft mbH ('The Hansa Nord')* [1976] QB 44, 71.

party assumes 'a legal right to the performance of the contract'[10] and each party also 'assumes a legally recognised and enforceable obligation to perform'.[11] Although Winterton focuses on English case law, the same point has been made by the High Court of Australia.[12] However, Justice Oliver Wendell Holmes was a famous exponent of the converse view: 'the duty to keep a contract *at common law* means a prediction that you must pay damages if you do not keep it, — and nothing else'.[13]

In other words, Holmes said that the *only* obligation which a defendant must fulfil upon a breach of contract is the obligation to pay damages for the breach.[14] The American law and economics scholars have taken Holmes' views a step further and developed the concept of 'efficient breach'.[15] Richard Posner is the primary exponent of the theory, saying that in some cases it will be Pareto efficient for a party to breach a contract simply because the profit from breach would exceed the profit from completing performance.[16] Pareto efficiency focuses on allocative efficiency, not distributive efficiency or fairness, and so the law is efficient if the subject matter of the contract goes to the 'user who values it the most'[17] and no one else is worse off. Thus, damages for loss are rightly awarded as the primary remedy for breach of contract. Posner has argued from the bench that the law of contract

[10] *Alley* v *Deschamps* (1806) 13 Ves Jun 225, 228; 33 ER 278, 279 *per* Lord Erskine.

[11] *In Re T & N Ltd* [2006] 1 WLR 1728; [2005] EWHC 2870 at [26] *per* David Richards J.

[12] *Coulls* v *Bagot's Executor and Trustee Co Ltd* (1967) 119 CLR 460, 504 *per* Windeyer J; *Placer Development Ltd* v *Commonwealth of Australia* (1969) 121 CLR 353, 373 *per* Windeyer J; *Zhu* v *The Treasurer of the State of New South Wales* (2004) 218 CLR 530, 575; [2004] HCA 56 at [128] (*Zhu*).

[13] O. W. Holmes Jr, 'The Path of the Law' (1897) 10 Harvard LR 457, 462 (emphasis added).

[14] J. Perillo, 'Misreading Oliver Wendell Holmes on Efficient Breach and Tortious Interference' (2000) 68 *Fordham Law Review* 1085, 1086–1087 has argued that Holmes has been misunderstood on this. He says Holmes' real view was that a promisor incurred liability to damages *unless* the stipulated act was performed, and thus that performance was an important consequence of a contract.

[15] R. Posner, *Economic Analysis of Law* (New York, NY: Wolters Kluwer for Aspen Publishers, 9th ed, 2014) §4.10.

[16] *ibid*.

[17] T. Ulen, 'The Efficiency of Specific Performance: Towards a Unified Theory of Contract Remedies' (1984) 83 *Michigan Law Review* 314, 345.

should not be developed in a way which deters efficient breach, because 'the law doesn't want to bring about such a result.'[18]

However, as Sir Frederick Pollock observed to Holmes, some areas of contract law reflect the view that contractual performance is prioritised, and that breach of contract is a wrong.[19] First, and most significantly, courts sometimes enforce contracts or contractual obligations by specific performance or injunctions.[20] Secondly, Pollock argues Holmes' view is inconsistent with anticipatory breach, because Holmes' view seems to be that no pecuniary liability arises until the actual breach occurs.[21] Finally, Pollock observes that the tort of inducing breach of contract allows a court to penalise third parties who induce a contracting party not to perform.[22] Winterton and Stevens have also suggested that other doctrines in contract further support the notion that contracts give rise to more than just an obligation to pay damages.[23] In any case, the High Court of Australia has expressly rejected the disjunctive view of contractual obligations that the defendant may elect to either perform or to pay damages.[24]

The reality: the presumptive remedy for breach of contract is not performance

Both Stevens and Winterton have argued that there is a 'right to performance'.[25] However, I question whether there can be said to be a 'right to performance' in common law countries such as England and Australia when the presumptive remedy for breach of contract is

[18] *Patton* v *Mid-Continent System* 841 F 2d 742, 750 (USCA 7th Cir, 1988) *per* Posner J.

[19] See Pollock's letter to Holmes dated 17 September 1897 in Sir Frederick Pollock, *Contracts* (London: Stevens & Son, 1911) 192, footnote K and Holmes' subsequent letter to Pollock dated 12 March 1911. Letters reproduced in M. De Wolfe Howe (ed), *The Holmes-Pollock Letters: The Correspondence of Mr Justice Holmes and Sir Frederick Pollock 1874 – 1932* vol I (Cambridge, Mass: Harvard University Press, 1942) 79–80 and 177 respectively.

[20] Holmes' qualification 'at common law' in the quote above is important; in my view he is not denying that some contracts may be specifically enforceable in equity.

[21] Pollock, n 19 above, 192, footnote K.

[22] Pollock's letter to Holmes dated 17 September 1897 in De Wolfe Howe, n 19 above, 79–80.

[23] Winterton, n 2 above, 142–146; Stevens, n 2 above, 172.

[24] *Zhu* n 12 above; *Tabcorp Holdings Ltd* v *Bowen Investments Pty Ltd* [2009] HCA 8 at [13], (2009) 236 CLR 272, 285–286 (*Tabcorp*).

[25] Stevens, n 2 above, 172; Winterton, n 2 above, 146–148.

damages in lieu of performance. No doubt this reflects my common law bias, but for precisely this reason, any argument for a 'right to performance' needs to be strong to overcome that bias in the Anglo-Australian context, but even more so in an American context.

The difficulty with the argument that there is a right to performance in common law jurisdictions is that courts do not generally place a defendant under a specific duty to perform upon breach. Expectation damages are the presumptive remedy for breach of contract, and specific performance and injunctions are only awarded if common law damages are 'inadequate'.[26] In practice, the common law preference to award the economic end result of performance rather than performance itself suggests that its commitment to performance is 'less than wholehearted.'[27] This is in contrast to civil and hybrid jurisdictions, where specific performance is the presumptive remedy for breach of contract.[28] In her excellent book, Rowan has argued that France, a civil jurisdiction, offers more 'extensive protection' of the claimant's performance interest than English law.[29] This is not only because specific performance is a presumptive remedy, but also because damages are more generous and termination is less available.[30]

Substitutivists often refer to Hohfeld's rights-based analysis,[31] as they argue that certain remedies which appear to be compensatory or gain-based are in fact substitutes for the violation of the right. Winterton is no exception. He uses Hohfeld to argue that the existence of a right to performance and a correlative duty to perform are logically implied by the very

[26] K. Barnett and S. Harder, *Remedies in Australian Private Law* (Melbourne: Cambridge University Press, 2nd ed, 2018) [10.19]–[10.26].

[27] E. McKendrick, 'Breach of Contract and the Meaning of Loss' (1999) 52 *Current Legal Problems* 37, 47.

[28] E. McKendrick, 'Specific Implement and Specific Performance – a Comparison' (1986) *Scots Law Times* 249; G. H. Treitel, *Remedies for Breach of Contract – A Comparative Account* (Oxford: OUP, 1988) 48–63; S. Rowan, *Remedies for Breach of Contract: A Comparative Analysis of the Protection of Performance* (Oxford: OUP, 2012) 37–55.

[29] Rowan, *ibid*.

[30] *ibid*, 237–239.

[31] W. Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23 Yale LJ 16; W. Hohfeld, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1917) 26 Yale LJ 710.

concept of breach.[32] The Hohfeldian system is complex and I will not fully enumerate it here. The important aspect of Hohfeld's analysis for the purposes of the present discussion is that when a person has a 'right' against another person, that right arises because the other person owed a duty to the first person. The law stipulates a duty (what one ought or ought not to do) and the right is correlative to this, so that if the duty is breached, the right is also violated. Thus, the first person has a 'claim-right' against the second person, meaning that the holder of the right may ask the state to prevent or remedy a violation of the right. So, for example, if Alphonse makes a contract with Beatrix, he comes under a (voluntarily undertaken) duty to do certain things stipulated in the contract, and Beatrix has a right for Alphonse to do those things. If Alphonse then breaches the contract, Beatrix gains a claim-right against Alphonse.

However, Hohfeld posits that for X to be able to say that he has a right against Y, Y must owe a correlative duty to X which reflects that right.[33] Moreover, if there has been a breach of the correlative duty attached to the primary right, there must also be a 'secondary right' of enforcement arising from that breach, otherwise the primary right ceases to have the characteristics of a right.[34] If the claimant has a 'right to performance' of a contract, and the defendant has a correlative duty to perform, in my view, it should follow that the remedies which are awarded for breach operate to enforce the correlative duty to perform. While courts exceptionally award specific performance, injunctions and actions for agreed sums, this is *not* the default position in Australian or English law.

Winterton argues that the species of argument expressed above 'conflates the question of a right's existence with the question of how such a right should be enforced.'[35] In his view, the right to performance is distinct from its method of enforcement, particularly if one adopts Raz's account that rights arise as 'reasons for action'.[36] In other words, the fact that a

[32] Winterton, n 2 above, 144.

[33] Hohfeld (1913), n 31 above; Hohfeld (1917), n 31 above.

[34] J. Austin, *Lectures on Jurisprudence* vol 2 R. Campbell (ed) (Bristol: Thoemmes, 5th ed, 2002) Lecture XLV, 794–795: 'I *have* no right, independently of the injunction or prohibition which declares that some given act, forbearance or omission, would be a violation of my right; nor would the act or forbearance be a violation of my right, unless my right and the corresponding duty were clothed with a sanction …'

[35] Winterton, n 2 above, 146.

[36] J. Raz, *The Morality of Freedom* (Oxford: OUP, 1986) 180–183; J. Raz, 'Legal Rights' in J. Raz, *Ethics in the Public Domain* (Oxford: OUP, 1994) 254.

particular action cannot be required upon a breach of duty does not mean that the right ceases to exist, and there may be other actions which become necessary in lieu of actual performance of the duty. My difficulty with this is that that Raz cannot be used to support a substitutive analysis because he explicitly criticises the idea that rights and duties are necessary correlative, in part because he sees rights as dynamic,[37] and thus his analysis is not consistent with a Hohfeldian conception of rights. While Raz does argue that there is a right to performance of a promise, this is not because of any correlative interest of the promisee in that specific performance; instead, he argues that there is a 'general interest' in promises being kept, and it is this that creates a right in the promisee,[38] and which gives rise to an entitlement to specific performance or expectation damages.[39] Consequently his view of rights is not consistent with a Hohfeldian analysis.

Instead of turning to Raz, Winterton might instead have turned to Gaudron J in *Marks* v *GIO Australia Holdings Ltd*:

> Contrary to what might be thought, the term 'expectation' loss does not indicate that damages are payable simply for thwarted expectations. Rather, damages are payable for the loss involved in non-performance of the contract. Even if a contract is not susceptible of specific performance, the other party is legally entitled to expect its performance.[40]

The better argument would have been that it does not follow that a breach of contract necessarily requires specific performance in order for a claimant to have a right to performance. Sometimes specific performance is not possible, and in lieu of that right, the party is legally entitled to expectation damages. However, while impossibility *is* a reason to decline specific performance,[41] even if specific performance is possible, the court may decide it is unavailable for other reasons which have nothing to do with impossibility, and more to

[37] Raz, *Morality of Freedom*, *ibid*, 171.

[38] *ibid*, 175–176; J. Raz, 'Promises in Morality and Law' (1982) 95 *Harvard Law Review* 916, 933.

[39] Raz, 'Promises in Morality and Law' *ibid*, 937.

[40] *Marks* v *GIO Australia Holdings Ltd* (1998) 196 CLR 494, 502.

[41] *Ferguson* v *Wilson* (1866) LR 2 Ch App 77; *Duncombe* v *New York Properties Pty Ltd* [1986] 1 Qd R 16; *Armstrong Strategic Management and Marketing Pty Ltd* v *Expense Reduction Analysts Group Pty Ltd* [2013] NSWSC 457.

do with the availability of a market substitute.[42] Specific relief is not, and never has been, the default response to a breach.

There are two other difficulties with Winterton's argument. The first is that expectation damages sometimes provide less than performance in reality, and are limited in ways that specific relief is not limited.[43] In this sense, it is suggested that Holmes was right: 'The only *universal consequence* of a legally binding promise is, that the law makes the promisor pay damages if the promised event does not come to pass.'[44]

Consequently, I agree with Holmes that if there is a presumptive remedial right for *all* contracts, the actual remedies awarded by courts suggest that it is a 'right to damages substituting for performance', subject to certain other competing considerations, including, as I have argued elsewhere, the doctrine of mitigation.

The second problem Winterton faces is that even in cases where there is perhaps a 'right to performance' (in other words, for contracts where specific performance will *prima facie* be awarded), such a right is defeasible, and this needs to be discussed more explicitly. Thus, civil and hybrid jurisdictions could be said to have a 'defeasible' right to performance arising upon entry into a contract.[45] The right to performance in these jurisdictions is subject to defeat if certain contingencies occur, but remains intact if no such contingencies arise.[46] Similarly, in common law jurisdictions, a 'right to performance' could be said to arise only in those categories of contract where courts are prepared to make money awards equivalent to specific relief.[47] However, as with civil law jurisdictions, the right is defeasible, as it is

[42] Barnett and Harder, n 26 above, [10.27]–[10.50].

[43] M. A. Eisenberg, 'Actual and Virtual Specific Performance, the Theory of Efficient Breach, and the Indifference Principle in Contract Law' (2005) 93 *California Law Review* 975, 989–996; M. A. Eisenberg, 'The Disgorgement Interest in Contract Law' (2006) 105 *Michigan Law Review* 559, 571–572.

[44] O. W. Holmes Jr, *The Common Law* (Boston: Little, Brown & Co, 1881) 301 (emphasis added). See also Holmes, n 13 above, 462.

[45] 'Defeasible right' is used here in the sense suggested in H. L. A. Hart, 'The Ascription of Responsibility and Rights' (1948–1949) 49 *Proceedings of the Aristotelian Society* 17, 175.

[46] McKendrick, n 28 above, 249; Treitel, n 28 above, 48–63.

[47] For a discussion of how different categories of contract are treated, see Barnett and Harder, n 26 above, [10.27]–[10.50].

subject to equitable discretionary considerations such as hardship, lack of clean hands and the like.[48]

It is for this reason that many authors who write about contract damages (including myself) speak not of a 'right to performance', but of the claimant's 'performance interest'.[49] The content of the duties imposed on a breaching defendant disclose that a claimant often has something *less* than an unalloyed right to performance, but she still clearly has an 'interest' in performance, and this is reflected in the remedies. The only overarching right applying to all contracts is the 'right to damages substituting for performance'. When expectation damages are awarded, the way in which they are calculated reflects the fact that they are a 'substitute' for performance, but the precise nature of that measure varies. It is to this that I now turn.

THE MEASURE OF SUBSTITUTIVE DAMAGES

There is academic disagreement on what measure of contract damages provide a substitute for performance, and what the preferable default measure should be. Broadly, there are three strands of substitutive analysis: first, cost-of-cure as a substitutive award which is argued to be the preferable default remedy for breach of contract; [50] second, diminution in value as a substitutive award which is argued to be the preferable default remedy for breach of contract;[51] and third, both diminution in value *and* cost-of-cure as substitutive awards, depending upon the nature of the contract concerned.[52]

Winterton's analysis falls within the third category, and my own sympathies lie squarely with his analysis.[53] I will outline the different analyses in brief compass and then state why I think Winterton's approach is the most nuanced and appropriate, but also where I think his views need further thought or expansion.

---

[48] *ibid*, [10.71]–[10.109].

[49] See, eg, D. Friedmann 'The Performance Interest in Contract Damages' (1995) 111 LQR 628; Coote, n 1 above, 566; B. Coote 'The Performance Interest, *Panatown*, and the Problem of Loss' (2001) 117 LQR 81.

[50] Coote, n 1 above, 540; Webb, n 1 above, 48; Pearce and Halson, n 1 above, 80–81; Smith, n 1 above, 94–95; Edelman, n 1 above.

[51] Stevens, n 2 above, 171.

[52] D. Winterton, 'Money awards substituting for performance' [2012] *Lloyd's Maritime and Commercial Law Quarterly* 446; Winterton, n 2 above.

[53] Barnett, n 8 above.

Cost-of-cure as a substitute for performance

According to analyses advanced by Emeritus Professor Brian Coote, Dr Charlie Webb and Professor Stephen Smith,[54] the 'difference in value' measure awarded for contracts seeking to gain a financial advantage is not a substitute for performance itself, but simply makes good losses. By contrast, awards of cost-of-cure are said to be substitutive. It has also been argued by the above scholars and others that damages measured on a cost-of-cure basis represent better protection of a claimant's performance interest.[55] It is then said that they should be available for every breach of contract unless rectification will not be undertaken, or the cost of repair is wholly disproportionate to the value of the loss, or the plaintiff is seeking the award in bad faith.

The difficulty with these analyses is that they do not take account of the fact that contracts have different aims, and the different measures of damages awards reflect this reality when courts calculate damages awards. For this reason, law and economics writers distinguish between 'the bargain principle' (ie bargains should be performed according to their terms) and 'the indifference principle' (ie contractual remedies should be structured so that the claimant should be indifferent between the defendant performing on the one hand and the defendant breaching and paying damages on the other).[56] Compensatory damages for breach are the law's attempt to ensure that the claimant is indifferent to the breach. But the amount required to make the claimant indifferent varies according to the aim of the contract. Damages for diminution in value are more likely to be adequate in situations where the claimant seeks to gain a financial advantage,[57] because the claimant is likely to be able to purchase a substitute performance. By contrast, in a situation where the claimant enters into a

[54] Coote, n 1 above, 540; Webb, n 1 above, 48; Smith, n 1 above, 93.

[55] Coote, *ibid*, 540; McKendrick, n 1 above; Webb, *ibid*, 48; Pearce and Halson, n 1 above, 80–81; Smith, *ibid*, 94–95; Edelman, n 1 above.

[56] R. Craswell, 'Contract Remedies, Renegotiation, and the Theory of Efficient Breach' (1988) 61 *Southern California Law Review* 629; M. Eisenberg, 'Actual and Virtual Specific Performance, the Theory of Efficient Breach, and the Indifference Principle in Contract Law' (2005) 93 *California Law Review* 975, 977–979. See also Friedmann, n 49 above, 67.

[57] A. Loke, 'Cost of Cure or Difference in Market Value? Toward a Sound Choice in the Basis for Quantifying Expectation Damages' (1996) 10 *Journal of Contract Law* 189, 191–193.

contract to obtain performance itself, and not the financial equivalent of performance, the better measure of loss is more likely to be cost-of-cure.

The second issue with these analyses is that they do not take account of the way in which the broader principle of mitigation relates to the diminution in value measure by presuming that the claimant will go out and purchase a substitute performance. By 'broader principle of mitigation', I mean not just the explicit stand-alone principle of mitigation which sometimes operates to reduce damages for breach of contract, but also the *implicit* mitigatory principle which is built into the calculation of damages of for breach of a contract for a marketable commodity. This oversight is common to all substitutive analyses, because they fail to appreciate that difference in value measures build in mitigation. This will be discussed in the third part of this review.

Diminution in value as a substitute for performance

Robert Stevens argues that substitutionary damages represent the value of the infringed right to performance.[58] By contrast to the analyses described above, he posits the converse, namely that the primary measure of substitutive damages is the difference in value between the performance contracted for and that provided, and that this should be the presumptive measure for damages for breach of contract.[59] This loss is the direct loss, which he argues is the 'next best' thing to the primary right itself.[60] He contrasts this with consequential losses flowing from the breach. Importantly, Stevens argues that mitigation is not present for awards for direct loss, but only for consequential losses.[61]

There are many difficulties with this analysis. First, it does not reflect the reality of the case law, particularly the cases involving cost-of-cure for defective property. In some of these cases, courts actually state that the award of cost-of-cure is the only way in some cases to provide a substitute for performance,[62] but Stevens chooses to ignore this. Stevens'

[58] Stevens, n 2 above, 171.

[59] *ibid*, 172.

[60] *ibid*, 174.

[61] *ibid*, 181–182.

[62] *Bellgrove* v *Eldridge* (1954) 90 CLR 613, 618 *per* Dixon CJ, Webb and Taylor JJ; *Radford* v *De Froberville* [1977] 1 WLR 1262, 1273 *per* Oliver J; *Dean* v *Ainley* [1987] 1 WLR 1729; *Tabcorp* n 24 above at [13]–[16].

insistence that all direct losses should be measured according to 'difference in value' leads him to argue that awards of cost-of-cure damages of defective property compensate for consequential loss.[63] Winterton observes that these analyses are unconvincing.[64]

Secondly, as Winterton observes, Stevens' analysis has been criticised by Professor Burrows and Professor (now Justice) Edelman. Edelman and Burrows' strongest critique is that Stevens' suggestion that we 'value the right' necessarily requires us to consider the factual deterioration of the claimant's position, and accordingly, the account collapses into the very thing Stevens was attempting to avoid: valuing a loss.[65]

Winterton's own account is said to differ from Professor Stevens' account in two ways. First, Stevens apparently asserts that the measure of compensation is determined by the underlying agreement, but Winterton argues that the underlying agreement is often not detailed enough to determine the scope of liability.[66] Secondly, and importantly, Winterton does *not* argue that substitutive damages should always be measured according to 'difference in value', but nor does he argue that substitutive damages should always be measured according to 'cost-of-cure'.[67] Consequently, he fits in the third category below.

Cost-of-cure *and* diminution in value as a substitute for performance

Winterton argues that substitutive awards substitute for performance itself. Where a breach is reversible, and acquiring a substitute performance is a 'reasonable' course of action for the promisee to adopt, the appropriate substitutionary measure is prima facie the minimum cost of (substitute) performance, which may be either market replacement (ie diminution in value) or repair (ie cost-of-cure). Thus, he argues that where diminution in value is the minimum which would enable the claimant to purchase a substitute performance, this should be favoured, but where it would not enable the claimant to purchase a substitute performance,

[63] Stevens, n 2 above, 189–192.

[64] Winterton, n 2 above, 170–171.

[65] J. Edelman, 'The Meaning of Loss and Enrichment' in R. Chambers, C. Mitchell and J. Penner (eds), *Philosophical Foundation of the Law of Unjust Enrichment* (Oxford: OUP, 2009) 211, 219; A. Burrows, 'Damages and Rights' in D. Nolan and A. Robertson (eds), *Rights and Private Law* (Oxford: Hart Publishing, 2012) 275, 280.

[66] Winterton, n 2 above, 170.

[67] *ibid*.

cost-of-cure may be available, subject to reasonableness requirements. He also argues that there is an alternative substitutive measure when the cost of performance is unquantifiable or 'unreasonable',[68] being the price of release from further performance.[69]

I wholeheartedly endorse Winterton's argument that *both* diminution in value and cost-of-cure damages operate to substitute for performance, depending on the subject matter of the contract and its availability on the market. I have contended elsewhere that *all* types of damages for breach of contract (whether difference in value, cost-of-cure or reliance) seek in some sense to provide an adequate monetary substitute for performance itself.[70] I would have liked more of a discussion of the 'reasonableness' qualification, and the difficulties the courts face in ascertaining what is 'reasonable'. As noted in another review of this book, Winterton focuses on English law, but a consideration of the Australian law on this point would have been fruitful.[71] Indeed, Associate Professor Solène Rowan has recently used Australian cases to underscore the difficulties with the English case law regarding cost-of-cure and the intention of the claimant to effect a cure.[72]

However, like Stevens, Winterton argues that 'mitigation' is not present for money awards which substitute for performance.[73] Both Stevens' and Winterton's substitutive accounts suffer from a common flaw,[74] in that they do not accurately take into account the way in which mitigation may limit the measurement of damages, and indeed is implicit in the difference in value measure.

HARD SUBSTITUTIVISTS AND THE DOCTRINE OF MITIGATION

[68] *ibid*.

[69] *ibid*, 201–215.

[70] Barnett, n 8 above.

[71] J. Paterson, 'Book Review: Money Awards in Contract Law' (2016) 39 *University of New South Wales Law Journal* 302, 306.

[72] S. Rowan, 'Cost of cure damages and the relevance to the injured promisee's intention to cure' (2017) 76 *Cambridge Law Journal* 616, 633–634, 640.

[73] Winterton, n 2 above, 165–166.

[74] See also Burrows, n 65 above, 278.

I have recently identified Dr Winterton and Professor Stevens as 'hard substitutivists',[75] in that they argue that substitution is the sole aim for substitutive awards, whether such awards seek to substitute for the right to performance (Stevens) or substitute for performance itself (Winterton). On these accounts, mitigation does not operate as a principled limit on such awards. Thus, as noted earlier Stevens and Winterton respectively argue that the doctrine of mitigation does not apply to awards for direct loss in contract as opposed to awards for consequential loss (in Stevens' terms)[76] or to money awards which substitute for performance as opposed to money awards which compensate for loss (in Winterton's terms).[77]

By contrast, I am a 'soft substitutivist',[78] as I do not contend that the substitutive aim operates to 'trump' other doctrines such as mitigation. I posit rather that the doctrine of mitigation is in direct tension with the substitutive aim, and that this tension permeates a large range of awards, including some substitutive awards. This has been recognised in the well-known case of *British Westinghouse Electric & Manufacturing Co Ltd* v *Underground Electric Railways Co of London Ltd* when Viscount Haldane said:

> The first [principle of contract damages] is that, as far as possible, he who has proved a breach of a bargain to supply what he contracted to get is to be placed, as far as money can do it, in as good a situation as if the contract had been performed. The fundamental basis is thus compensation for pecuniary loss naturally flowing from the breach; but this *first principle is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming in respect of any part of the damage which is due to his neglect to take such steps.*[79]

On my account, this tension is justified because the mitigation rule reflects a well-recognised and overriding general policy of the law in favour of, among other things, encouraging self-help by claimants, and effecting distributive justice. On this approach, damages for breach of contract act as a substitute for performance itself, but mitigation recognises that if a claimant has already procured a substitute performance, giving a full pecuniary award substituting for

[75] K. Barnett, 'Substitutive Damages and Mitigation in Contract Law: Tension between Two Competing Norms' (2016) 28 *Singapore Academy of Law Journal* 795, 797.

[76] Stevens, n 2 above, 181–182.

[77] Winterton, n 2 above, 165–166.

[78] Thanks to Adam Kramer for coining this term in discussions with me.

[79] [1912] AC 673, 689 (emphasis added).

performance would overcompensate the claimant. This relates to the important point made by Mason CJ and Dawson J of the High Court of Australia in *Commonwealth* v *Amann Aviation Pty Ltd*:

> The corollary of the principle in *Robinson* v *Harman* is that a plaintiff is not entitled, by the award of damages upon breach, to be placed in a superior position to that which he or she would have been in had the contract been performed.[80]

Moreover, where 'avoidable losses' are concerned,[81] courts simply assume that where there is a contract for a marketable commodity, the claimant will take advantage of the opportunity to go onto the market to avoid the loss. This will be discussed further below with regard to difference in value damages.

Of course, as Winterton notes, there are disagreements as to exactly how far courts should reduce damages by taking into account occurrences after breach has occurred, particularly in relation to 'avoided loss'. He sees cases such as *Clark* v *Macourt*,[82] which involve 'avoided losses', as being supportive of a substitutive approach.[83] I concede that this is certainly arguable,[84] but one could also argue that the courts' approaches on these issues are motivated by efficiency concerns and a desire to incentivise self-help.[85]

Mitigation explicitly enters into contract law as a separate stand-alone doctrine used to limit the availability of damages in particular circumstances.[86] In essence, the court does

---

[80] *Commonwealth* v *Amann Aviation Pty Ltd* (1991) 174 CLR 64, 82.

[81] Avoidable losses are those losses the claimant could have avoided by seeking a substitute performance, whereas avoided losses are those which the claimant has avoided by undertaking mitigating conduct. See J. Edelman, *McGregor on Damages* (London: Sweet & Maxwell, 20th ed, 2018) [9-002] and H. McGregor, 'Mitigation in the Assessment of Damages' in D. Saidov and R. Cunnington (eds), *Contract Damages: Domestic and International Perspectives* (Oxford: Hart, 2008) 329, 332–333.

[82] *Clark* v *Macourt* (2013) 253 CLR 1; [2013] HCA 56.

[83] Winterton, n 2 above, 76; D. Winterton, 'Case Note: *Clark* v *Macourt* – Defective Sperm and Performance Substitutes in the High Court of Australia' (2014) 38 *Melbourne University Law Review* 755.

[84] K. Barnett, 'Contractual Expectations and Goods (note)' (2014) 130 *Law Quarterly Review* 387.

[85] M. G. Bridge, 'Mitigation of damages in contract and the meaning of avoidable loss' (1989) 105 *Law Quarterly Review* 398, 409–410; Barnett, n 75 above, 805–807.

[86] See, eg, *Burns* v *MAN Automotive (Aust) Pty Ltd* (1986) 161 CLR 658 *per* Brennan J (diss). Brennan J's judgment, although dissenting, is the vastly superior judgment in this case.

not award damages to a claimant if a reasonable claimant would have responded to the breach by taking certain mitigating action. The measurement therefore deems the claimant to have mitigated. However, mitigation also *implicitly* applies to awards made according to a 'difference in value' measure, because just as with explicit mitigation, the claimant is deemed to have taken certain actions in response to the breach, and damages are calculated accordingly, even if the claimant has not taken those actions. It follows that these awards are *never* solely substitutionary. The difference in value measure applies to marketable commodities precisely because in such cases a substitute can be obtained, and the courts expect a claimant to do so.

It is helpful to illustrate how mitigation is implicit in the calculation of difference in value damages by using an example of a contract for delivery of goods where one party breaches by failing to deliver.[87] Suppose that Kevin (K) contracts with Lilian (L) for the supply of 100 red apples for which he has agreed to pay $100. He plans to sell the apples to consumers for $200. L fails to supply the red apples by the stipulated date. The measure of loss as adopted in sale of goods legislation assumes that K mitigates his loss by purchasing 100 red apples from Marcia (M), for which he must pay the market price (as at the date of breach). Suppose the market price as at the date of breach is $150. In order to ascertain a fair pecuniary substitute for actual performance, the court must compare K's promised position (what Kramer has called the 'hypothetical non-breach position') with his assumed position after mitigation (what Kramer has called the 'hypothetical breach position').[88] K's act of mitigation required him to pay $50 more to receive the promised apples. If K has not yet paid L the contract price, the court simply gives K the difference between the contract price ($100 with L) and the market price at the date of delivery ($150 in a stable market). The difference is $50, the additional cost of securing substitute performance. If K has paid the contract price to L, the court will require L to refund the contract price plus the $50 difference to K. In both instances, K is provided with a money award substituting for actual performance. In economic terms, K is now indifferent between L performing on the one hand, and L breaching and paying damages on the other, because he knows he can get a substitute performance from M with the money award he has received.

[87] I have used this example before: see Barnett, n 75 above, 803–804.

[88] A. Kramer, *The Law of Contract Damages* (Oxford: Hart Publishing, 2014) 345.

But pivotally, if K does not purchase substitute apples from M, the court nonetheless *deems* him to have done so. The measure of damages will still be the difference between the position he would have been in had L performed the contract and the position he would have been in had he purchased substitute apples on the market. The fact that he has not acquired substitute apples is irrelevant. The substitutive damages awarded to him assume mitigation, and mitigation is implicitly built into the difference in value measure both at common law and under statute. In other words, when the court measures damages, the claimant is deemed to have taken reasonable action, even if he has not.

Winterton would no doubt respond that when he argues that mitigation does not enter into the calculation of damages for diminution in value, he means that mitigation *as a stand-alone doctrine* does not apply to the diminution in value measure. This may be the case, but I think his argument needs qualification, and overlooks important and subtle ways in which the doctrine of mitigation in a broader sense may impinge upon the measurement of contract damages in a non-explicit manner. Winterton needs to explain further what he means by 'mitigation' and what his position is on implicit mitigation such as that implicated by the difference in value measure. My own view is that mitigation ensures that such damages provide a more accurate substitute, because they take into account the fact that a substitute is available on the market and deem that any reasonable claimant would take advantage of that.

SUBSTITUTIVE AWARDS UNDER LORD CAIRNS' ACT

As the UK Supreme Court notes in its recent decision in *Morris-Garner* v *One Step (Support) Ltd*, some awards pursuant to Lord Cairns' Act are not awards for release from performance, and are instead genuinely substitutive for specific relief.[89] In this review, I simply want to pick out one of Winterton's arguments, which I found to be compelling in relation to these cases to ensure that it gets more currency. The argument related to awards in lieu of specific performance pursuant to Lord Cairns' Act, and the difficulty of reconciling the results in *Wroth* v *Tyler* and *Johnson* v *Agnew*. In *Wroth* v *Tyler*,[90] the plaintiff sought specific performance of a contract for the sale of a house, but the court declined to award specific performance because of potential hardship on a third party, the defendant's wife, who had

[89] *Morris-Garner* v *One Step (Support) Ltd* [2018] UKSC 20 at [94] *per* Lord Reed.

[90] *Wroth* v *Tyler* [1974] 1 Ch 30.

registered an interest in the house under the Matrimonial Homes Act 1967 (UK). Megarry J awarded Lord Cairns' Act damages in lieu of specific performance. The damages were measured by the difference between the value of the house at the date of judgment and the value at the date of the contract, rather than by the difference between the value at the date of breach and at the date of the contract, because the value of the house had gone up steeply since the date of the breach. Megarry J awarded £5,500 to better reflect the right to performance of the contract lost by the plaintiff.[91] I have always thought that the result in this case is correct.

However, in *Johnson* v *Agnew* Lord Wilberforce said that the principles governing the calculation of Lord Cairns' Act damages and common law damages are the same.[92] There is broad truth in this insofar as compensatory-style awards are concerned, for it seems that an award of Lord Cairns' Act damages for a breach of contract primarily aims to meet the plaintiff's expectation (albeit in a more generous fashion),[93] and an award of Lord Cairns' Act damages for a tort aims to place the plaintiff in the position as if the tort had not occurred (again, albeit in a more generous fashion).[94] However, courts have struggled to apply *Johnson* v *Agnew* in subsequent cases.[95] The two cases have always been difficult to reconcile.

Winterton argues that the result in *Johnson* v *Agnew* can be reconciled with *Wroth* v *Tyler* if one takes into account the fact that it was the *vendor* in *Johnson* v *Agnew* who sought specific performance.[96] The vendor was unable to counter-perform his part of the bargain (namely, to transfer title) because the mortgagees had sold the land, and accordingly it was appropriate not to award the vendor damages which substituted for specific relief. By contrast, in *Wroth* v *Tyler*, the purchaser sought specific performance. Just as specific performance is dependent upon the plaintiff being ready and willing to perform, similarly, damages substituting for specific relief should depend on the plaintiff fulfilling payment of

[91] *ibid*, 57–58.

[92] *Johnson* v *Agnew* [1980] AC 367, 400.

[93] As in *Wroth* v *Tyler* n 90 above.

[94] See, eg, cases for damages in lieu of an injunction restraining an obstruction of light: *Kine* v *Jolly* [1905] 1 Ch 480 (aff'd *Jolly* v *Kine* [1907] 1 AC 1); *Griffith* v *Richard Clay & Sons Ltd* [1912] 2 Ch 291; *Wills* v *May* [1923] 1 Ch 317.

[95] See, eg, *Domb* v *Isoz* [1980] Ch 548.

[96] Winterton, *Money Awards*, n 2 above, 312–314.

the purchase price. Because the plaintiff could fulfil his side of the bargain, damages were made on a substitutive basis.

In my opinion, Winterton's analysis provides a compelling rationalisation of two seemingly incommensurable cases. As I noted at the outset of the review, his analysis has some similarity with the principle that the claimant be ready and willing to perform in order to obtain an award of specific performance.[97] It logically seems to follow that if an award substitutes for specific performance, similar considerations should operate, and that if a claimant is not ready and willing to perform her part of the bargain, a substitutive award should not be made. However, the analogy cannot be overemphasised, as the requirement in specific performance is less strict, and does not require actual counter-performance unlike Winterton's approach.

AWARDS FOR THE PRICE OF 'RELEASE' FROM PERFORMANCE

I read with the great interest the section of Dr Winterton's book outlining how awards for the price of release from performance are substitutive.[98] In essence, he argues that where specific relief or its monetary equivalent is not available, the next best award is the sum a reasonable person in the claimant's position would have accepted to release the breaching party at the time of the breach. He says that the basis for the claim is that the breach involves an unauthorised expropriation by one party of the other party's contractual right.[99] He says that these awards are required when normal measures (either loss-based or substitutive) are not possible, nor is specific relief, and indeed performance is now impossible. I have some sympathy for a substitutive argument in this context, although I would argue that such awards are gain-based.[100] Winterton argues that the hypothetical price of release is the best way of measuring a substitutionary award because the subjective evidence often shows that the claimant would not have accepted any sum, and accordingly, it is better to adopt an objective

[97] *Green* v *Sommerville* n 3 above.

[98] Winterton, n 2 above, 202–203.

[99] *ibid*.

[100] K. Barnett, *Accounting for Profit for Breach of Contract* (Oxford: Hart Publishing, 2012). See also J. Edelman, *Gain-based Damages: Contract, Tort, Equity and Intellectual Property* (Oxford: Hart Publishing, 2002).

approach.[101] He notes that some may argue that the reasonable price of release is not truly a substitute for performance because it does not enable the claimant to obtain substitute performance from elsewhere. (This is exactly my own objection to this measure, as it happens: it seems to me that this measure in no way represents a substitute for the right to performance, except as a 'tertiary' measure that does not directly reflect the breach). Winterton admits that the measure is not a true substitute for performance, but asserts that this is not a strong reason to reject it because liability is predicated upon the impossibility of substitute performance. He says:

> Therefore, although the reasonable price of release does not enable to promise to obtain a true equivalent to performance, it does provide this party with a true substitute for the *right* to performance since it at least gives this party the objective market value of that right at the date it was compulsorily acquired.[102]

Winterton would no doubt be somewhat heartened by the English Supreme Court's recent decision in *Morris-Garner* v *One Step (Support) Ltd*.[103] First, Lord Reed acknowledges that contract damages have a substitutive aspect.[104] Secondly, Lord Reed states that where the claimant is deprived of a valuable asset or right, the claimant loses 'his right to obtain the economic value of the use in question, and [the defendant] should therefore compensate him for the consequent loss.'[105] *Wrotham Park* is said to reflect the fact that 'the refusal of an injunction had the effect of depriving the claimant of an asset which had an economic value.'[106] (As an aside, it is unfortunate that the Supreme Court did not cite Winterton's book, nor the research of other scholars who have taken a compensatory/substitutionary approach,[107] as the judgment would have been more convincing to sceptics of a compensatory approach such as myself if these arguments had been taken into account.)

---

[101] Winterton, n 2 above, 204.

[102] *ibid*, 205.

[103] *Morris-Garner* v *One Step (Support) Ltd* n 89 above. The Court backed away from Lord Nicholls' apparent gain-based approach in *Attorney-General* v *Blake* [2001] 1 AC 268, 281–283.

[104] *ibid* at [35].

[105] *ibid* at [30] *per* Lord Reed, with whom Lady Hale, Lord Wilson and Lord Carnwath agreed.

[106] *ibid* at [63].

[107] See, eg, P. Benson, 'Disgorgement for Breach of Contract and Corrective Justice: An Analysis in Outline' in J. Neyers, M. McInnes and S. Pitel (eds), *Understanding Unjust Enrichment* (Oxford: Hart Publishing, 2004)

On the other hand, Winterton would no doubt be disheartened that Lord Reed seems to have rejected the 'price for release from the bargain' as a basis for these cases,[108] and has characterised the awards which are made as compensating for the loss of the economic value of the asset or contractual right.[109] However, somewhat confusingly, Lord Reed said that the economic value of the right which the court has declined to enforce is measured 'by reference to the amount which the claimant might reasonably have demanded as a quid pro quo for the relaxation of the obligation in question,' which seems to take us back to the price of release, albeit via a loss-based pathway.[110] It has been suggested to me[111] that the reason for Lord Reed's dislike of the notion of 'release from performance' as a basis for these awards stems from the fact the defendant is never released from his obligation, but must pay compensation for the claimant's loss of ability to enforce it. In any event, the practical effect is the same: while the claimant's rights may not be extinguished, they are no longer able to be exercised, and the award of damages compensates for this.

CONCLUSION

Dr Winterton is to be commended for his book on substitutive awards for breach of contract. As I noted at the outset, it is the most convincing 'hard substitutivist' account of contract damages I have encountered thus far, because his analysis accommodates under the substitutionary umbrella contractual damages measured according to difference in value and

311; A. Botterell, 'Contractual Performance, Corrective Justice, and Disgorgement for Breach of Contract' (2010) 16 *Legal Theory* 135; K. Barker, '"Damages Without Loss": Can Hohfeld Help?' (2014) 34 *Oxford Journal of Legal Studies* 631; T. Cutts, '*Wrotham Park* Damages: Compensation, Restitution or a Substitute for the Value of the Infringement of the Right' [2010] *Lloyd's Maritime and Commercial Law Quarterly* 215; M. McInnes, 'Account of Profits for Common Law Wrongs' in S. Degeling and J. Edelman (eds), *Equity in Commercial Law* (Pyrmont: LBC, 2004) 416–418; M. McInnes, 'Gain, Loss and the User Principle' (2006) 14 *Restitution Law Review* 76, 84–86; R. Stevens, *Torts and Rights* (Oxford: OUP, 2007) 80; Stevens, n 2 above, 192–193; J. N. E. Varuhas, 'The Concept of "Vindication" in the Law of Torts: Rights, Interests and Damages' (2014) 34 *Oxford Journal of Legal Studies* 253, 271–272.

[108] *Morris-Garner* v *One Step (Support) Ltd* n 89 above at [15], [74] *per* Lord Reed. cf Lord Sumption at [106]–[111], [115]–[123].

[109] *ibid* at [93].

[110] *ibid* at [94].

[111] Associate Professor Jason Varuhas.

cost-of-cure. I also very much enjoyed his arguments with regard to the ability to perform a bargain before a substitutive award will be made.

My comments with regard to the right to performance represent a difference of opinion upon which reasonable minds may (and do) differ. My criticisms with regard to mitigation are more serious, and deserve further exploration by Winterton and other hard substitutivists in future works. What does it mean for a substitutive analysis that mitigation is implicitly present in the calculation of damages for difference in value? How can the aims of mitigation and the aims of substitution be reconciled? Does mitigation ensure that a more accurate substitute is provided or is it in direct tension with the substitutionary aim? These questions will provide ample grist for the mill for any academic with an interest in contract damages.

In conclusion, I recommend that any scholar, judge or practitioner with an interest in contract damages should read Winterton's work. It is clear and well-written, and his analysis resolves some difficult problems of contract law, and also raises many other interesting questions.