

DAMAGES FOR BREACH OF CONTRACT: COMPENSATION, COST OF CURE AND VINDICATION

ABSTRACT

A cost of cure award seeks to undo the intangible harm or injustice that the promisor has caused to the promisee, thereby giving the promisee the performance he contracted for, and protecting his primary performance interest. In contrast, compensation protects the promisee against another kind of harm, although this time it is tangible: direct and/or consequential loss, which may flow from the violation of the promisee's primary right. The promisee's secondary compensation right requires the promisor to make good the promisee's pecuniary loss to undo the tangible harm that the promisee has also suffered from the breach. This article aims to illuminate the distinct role and aim of a cost of cure award as a legal response to breach of contract from compensatory damages, clarify when such a role should actually be fulfilled, and show how these two remedies can co-exist in harmony.

I INTRODUCTION

The assumption is often made that in order to be legally enforceable, a promise must, at least, entail a moral obligation. Samuel Stoljar says that the requirement to keep promises arises in the moral sphere before entering the legal domain.¹ When a promise is made, the promisee possesses a moral claim against the promisor, although the former may not yet have obtained the actual performance. In the words of Conrad Johnson, '[t]o be under a legal obligation is to be under a requirement that is ... a *moral* obligation'.² The legal obligation, therefore, represents the enforceable administration of morality. The moral obligation to perform the contract exists alongside the legal obligation.³

According to this explanation, the promisor is subject to two sets of obligations, namely legal and moral (where the former incorporates the latter). Therefore, when a judge, in the event of a breach, specifically enforces the promised performance, they are in fact doing no more than enforcing the promisor's moral obligation. The

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¹ Samuel Stoljar, 'Keeping Promises: the Moral and Legal Obligation' (1988) 14 *Legal Studies* 258, 258.

² Conrad Johnson, 'Moral and Legal Obligation' (1975) 12 *Journal of Philosophy* 315, 332 (emphasis in original).

³ Nina C Z Khouri, 'Efficient Breach Theory in the Law of Contract: An Analysis' (2000) 9 *Auckland University Law Review* 739, 759.

legal duty is an extension of the moral obligation. These are the basic features of any legal regime that is in step with the morality of promissory obligations. If common law is to run parallel to the morality of promises, it must require the breaching seller to keep their promise, not simply to pay off the buyer.

The rule that expectation damages, not specific performance, is the primary remedy awarded for breach of contract is often taken to show that contract law does not recognise, and is not based upon, a moral obligation to perform a contract. This fact is at odds with the (moral) notion that ‘a contract is first of all a promise’ which, therefore, ‘must be kept because a promise must be kept’.⁴ However, a promissory conception of contract law does not require that specific performance be the default remedy. In spite of denying the non-breaching party specific performance, the common law of contract does not deny that the promise-breaker should have performed the contract and respected their moral obligation in the first place.⁵ Nor does it deny that specific performance is the ideal and most suitable moral response to promise-breaking or anticipatory repudiation. Yet there are convincing reasons why the courts should not always (through legal means) enforce the morality of promissory obligation or specific performance.⁶ Contract law, thus understood, can be said to run neither against the morality of promise nor parallel to it.

In common law specific performance is available only when damages are inadequate. A number of theorists have argued that the adequacy test is an unsatisfactory instrument for explaining why contract law, if it indeed holds that contractual obligation is based upon the moral obligation to keep one’s word, does not routinely grant specific performance in the event of a breach.⁷ This divergence between legal doctrine and the implication of a moral account of promising is so profound as to be in need of an explanation. If the traditional view that valid contractual obligations should be performed is indeed accepted in contract law, then why is specific performance not routinely granted in the event of promise-breaking?

According to the ordinary understanding of promissory obligation, judges should in general take seriously the moral force of contracts as promises. They should, in the event of a breach, always (through legal means) enforce the morality of promise or

⁴ Charles Fried, *Contract as Promise: A Theory of Contractual Obligation* (Harvard University Press, 1981) 17. See also Stephen A Smith, *Contract Theory* (Oxford University Press, 2004) 398; Dori Kimel, *From Promise to Contract: Towards a Liberal Theory of Contract* (Hart Publishing, 2003) 95–6.

⁵ Seana Shiffrin, ‘The Divergence of Contract and Promise’ (2007) 120 *Harvard Law Review* 708, 398–9; Kimel, above n 4, 104, 112.

⁶ Shiffrin, above n 5, 709, 733.

⁷ Kimel, above n 4, 96; Melvin Eisenberg, ‘Actual and Virtual Specific Performance, the Theory of Efficient Breach, and the Indifference Principle in Contract Law’ (2005) 93 *California Law Review* 975, 1016; Anthony Ogus, ‘Remedies’ in Donald Renshaw Harris and Denis Tallon (eds), *Contract Law Today: Anglo-French Comparisons* (Clarendon Press, 1989) 243, 243–63; Donald Harris, David Campbell and Roger Halson, *Remedies in Contract and Tort* (Butterworths, 2nd ed, 2002) 221–7; Andrew Burrows, *Remedies for Torts and Breach of Contract* (Oxford University Press, 3rd ed, 2004) 427.

specific performance. Once judges compel the defaulting promisor to provide the promised performance, his moral obligation becomes a legal obligation as well. The legal norms regulating promises must not diverge from the moral norms that apply to them; the legal duty must be an extension of the moral obligation. It therefore represents the enforceable administration of morality.

However, the failure to take seriously the moral force of contracts as promises is an indication that judges do not recognise a moral obligation to perform a promise, and thus run against the morality of promissory obligation. The moral obligation will not be satisfied if the defaulting promisor provides only a compensatory award.

The following questions then arise: Does the common law run against the morality of promise? The answer to this question is negative. A number of justifications have been put forward to explain the common law's reluctance to award specific performance despite its undoubted acceptance as the appropriate moral response to promise-breaking.

The justifications upon which we seek to justify the common law's approach are not driven by an underlying general normative position that contradicts the value of promissory norms as utilitarian theories do. For example, embracing any explicit or implicit recommendation to break a promise or asking the contracting parties to adopt the view that people who breach their contractual promises are doing a good thing if this would lead to better social consequences overall and that incentives should be produced for them to behave in this way.⁸ Judge Oliver Wendell Holmes argued that in law a contracting party has the option either to perform the contract (eg, sell goods, produce goods, render some service, and so on) or to pay damages for the loss.⁹ Therefore, if they provide compensation, they commit no wrong; they have done no more or less than to choose which way to perform their obligation. Holmes viewed the obligation to perform a contract as corresponding to a choice to perform or else to provide compensation.¹⁰

Holmes' view predates the so-called efficient breach theory. The idea underlying the theory is that the promisor should be allowed, or even encouraged, to break their contract and provide compensation instead if they can pursue a more profitable or desirable venture than that which they are currently pursuing, notwithstanding they have agreed to a contract and accepted its terms.¹¹ Lawyer-economists assume that

⁸ Shiffrin, above n 5, 732.

⁹ Oliver Wendell Holmes, 'The Path of the Law' (1897) 10 *Harvard Law Review* 457, 462.

¹⁰ Clark A Remington, 'International Interference with Contract and the Doctrine of Efficient Breach: Fine Tuning the Notion of the Contract Breacher as Wrongdoer' (1990) 47 *Buffalo Law Review* 645, 647.

¹¹ Maree C Chetwin and David K Round, 'Breach of Contract and the New Remedy of Account of Profits' (2002) 38 *ABACUS: A Journal of Accounting, Finance and Business Studies* 406, 410; Donald Harris, David Campbell and Roger Halson (eds), *Remedies in Contract and Tort* (Butterworths, 2nd ed, 2002) 12; R Sharpe, *Injunctions and Specific Performance* (Canada Law Book, 1983) 276.

an efficiently breached contract benefits the welfare of society, on the basis that the breach will result in a more efficient use of goods and services.¹² Therefore, undoubtedly influenced by Holmes' understanding of contractual obligation as a simple option either to perform or to provide compensation, lawyer-economists have analysed the law of contract as a means of determining and reinforcing efficient economic behaviour.¹³

The common law's reluctance to award specific performance, despite an undoubted acceptance that it is the appropriate moral response to promise-breaking, can be justified on many grounds. For example, it raises problems concerning both social norms and the risk of error,¹⁴ it creates a serious potential for opportunism,¹⁵ it is undesirable in a contract requiring personal services (eg, employment contracts) because this could be tantamount to slavery, and, in some cases, such as *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd*,¹⁶ it is undesirable where performance requires undue judicial supervision.¹⁷

The present argument in this article is not intended to alter the common law's approach to specific performance, but rather to highlight that there are two distinct contractual interests constitutive of a contract and two distinct ways in which the promisor can cause harm to the promisee, each of which is protected by a different remedy and for a different purpose.

Contract law's concern appears focused on the legally binding contracts that market participants make and the rights and duties that occur as a result. A great deal of research has questioned the exact nature of these rights and duties.¹⁸ In particular, what rights does the buyer acquire by virtue of entering into a contract with the

¹² Frank Menetrez, 'Consequentialism, Promissory Obligation, and the Theory of Efficient Breach' (2000) 47 *University of California At Los Angeles Law Review* 859, 860.

¹³ Khouri, above n 3, 739.

¹⁴ Eisenberg, above n 7, 1020–1.

¹⁵ *Ibid* 1026.

¹⁶ [1998] AC 1. See also *Koepfel v Koepfel*, 161 NYS 2d 694 (App Div, 1957).

¹⁷ Dan B Dobbs, *Law of Remedies: Damages, Equity, Restitution* (West Publishing, 2nd ed 1993) 135–41. As Dobbs has pointed out:

The adequacy test is repeatedly invoked today when the plaintiff seeks equitable relief. Nevertheless its importance has declined. Many cases do not mention the test at all. Some cases mention the test but find plenty of grounds for saying that the legal remedy is not adequate. Adequacy of the legal remedy is often judged quite liberally in favor of the equitable remedy. When equitable relief is denied, it is quite often on grounds entirely distinct from the adequacy grounds ... So although the rule is invoked, it is also often ignored, sidestepped, or invoked in a way that means something else altogether. It is probably fair to say that the adequacy test has been evolving from a rule to a factor in the court's balance of costs and benefits ... The adequacy rule, as a rule that simply bars the gate, is virtually dead and probably should be (citations omitted).

¹⁸ See Rafal Zakrzewski, *Remedies Reclassified* (Oxford University Press, 2005); Stephen A Smith, 'The Law of Damages: Rules for Citizens or Rules for Courts?' in Djakhongir Saidov and Ralph Cunnington (eds), *Contract Damages: Domestic and International Perspectives* (Hart Publishing, 2008).

seller? What is each market participant obliged to do? In *Photo Production Ltd v Securicor Transport Ltd*,¹⁹ Lord Diplock made it clear that there are two kinds of rights: primary and secondary.²⁰ The distinction between primary and secondary rights, as far as English jurisprudence is concerned, was first made by John Austin.²¹ A secondary right arises from a legal wrong, a breach of a primary duty. A primary right is a right which exists independently of a wrong.

II PERFORMANCE AND COMPENSATION: THE TWO DISTINCT CONTRACTUAL INTERESTS

Private law protects many interests; for example, interests in a person's bodily integrity, and the entitlement to have contracts performed according to their specific terms (hereinafter referred to as 'the performance interest'). The imposition of legal duties on individuals requiring them to respect such interests, offers the primary method of protecting these interests.²² Individuals may be required to abstain from doing acts liable to harm these interests — for example, the duty to abstain from causing physical injury to another. Positive protection may also be given by a duty upon an individual to perform actions giving effect to the protected interest, for example, a duty to deliver goods or render services. Of course, these rights can be enforced directly so long as a claimant can obtain an injunction, requiring the defendant owing the duty to forbear from causing physical injury, or obtain a decree of specific performance, requiring the defendant owing the duty to do the very thing that the substantive duty requires them to do.²³ Pothier's original terminology²⁴ will be adapted for use in what follows: reference will be made to primary performance interests, which are protected by primary rights and duties.

It can thus be seen that enforcing a primary right directly involves ordering the defendant, who is under the corresponding duty, to do what they are required to do, or to forbear from doing what they are required not to do. Nevertheless, such enforcement will not always be possible. More specifically, it is not typically too late for the claimant to enforce (or rely on) their primary right when it is infringed. Nevertheless, it may be so if its subject matter is destroyed.²⁵ For example, a contractual right to deliver the Mona Lisa can no longer be given effect if the painting is destroyed. Similarly, a right to bodily integrity cannot be protected if the claimant

¹⁹ [1980] AC 827.

²⁰ *Ibid* 849.

²¹ Robert Joseph Pothier, *A Treatise on the Law of Obligations or Contract* (William David Evans trans, R H Small, 3rd ed, 1853). See also John Austin, *Lectures on Jurisprudence* (R Campbell (ed), John Murray, 5th ed, 1885) vol II, lecture XLV, 367.

²² Charlie Webb, 'Performance and Compensation: An Analysis of Contract Damages and Contractual Obligation' (2006) 26 *Oxford Journal of Legal Studies* 41, 42.

²³ *Ibid*.

²⁴ Pothier, above n 21, 367.

²⁵ Zakrzewski, above n 18, 104.

is killed by the defendant. It is futile to order the defendant subsequently to perform the original duty not to act in the way which caused the death of the claimant.

The same is equally true of a past infringement of a contractual right that correlates with a negative duty, in that it cannot be given effect to (or protected) by ordering the defendant not to breach their substantive primary duty.²⁶ So, there are two main and quite distinct contractual interests constitutive of a contract. First, the interest in securing the contracted-for performance; secondly, the interest in ensuring, if that performance is not completely (but substantially) secured or not secured at all, that one is not left worse off as a result thereof. The claimant can bring a claim to give effect to their performance interest and/or can bring a claim to give effect to their compensation interest. The secondary compensation interest is a separate interest, not merely an alternative or substitute formulation of the primary performance interest.²⁷

It may be argued, however, that in some cases, particularly where the claimant enters into the contract with a view to making a profit, although they obtain damages rather than performance, they end up in an identical position, having effectively made their

²⁶ Ibid 105.

²⁷ The well-known English case of *Farley v Skinner* [2002] 2 AC 732 illustrates the difference between a primary obligation and a secondary obligation, between a performance interest claim and a compensation interest claim. In that case, Farley bought a house that was situated 15 miles from Gatwick Airport. He hoped the house was a quiet country retreat and, before the purchase, he appointed the defendant to survey the property and specifically asked him to investigate and report whether the property was affected by aircraft noise. The defendant stated that noise was unlikely to be a problem, ‘although some planes will inevitably cross the area, depending on the direction of the wind and positioning of the flight path’: at [750C]. On the strength of the surveyor’s negligent assurance that the house was not significantly affected, the claimant decided to purchase it. However, after spending a considerable sum in refurbishment, the claimant discovered that aircraft noise was quite often a problem and that it interfered with his enjoyment of the house. Although the claimant’s enjoyment of the property was diminished by the noise, the value of the house was nevertheless unaffected. The claimant decided not to sell the house but sued the surveyor for damages for discomfort and inconvenience arising out of the breach of contract. The trial judge found that the defendant was in breach of contract and awarded the claimant £10 000 for physical inconvenience, discomfort and distress. The House of Lords upheld this award. Inasmuch as the surveyor’s defective performance was less valuable than the performance due, the difference between these two values was paid by the surveyor to Farley as compensatory damages (£10 000). Surely, the combination of the defective performance and the compensatory award places Farley in no worse a position than that which he would have been in if the contract had been performed properly. However, he has not received the contracted-for performance — that is, of a surveyor exercising a reasonable care to investigate — with the consequence that Farley will not be in the position of having received the performance due to him. This means that Farley’s performance interest is not given effect. His right to the contracted-for performance is not being enforced. Here, the court has recognised a separate interest and right in Farley, namely, his compensation interest in not being left worse off by reason of the surveyor’s breach of contract. As Webb notes, ‘[t]here is a difference between recovering the value placed on the stipulated performance and actually receiving that stipulated performance’: Webb, above n 22, 55. See also Smith, above n 18, 36–7.

profit (ie, the expected increase in their wealth is still fulfilled). Should receiving compensatory damages for non-performance in such cases be understood to be the same as receiving performance? This question must be answered negatively. Consider the following example. Suppose that a seller agrees to sell 200 bicycles to a buyer for a total price of \$1000. But suppose further that, before delivery, a third party (ie, a second buyer), who values the seller's bicycles more highly than the first buyer, offers the seller \$2500 to purchase the 200 bicycles. Suppose the seller cannot meet the third party's demand without breaching their contract with the first buyer, as they have only 200 bicycles to sell. If the seller breaches their contract with the first buyer, they must pay them damages. The market price of the 200 bicycles at the time of breach is \$1200, and the first buyer's valuation of the bicycles at the time of breach is \$1400. If the contract had been performed, the first buyer would have enjoyed a surplus of \$400. The first buyer will enjoy a surplus of \$400 if they recover market-price damages, because they can purchase an identical 200 bicycles on the market for \$1200, and their market-price damages of \$200 will bring their effective price to \$1000.

It is true that the first buyer, after the receipt of the damages (\$200), will be able to make the profit they intended, but careful consideration shows us that before they are able to recover the \$200 which will eventually protect their reason for entering into the contract (ie, they will be able to make the profit they expected), they have to go into the market and purchase 200 bicycles that are identical to the contracted-for bicycles. They must then sue for the difference between the contract price and the market price. This tells us that the first buyer's market-price damages of \$200 are designed merely to ensure that their financial loss is made good; that they are not left worse off by reason of the seller's breach of their substantive primary duty to perform. The \$200 only remedies the losses that flow from the violation of the buyer's primary right to performance. The secondary obligation, thus understood, does not entitle the first buyer to the performance due to them (ie, 200 bicycles).

In contrast, the aim of the primary obligation is different. Instead of seeking to compensate the first buyer for any loss caused by the seller's breach of contract, it seeks to ensure that they do receive the consignment of bicycles for which they bargained — the primary obligation remedies the breach itself. The important point is that, although compensatory damages might in some cases mean that the claimant achieves and fulfils the main reason for entry into the contract, a claim for compensation for the claimant's financial loss still does not amount to an assertion of their performance interest. It should therefore be distinguished from a performance interest claim. Compensatory damages merely respond to the financial loss which may flow from the breach of the claimant's primary right to performance and not to the breach itself.²⁸ This distinction can be best explained by the theory of corrective justice.

²⁸ Catherine Mitchell, 'Remedial Inadequacy in Contract and the Role of Restitutionary Damages' (1999) 15 *Journal of Contract Law* 133, 150; Catherine Mitchell, 'Promise, Performance and Damages for Breach of Contract' (2003) *Journal of Obligations and Remedies* 67, 69.

III CORRECTIVE JUSTICE

The idea of corrective justice received an early formulation in Aristotle's treatment of justice in *Nicomachean Ethics*, Book V.²⁹ For Aristotle, corrective justice is the theory of the mean; more specifically, 'the just, or the equal, is the mean between the more and the less'.³⁰ Once it is established that the defendant has, as a result of their wrongful act, taken and acquired more than they ought to have — that is, more than the mean — then they must surrender their surplus to the claimant, who has less than the mean, or who has less than what they would have had, had the defendant never acted wrongfully towards them.³¹ As a result of the wrong there is an excess (gain) for the defendant, while the claimant endures deficit (loss) as a result of an injustice at the defendant's hands.

That Aristotle refers to the gains and losses of corrective justice normatively, rather than materially or financially, is indisputable. He considers that the equality between the particular parties is disturbed whenever corrective justice is violated. In this way, he lays the complete normative weight of his theory on that equality. The question now to be examined is this: in what regard could the parties possibly be equal? Aristotle provides no clear answer to this crucial question. He simply offers corrective justice as a transactional equality, without saying in what respect the parties are equal. The result is that we cannot, in a dialogue, merely state that the defendant's behaviour is an 'injustice', because merely to state this does not provide an argument. We must explain why the word 'injustice' arises, or is applied in the first place, which requires an account of the kind of equality applicable here, and an account of why it is wrong to disturb it without justification.

The theory of corrective justice is a philosophical explanation — first outlined by Aristotle and later allegedly incorporated by Immanuel Kant into the notion of natural right — of how justice may be done in private law for both parties.

The Kantian principle of right 'is a philosophy of freedom that starts with the operation of free will conceived as self-determining activity'.³² In Kant's account, '[t]he fundamental principle applicable to the interaction of self-determining beings is that action should be consistent [or co-exist] with the freedom of whomever the action might affect'.³³ According to Kant, rights — such as contractual performance — 'are the juridical manifestations of the freedom inherent in self-determining

²⁹ Aristotle, *Nicomachean Ethics* (Roger Crisp trans, Cambridge University Press, 2000) Book V, 2–5, 1130–3, [a14]–[b28].

³⁰ Francesco Giglio, 'Restitution for Wrongs: A Structural Analysis' (2007) 20 *Canadian Journal of Law and Jurisprudence* 5, 22.

³¹ *Ibid.*

³² Ernest J Weinrib, 'The Gains and Losses of Corrective Justice' (1994) *Duke Law Journal* 277, 290. See Immanuel Kant, *The Metaphysics of Morals* (Mary J Gregor trans, Cambridge University Press, 1991) 40–3.

³³ Weinrib, above n 32, 290–1.

activity'.³⁴ Action is thus compatible with the freedom of others so long as it is not contrary to their legal rights. If the promisee has a right to contractual performance, the other party is morally bound by a corresponding obligation to perform unless the promisee has released them from that obligation. The promisee has control over the choices available to the promisor who bears the corresponding obligation.³⁵ To put this differently, the promisee is in a moral position to determine, by their freedom of choice, the way in which the promisor should behave and in this way to limit the latter's freedom of choice.³⁶ In the words of Kant, rights are 'moral capacities for putting others under obligations'.³⁷

Right and obligation are connected — and so therefore are the promisor and the promisee — by the fact that the substance of the right is the essence of the obligation. The right represents the moral position of the promisee, which is to ensure that they demand and receive just what they have been promised in the contract; the promisee cannot demand more than that. The obligation represents the moral position of the promisor, which is to ensure that they perform no less than what they consented to perform in the contract. If both positions are maintained as stipulated, then the promisor and promisee are on an equal footing with respect to their rights and obligations in the contract. The promisor's freedom of action should be capable of coexisting with the freedom of the promisee, which manifests itself in the right to performance, always assuming that the two freedoms must coexist, with the two sides being equal.³⁸ As Weinrib states:

As Aristotle himself notes, the parties to a corrective justice transaction are equal in a very peculiar way: the equality abstracts from the particularity of the parties' social rank or moral character to the sheer relationship of wrongdoer and sufferer. Corrective justice treats the parties as equals because all self-determining beings, regardless of rank or character, have equal moral status. The conjunction of right and duty is simply this equality of self-determining beings viewed juridically, from the standpoint of the correlativity of one person's action and its effects on another.³⁹

³⁴ Ibid 291; Kant, above n 32, 90–5, 101–3.

³⁵ Eduardo Rivera-López, 'Promises, Expectation, and Rights' (2006) 81 *Chicago-Kent Law Review* 21, 34.

³⁶ H L A Hart, 'Are There Any Natural Rights?' (1955) 64 *The Philosophical Review* 175, 180; Peter Vallentyne, 'Natural Rights and Two Conceptions of Promising' (2006) 81 *Chicago-Kent Law Review* 9, 12.

³⁷ Kant, above n 32, 63.

³⁸ See Stoljar, above n 1, 269.

³⁹ Weinrib, above n 32, 292 (citations omitted). For a more complete argument of the connection between corrective justice and Kantian right, see Peter Benson, 'The Basis of Corrective Justice and Its Relation to Distributive Justice' (1992) 77 *Iowa Law Review* 515, 601–24; Steven J Heyman, 'Aristotle on Political Justice' (1992) 77 *Iowa Law Review* 851, 860–3; E Weinrib, 'Restitutionary Damages as Corrective Justice' (2000) 1 *Theoretical Inquires in Law* 1.

This statement can be best explained through the following example. Suppose that an employer enters into a contract with their employee prohibiting them from selling and disclosing any confidential information during their term of employment and thereafter. The employee has an obligation, which means that there is something owed specifically to the employer, so a legal right arises out of this contract. If the employee breaches their contractual promise to the employer by selling and disclosing confidential information to a third party, the employer will claim that the breach represents a wrong against them — that wrong arising from the claim that they have been unequally, unjustly or harmfully treated in the sense of diminishing their status as a promisee. The employer's moral status to determine, by their freedom of choice, how the employee should use the information (and in this way to limit the latter's freedom of choice to act) has been diminished. Thus understood, the absence of coexistence between these two freedoms would simply mean that the employee will cause normative (or as I call it 'intangible') harm to the employer. In this light, the employee's breach of contract leaves the employer in a normatively disadvantaged situation. The two parties are no longer equal in their moral status.

Unless the employee can undo the wrong or injustice they have committed (by breaching the primary right not to sell and disclose confidential information to a third party), the employer will never be able to re-establish their condition as controller of how the information ought to be used by the employee, and, thereby, as a promisee, with respect to the past infringement of the contractual right. However, it is a foregone conclusion that the wrong committed by the employee cannot be undone. The employer cannot require the employee to refrain from doing what they have already done — 'the past cannot be undone'.⁴⁰ As Zakrzewski said, '[r]equiring the person owing the duty to abstain from doing what he or she has already done would be a fruitless exercise'.⁴¹ Therefore, regarding this past infringement, the employer cannot regain their status as a promisee. The freedom of both parties can in no way be returned to a state of coexistence. The state of equality, which involves the employee and the employer being on an equal footing with respect to their rights and obligations in the contract, can no longer be achieved or restored.

The employer can, it is true, rely on this primary right to regulate future conduct by obtaining an injunction to prevent the employee from committing any further infringements, but this primary right will provide no protection with respect to the infringements already committed. Here, the employer can bring a claim for compensatory damages to make good their pecuniary loss concerning the past infringements — the secondary compensation interest.

Clearly, Ernest Weinrib's work provides some valuable clues in what respect the parties are equal. His normative approach provides a background to the idea of equality. In the following section, I attempt to situate the concepts of intangible and tangible harm within the theoretical framework of corrective justice supplied by Weinrib.

⁴⁰ Zakrzewski, above n 18, 105.

⁴¹ Ibid.

IV INTANGIBLE AND TANGIBLE HARMS

If the promisor breaches their obligation to perform — and thus the promisee's right to performance — they have then acted unequally, unjustly or harmfully against the promisee. For example, in the sense of undermining their position as a promisee, the promisee's moral status to determine, by their choice, how the promisor should act has been diminished (hereinafter referred to as 'intangible harm'). The concept of intangible harm it can, therefore, be seen, arises in the absence of the coexistence of the freedoms of, or equality between, the two parties, regardless of whether or not the promisor's breach of promise has actually caused the promisee any financial loss. Stated differently, the promisor's breach of contract is intangibly harmful to the promisee, not because it necessarily deprives them of a financial interest (although it sometimes, perhaps often, does so), but because it leaves them in a disadvantaged situation: their situation as a promisee has been undermined.⁴² The intangible harm here is thus independent of any material or financial measurement. It is a normative concept, which refers to the disadvantageous position occupied by the promisee as a result of the promisor's breach of contract.

By compelling the breaching promisor to fulfil their duty to perform, and so the promisee's right to performance, the court seeks to undo the intangible harm or injustice that the promisor has caused to the promisee. The court also restores to the promisee the privilege of limiting the promisor's freedom of choice of how to act, which was undermined by the promisor's behaviour, thereby giving the promisee the performance they contracted for, and protecting their performance interest. The promisee's interest in having the promise performed is a primary interest, which is effectuated by the recognition of the promisee's (primary) right that the promisor should perform their side of the contract. This brings about a corresponding (primary) obligation on the promisor to perform. Correctly understood, the performance interest does not seek to prevent or remedy the financial loss that the promisee may suffer by reason of the promisor's breach of the primary duty. After all, there are cases where, although the promisor's performance was defective, the promisee suffered no financial loss.⁴³ The promisee's claim for compensation could not therefore be linked with their performance interest claim. The performance interest in such cases

⁴² See Giglio, above n 30, 25.

⁴³ Consider the following example. Suppose that a contractor promises to build a house to certain specifications, one of which is that Brand X pipes are to be used in the plumbing. The contractor builds the house according to the specifications, save that they used different materials, installing Brand Y pipes rather than Brand X. In order to calculate the claimant's financial loss from this breach, the court must determine what the claimant stood to gain from the performance of the contract. Inasmuch as Brand Y is equal in quality, appearance, market value and cost to Brand X, the use of Brand Y pipes does not affect the value of the building work (whether this is assessed at market rates or by reference to the value placed on the work by the claimant). Accordingly, no financial loss is suffered by the claimant. But still the claimant has not received the exact performance they contracted for. In such a case, therefore, if the claimant aims to force the defendant to deliver the promised performance, it will be difficult to argue that compensation can give effect to their interest in having the contract performed as

seeks to make the promisor perform what they have promised, no more, no less. This primary interest is protected if a prohibitory injunction or a specific performance remedy is available to the promisee. As Charlie Webb has agreed:

Where a claimant asserts his performance interest the notion of loss is superfluous. He has a right that the defendant performs and he is seeking to have this enforced. It may be that a breach of contract will cause him loss ... but his interest in performance is independent of this. A contracting party has a right to the defendant's performance regardless of what losses, if any, will be caused by failure to perform.⁴⁴

There are, therefore, two distinct ways in which the promisor can cause harm to the promisee, each of which is protected in a different way and for a different purpose. The promisee has a secondary compensation interest in not being left worse off by reason of the promisor's breach of primary duty. This interest is effectuated by recognising a right in the promisee that the promisor should compensate the promisee for any financial losses resulting from failure to perform their primary duty.⁴⁵ It protects the promisee against another kind of harm, although this time it is tangible: direct and/or consequential loss, which may flow from the violation of the promisee's primary right (hereafter referred to as 'tangible harm').

The promisee's secondary compensation right requires the promisor to make good the promisee's pecuniary loss to undo the tangible harm that the promisee has also suffered from the breach. For, when the time has passed for the delivery to be made on time, only the promisor's breach of the first part of the obligation (viz, for delivery to be made) and, therefore, the intangible harm suffered by the promisee in the sense of them being undermined in the first instance, has been undone by specific performance. Here, the promisee's primary performance interest is substantially fulfilled, but they have still suffered financial loss for services having been delivered late. The promisor's breach of the second part of the obligation (viz, that delivery be made on time) and, as such, the intangible harm suffered by the promisee in the sense of them being undermined in the second instance, cannot be cured and undone, where the time has already passed for the delivery to be made on time. This being so, it follows that the promisor is required to protect the promisee's secondary compensation interest, which ensures that the promisee is not left worse off as a result of not having had their primary performance interest completely addressed. The promisee will then be entitled to be awarded the amount of their pecuniary loss, let's say \$15 000 here, as the monetary value calculated to equal the value of timely delivery to the promisee. The secondary interest, thus understood, does not seek to undo the intangible harm or injustice that the promisor has caused to the promisee, and so

⁴³ *cont'd*

specified. This indeed proves that compensatory damages cannot and should not be said to equate to enforced performance. This example is based on the facts of *Jacob & Youngs, Inc v Kent*, 230 NY 239 (1921).

⁴⁴ Webb, above n 22, 54.

⁴⁵ See Zakrzewski, above n 18, 102–3, 165–6; Smith, above n 18, 36–7.

does not give the promisee the performance they contracted for. Rather, the remedy of compensation, unlike specific performance prohibitory injunction, responds to loss resulting from the breach and not to the breach itself.

V SMITH'S INTANGIBLE HARM CONCEPT

Stephen A Smith argues that if a promisor has committed a breach of contract, then they will cause both a tangible harm (ie, direct and/or consequential loss) to the promisee and an intangible harm.⁴⁶ It should be noted here that by 'intangible harm' Smith does not mean the injustice that the promisor has committed against the promisee in terms of his diminished status as a promisee, as described earlier. Nor does he mean the loss of reputation, injured feelings, pain and suffering, or indeed any kind of 'mental distress', 'emotional disturbance' or 'aggravated damages' that may be cited as grounds for compensation as a result of a breach.⁴⁷ Such losses are still regarded as tangible harms.⁴⁸ For Smith, the meaning of intangible harm is understood to be the destruction of the actual or potential bonds of trust between the parties to the contract.⁴⁹

In Smith's view, an award of damages is a wholly effective means to compensate the promisee for the tangible harm caused to them as a result of the promisor's failure to perform, but it is not an adequate means of repairing the intangible harm.⁵⁰ Compensation, he says, cannot remedy the intangible harm that a breach has caused, because bonds of trust are created by the promisor's voluntary undertakings. It is not possible to buy them.⁵¹ The trust that the promisee has put in the promisor is lost upon breach and it cannot be restored by monetary damages. Can one buy friendship or love? Of course not; and the same conclusion applies to broken bonds of trust in promise cases.

One might wonder, then, whether a decree of specific performance could remedy the intangible harm caused by a breach in any better way. The answer is an unequivocal 'no'. According to Smith, to compel the promisor to provide the promised performance following breach of the contract is 'self-defeating' given that the only way to give effect to the bonds of trust created by the promisor's voluntary undertakings is through performance which itself is voluntary.⁵² Where there is coercion, trust is necessarily not manifest. The relationship of mutual trust and respect, which

⁴⁶ Stephen A Smith, 'Performance, Punishment and the Nature of Contractual Obligation' (1997) 60 *Modern Law Review* 360, 396.

⁴⁷ See Guenter H Treitel, *The Law of Contract* (Sweet and Maxwell, 12th ed, 2007) 891–4.

⁴⁸ Smith, above n 46, 396.

⁴⁹ *Ibid.*

⁵⁰ *Ibid.* 370.

⁵¹ *Ibid.*

⁵² *Ibid.*

has broken down, cannot be rebuilt by an order of specific performance. Accordingly, compelling the promisor to perform amounts to recognition not of the special bond that connects them to the promisee, but rather of the existence of external sanctions.⁵³ An order of specific performance is a highly coercive remedy. Violating such an order constitutes contempt of court and is punishable by jail, a civil fine or both. These background prospects are the main reason why the defaulting promisor performs their undertaking in accordance with such an order. Bonds of trust between contracting parties are created by agreement and cannot be created by an order of specific performance. Such an order, thus understood, is an ineffective means to remedy the intangible harm resulting from the promisor's failure to perform the contract.

Smith concedes that valid contractual undertakings should be performed. But, whereas there is no remedy for intangible harm, Smith argues that adopting a regime of routine specific performance 'would make the intangible benefits of contracting more difficult to achieve'.⁵⁴ In his view, this is the case because potential breachers would perform their obligations in order to escape the threat of the award of a decree of specific performance and its consequences if not complied with. If so, then it follows that adopting a regime of routine specific performance would leave the interacting parties ignorant of 'whether or not performance has been done for the right reasons' and even make it less likely that it has.⁵⁵ Each no longer knows whether the commitment of the other to fulfilling their obligations results from them keeping their word or merely from a desire to escape the decree and its sanctions.

It further follows, from Smith's view, that a regime of routine specific performance would deprive performance, and consequently contracting in general, of its potential to create bonds, thereby 'making the valuable activity of contracting less valuable'.⁵⁶ In practical terms, the bond-creating function of contract would be weakened in the case where specific performance is the normal legal response to a breach of contract. The exclusion of specific performance as the default rule would conversely make the promisor's performance of the contract a stronger confirmation of the special bond between them and the promisee.⁵⁷ Thus understood, if contract is to be taken seriously as a way of creating bonds, then the recognition of specific performance as a general rule must be rejected. The justification for routinely dealing with breach of contract by an award of monetary damages in preference to specific performance is that more scope is thereby left 'for the operation of good intentions'.⁵⁸ As Smith says:

There are some wrongs that law cannot undo and some aspects of life into which law should not intrude. The bond-destruction that results from breach

⁵³ Ibid.

⁵⁴ Ibid.

⁵⁵ Ibid 370–1.

⁵⁶ Ibid 371.

⁵⁷ Ibid.

⁵⁸ Ibid.

of contract is a wrong that law cannot cure and the bond-creation that results from the completion of a contract is an area of life into which law should not intrude.⁵⁹

Smith's argument, however, is not persuasive. More specifically, he assumes that when the promisor breaches their promise, the promisee files a specific performance suit against them only because they have destroyed the relationship which had been or was being developed between them. This is not necessarily so. For, although it is true that the promisee normally has a complaint concerning the promisor's abuse of their trust, and that there is no remedial response to this sort of complaint, we should also not forget that the promisee has another complaint. It is that the promisor has acted unequally, unjustly or harmfully towards them in the sense of diminishing their status as a promisee. Thus, the promisee seeks specific performance to undo that injustice, thereby obtaining the performance contracted for. This paper does not question the fact that the promisee's complaint regarding the destruction of the special tie between them and the promisor has no remedial response. Rather, it simply holds that Smith has overlooked the fact that the promisee has another complaint against the promisor, one which can still be responded to through the remedy of specific performance. Smith's intangible harm concept is wrongly defined. He should instead adopt my definition, namely, that the promisor's breach of contract is intangibly harmful to the promisee, because it leaves them in a disadvantaged situation: their status as a promisee has been undermined.

VI THE PERFORMANCE INTEREST AND DAMAGES AWARDS

The performance interest is given effect by particular remedies: specific performance and injunctions. Nevertheless, the question to be considered now is how the performance interest may be given effect by an award of damages.

To begin with, the court may award the claimant damages measured on a 'cost of cure' basis. On this basis, the claimant is given the sum of money needed to obtain the performance for which they contracted from a different source. Consider the following example. Suppose that farmer Macdonald agrees to allow the Gritty Gravel Co. to extract gravel from some of his fields. The contract requires Gritty to restore the fields to their previous condition when extraction is complete. Gritty refuses to do so. Following this breach, Macdonald asks the court to enforce the contract. Rather than providing Macdonald with a decree of specific performance, however, the court may award him damages measured on the cost of cure. Such an award will enable Macdonald to obtain the stipulated performance (ie, restoring the fields to their previous condition) from another source.

The gravel extraction example shows that a cost of cure award is not an ordinary damages award. Typically, compensatory damages merely respond to any direct and/or consequential loss which may flow from the breach of the claimant's primary

⁵⁹ Ibid 377.

right to performance and not to the breach itself. It is clear that compensation must be compensation for loss. Yet a cost of cure award is intended to allow claimants such as Macdonald to cure the breach itself. It aims to place him in the actual position he would have been in had Gritty performed its primary duty; it does not compensate for any financial losses. Value of loss damages and cost of cure damages do not share the same objective — they are fundamentally different. For example, in *Radford v de Froberville* (*'Radford'*),⁶⁰ the defendant breached his obligation to build a wall that would separate his land from the claimant's. The claimant sued for the cost of building the wall. The court awarded the cost of cure although the difference between the value of the claimant's land with or without the wall was almost nil. The cost of cure is clearly greater than the value of loss, and therefore cannot be understood as compensatory. It is rather a substitute for ordinary specific relief. The damages awarded in *Radford* are a substitute for, and a vindication of, the right that has been infringed by the defendant. As Smith has argued:

[C]ost of cure awards are best explained as a form of substitute specific relief: their aim is not to compensate the plaintiff for the value or utility of whatever was lost, but to eliminate or undo the physical change in the plaintiff's world that has been or will be brought about by the defendant's breach of duty ... Payment of the cost of cure is a substitute for what the defendant should have done originally. Having failed in his primary substantive duty (to perform a contract, to not injure), there arises, at the moment of failure, a substitute duty to achieve the same end by paying for substitute performance.⁶¹

However, both the gravel extraction example and *Radford* show that a cost of cure award provides the claimant only with the resources to obtain from a different source the stipulated performance they contracted for. Does this change the fact that such an award is equivalent to performance of the contract — and that therefore the

⁶⁰ [1977] 1 WLR 1262.

⁶¹ Smith, above n 18, 35–6. For a similar view on this matter, see Charlie Webb, 'Justifying Damages' in Jason W Neyers, Richard Bronaugh and Stephen G A Pitel (eds), *Exploring Contract Law* (Hart Publishing, 2009) ch 6. Charlie Webb observes that if the right to performance is taken seriously, then it would seem that specific performance should be the natural remedy and most suitable moral response to promise-breaking. However, the occasion for the performance may be past or its reclamation may require undue supervision by the court. If this is so, then what is the solution? Webb claims that this contractual right 'can, sometimes, be effectuated through an award ... which the claimant uses to purchase an equivalent performance from an alternative source'. The aim is to find remedies which in so far as possible abide by the special domain of contract law. Webb argues that any damages award that goes beyond simulating performance requires reflection on 'the norms and ideals which shape and justify the law': at xiv. For more details on the 'cost of cure' award, see Stephen A Smith, 'Substitutionary Damages' in C Rickett (ed), *Justifying Remedies in Private Law* (Hart Publishing, 2008); Ewan McKendrick, *Contract Law* (Oxford University Press, 6th ed, 2005) 1017; Ewan McKendrick, 'Breach of Contract and the Meaning of Loss' (1999) 52 *Current Legal Problems* 37; Brian Coote, 'Contract Damages, *Ruxley*, and the Performance Interest' (1997) 56 *Cambridge Law Journal* 537; Eisenberg, above n 7, 1041–8.

claimant's performance interest is effectively met? The answer is 'no'. Although the end product will be obtained from another source, a cost of cure award gives the claimant a substantial part of the performance, thereby making only a small change to the nature of their performance interest. After all, as Guenter H Treitel has said:

Specific relief will hardly ever give the aggrieved party exactly the performance to which he was entitled, if for no other reason than that the enforced performance resulting from this form of relief will generally take place at a time other than that stipulated in the contract.⁶²

In practice, the claimant contracts both for services to be delivered and for those services to be delivered on time. Should the court enforce only one of these obligations, it is not providing the claimant with all they contracted for. If the court is, however, content in such circumstances to order a different performance from that agreed upon between the parties, on the basis that the claimant thereby gains a substantial part of the performance originally agreed upon, then there appears to be no objection to the court doing so by making a cost of cure award. The claimant would thus obtain the end product for which they contracted. In both cases it is difficult in the end to give the claimant exactly what they contracted for, but still it cannot be denied that they receive a substantial part of what the stipulated performance would have given them.⁶³ There is a great similarity between specific performance and a cost of cure award. Each gives the claimant a substantial part of the performance they contracted for; they can be an excellent means of protecting the claimant's primary performance interest.

One reason why the court might be reluctant to grant the claimant a specific performance decree and instead grant them a cost of cure award can be found in the fact that the defendant's performance of their original obligation is not possible anymore, because it is physically impossible for them.⁶⁴ Furthermore, the court's reluctance to compel the defendant specifically to perform can be justified because the threat of enforcing specific performance could be used oppressively — for example, where the defendant, in order to circumvent a difficult personal confrontation, might be required to pay the cost of cure, buying out the claimant's right to specific performance.⁶⁵ It can also be justified based on the risk that because of the great tension between the two parties, the defendant who is required to perform specifically may not fulfil their obligations properly and carefully, but may instead perform defectively. A cost of cure award is therefore a substitute for specific performance, awarded in cases where specific performance is not possible or desirable. It is a vindication of the right that has been infringed by the defendant.

⁶² Guenter H Treitel, *Remedies for Breach of Contract – A Comparative Account* (Oxford University Press, 1988) 1.

⁶³ Webb, above n 22, 61.

⁶⁴ The fact that the actions specified in a contract are physically capable of being performed does not mean that the defendant is still able to perform their primary contractual duty. See Smith, above n 18, 36.

⁶⁵ Harris, Campbell and Halson, above n 7, 191.

One crucial question remains: are there any conditions that should be satisfied in order for the claimant to be entitled to the cost of cure award? The answer is an unequivocal ‘yes’. There are two such conditions. First, the claimant is entitled to the cost of cure award if they undertake to use it to obtain the end product of performance. More specifically, as noted above, the aim of the cost of cure award is not to compensate the claimant for any financial losses caused by the defendant’s failure to deliver the stipulated performance — ie, the notion of loss is simply superfluous — but rather to enable the claimant to obtain that stipulated performance from a different source, thereby protecting their primary performance interest. Thus, such an award aims to place the claimant in the actual, not just metaphorical, situation in which they would have been if the breach had never been committed in the first place; it is a substitute for what the defendant should have done originally.

Surely, if such an award is not used for this purpose, the claimant will end up with defective performance and a sum of money which they can spend as they wish, with the consequence that the cost of cure award cannot be said to be equivalent to performance of the contract. The claimant must not be allowed to keep such a windfall. This is because if a cost of cure award is justified on the ground that it is a substitute for specific performance for the protection of the performance interest, then it seems as a matter of reasonableness that such an award must be given to the claimant, if, and only if, they undertake actually to use it to do the relevant work.⁶⁶ Therefore, clearly, it will be unreasonable to grant the claimant the cost of cure award, if they have no intention to cure the breach (or to effect reinstatement) — the rationale for the award disappears. Oliver J concluded in *Radford*, discussed above, that ‘the claimant genuinely wants this work done and that he intends to expend any damages awarded on carrying it out. In my judgment, therefore, the damages ought to be measured by the cost of the work, unless there are some other considerations which point to a different measure’.⁶⁷ The money should not simply go straight into the claimant’s pocket as a windfall but should instead be spent on curing the breach and therefore reflects the claimant’s interest in securing the contracted-for performance; in seeing the contract they are involved in being performed. Otherwise, such an award cannot be regarded as giving effect to the claimant’s performance interest, and therefore cannot be justified on this basis. As Webb has said:

[T]he reason why the claimant should not be entitled to such a windfall is not because this exceeds any loss that he may have suffered (it may, but this is not point where the claim is not for compensation), but because this in no way gives effect to his performance interest. This being so, there is every reason why the court *should* be concerned with the use to which the claimant may put a performance interest damages award ... such an award should be conditional upon the claimant undertaking to use his damages.⁶⁸

⁶⁶ Smith, above n 4, 422.

⁶⁷ [1977] 1 WLR 1262, 1284.

⁶⁸ Webb, above n 22, 63 (emphasis in original) (citations omitted).

While one important reason for the existence of a concept of ‘reasonableness’, above, is to avoid the conferral of a windfall on the claimant, it can also be seen to have a role beyond this, namely, to avoid undue hardship to the defendant. This is actually the second condition that should be satisfied in order for the claimant to be entitled to the cost of cure award, namely, that granting the claimant such an award does not cause severe hardship to the defendant.⁶⁹ The example of pipes, discussed earlier,⁷⁰ will elucidate this. In that example, the house as built conforms to the specifications except in relation to the brand of pipes to be used in the plumbing work during the construction. Brand Y pipes rather than Brand X were installed. However, Brand Y is equal in quality, appearance, market value and cost to Brand X — indeed, the same thing, though manufactured in another place. The pipe was largely encased within the walls of the completed house. In light of this, to conform to the requirements of the owner would involve knocking down the house and rebuilding. Here, the claimant should not be entitled to the cost of cure award, for they have already received substantially what they had contracted for. It would be wholly unreasonable to grant the claimant such an award ‘in order to enable him to undo what had been done when what had been done was substantially what he had contracted for’.⁷¹ This is an example where it would clearly be unreasonable to award cost of cure.

The fact that the claimant has already received substantially what they had contracted for means that granting them such an award would cause undue or severe hardship to the defendant.⁷² The defendant has a claim to being treated fairly, although it is them who breached the contract and the claimant who is the victim.⁷³ However, the problem in the pipes example is that if the proper measure of damages is the difference in value and the diminution in value is nil, then should the court not revert to an award on the cost of cure? The answer is ‘no’. Lord Lloyd, in *Ruxley Electronics and Construction Ltd v Forsyth* (‘*Ruxley*’), considered that an injustice that arises by way of making an award of too little is not counterbalanced by a court making an award of too much: ‘that cannot make reasonable what ... has been found

⁶⁹ Similarly, specific performance will not be ordered where this would cause undue hardship to the defendant (see, eg, *Patel v Ali* [1984] Ch 283).

⁷⁰ Above n 43.

⁷¹ Ewan McKendrick, ‘Breach of Contract and the Meaning of Loss’ (1999) 52 *Current Legal Problems* 37, 48.

⁷² See Stephen A Smith, ‘The Law of Damages: Rules for Citizens or Rules for Courts?’ in Djahongir Saidov and Ralph Cunnington (eds), *Contract Damages: Domestic and International Perspectives* (Hart Publishing, 2008) 35–6; Edward Yorio, ‘In Defense of Money Damages for Breach of Contract’ (1982) 82 *Columbia Law Review* 1365, 1389; Webb, above n 5, 63–4; Guenter H Treitel, *The Law of Contract* (Sweet and Maxwell, 11th ed, 2003) 947–8, 1026–7 (discussing how the cost of cure award can be refused on the ground of severe hardship to the defendant, as where, for example, the expense of the work involved is wholly out of all proportion to the benefit to be obtained).

⁷³ See Edward Yorio, *Contract Enforcement: Specific Performance and Injunctions* (Little, Brown, 1989) 527; Paul Richards, *Law of Contract* (Pearson Education, 8th ed, 2007) 399–400.

to be unreasonable'.⁷⁴ So, compelling the defendant in the pipes example to pay the cost of cure would cause a hardship amounting to injustice. Where the cost of cure award is unreasonable, the claimant will be compensated, for example, for 'loss of amenity' or mental distress. This is a middle position between two extremes and it is fair to both parties. The result might be otherwise if the claimant had not received substantially that for which they had contracted; for example, where a house is constructed so defectively that it is of no use for its designed purpose. In such a case, it would be reasonable to award cost of cure to undo the breach (or to effect reinstatement). This being so, the question of reasonableness plays an important role in deciding whether to make the award for the cost of cure or not.

In *Ruxley*, neither of these two conditions were satisfied. In that case, the claimants entered into a contract with the defendant to construct a swimming pool in his garden. It was to be of a maximum depth of seven feet six inches, but in breach of contract, the finished pool was only six feet nine inches deep. When the defendant discovered this fact, he refused to pay the contract price. The claimants filed a suit against him for the contract price. The trial judge found that the claimants had substantially performed their obligations under the contract. In this light, it was held that the defendant was liable to pay the claimants the contract price. The defendant was thus left to his counterclaim for damages for breach of contract.

At trial, three facts were established. The first was that the difference in value between the swimming pool which was provided and the pool which should have been provided was found to be nil. The second was that the only way to increase the depth was to rebuild the pool at a cost of £21 460, which was nearly a third of the total price of the pool. The third was that the difference in depth did not impair the defendant's use of the pool. The trial judge, in light of the above facts, refused to award the defendant the cost of cure of £21 560. Rather, he awarded him damages to reflect the loss of amenity which he suffered as a result of not getting the pool for which he had contracted. The Court of Appeal (by a majority) allowed an appeal by the defendant, holding that the decision to award the defendant general damages of £2500 for loss of amenity did not adequately protect his interest in having the contract performed, because the award would not enable him to have the swimming pool for which he contracted.

The course followed by the majority of the Court of Appeal was thus to award the defendant the full cost of carrying out the work. The House of Lords overturned the decision of the Court of Appeal and refused to award the defendant the cost of cure of £21 560, as to do so would be unreasonable.⁷⁵ The cost of cure was described by Lord Mustill as 'wholly disproportionate'⁷⁶ to the value of the loss and by Lord Lloyd as 'out of all proportion'.⁷⁷ Moreover, their Lordships did not

⁷⁴ [1996] AC 344, 374.

⁷⁵ In *Radford and Ruxley*, in deciding whether the cost of cure was an appropriate award, the courts referred to whether such an award was reasonable.

⁷⁶ [1996] AC 344, 354.

⁷⁷ *Ibid* 357. See also *McGlenn v Waltham Contractors Ltd* (2008) 111 Con LR 1.

actually believe that the defendant was as interested in getting his pool rebuilt as he was in punishing the claimants. Their Lordships were therefore concerned that the defendant was seeking the cost of cure award in bad faith. However, rather than awarding the defendant no damages at all for breach of contract the House of Lords upheld the trial judge's ruling for loss of amenity (£2500).

In light of the above discussion, it seems that there are two main and quite distinct contractual interests constitutive of a contract: the performance interest and the compensation interest. The secondary interest is a separate interest, not merely an alternative formulation of the primary interest: receiving compensatory damages for non-performance is not the same as receiving performance. However, some scholars entirely reject this distinction. For example, in his book *From Promise to Contract*, Dori Kimel talks about wrongful losses as the only harm that the promisee can possibly suffer as a result of the violation of their right to performance.⁷⁸ He believes that protection against a wrongful loss (ie, a loss that arises from rights-infringing behaviour) can be provided in two ways. The first is by preventing the promisor from causing wrongful (financial) loss by ordering them to do the very thing they had promised to do under the contract. The second is by redressing (or repairing) the wrongful loss by ordering the promisor to compensate the promisee for the financial loss flowing from the violation of their right to performance. In Kimel's view, the court gives the promise-breaker the choice to perform the contract or to pay damages in order to prevent or repair wrongful losses when — and only when — damages would fully (or effectively) redress those wrongful losses.

According to this view, Kimel seems to perceive both compensatory damages and specific performance as protecting the promisee against one kind of harm and so giving effect to one interest, namely, the performance interest. In other words, he seems to perceive the performance interest as the sole contractual interest and reimbursement orders as substitutional remedies which protect (or give effect to) the performance interest, thereby leaving no place for a secondary (compensatory) interest. Obviously, then, the distinction between the performance interest and the compensation interest has been neglected by Kimel. For him, thus understood, receiving compensatory damages for non-performance is the same as receiving performance. In what follows, this article questions Kimel's rejection of the distinction. More precisely, this article suggests that there are at least two reasons why this view is unsustainable and why Kimel's view should therefore not be embodied in contract law.

A Freedom of Contract

A simple explanation of why Kimel's understanding of contractual obligations should not be embodied in the law — and accordingly why we should accept that there are two distinct contractual rights and interests — can be derived from the principle of freedom of contract. More specifically, Kimel's view that the court gives the promise-breaker the choice to perform the contract or to pay damages in order

⁷⁸ Kimel, above n 4, 96–104.

to prevent or repair wrongful losses does not reflect what the contracting parties agree to. Certainly, parties could agree to disjunctive obligations to perform or to compensate; indeed, some parties clearly do reach such agreements. However, as a general account of how parties understand their agreements, it is quite unconvincing to suggest that they have agreed, in the typical case, to disjunctive obligations to perform or to provide compensation.⁷⁹ In practice, parties enter into a contract in the expectation that it will be performed⁸⁰ — a conclusion supported by empirical evidence. In 1990, David Baumer and Patricia Marschall surveyed 119 North Carolina corporations about their attitudes towards wilful breach. One question was, ‘[i]f a trading partner deliberately breaches a contract because a better deal can be had elsewhere, is such behaviour unethical?’ One hundred and five respondents said ‘yes’.⁸¹ Contracting parties do not usually accept that performance may depend on a subsequent choice by the other party to pay damages rather than perform.⁸² Rather, it seems likely that if this contingency were explicitly considered by the parties, they would decide to grant a right to terminate the contract upon payment of damages, or otherwise provide for the eventuality of breach.⁸³ As Lord Lindley said in *South Wales Miners’ Federation v Glamorgan Coal Company Ltd*:

Any party to a contract can break it if he chooses; but in point of law he is not entitled to break it even on offering to pay damages. If he wants to entitle himself to do that he must stipulate for a provision to that effect.⁸⁴

If Kimel’s view were applied by judges, they would examine the actual content of a contractual obligation and determine whether enforcing it would be economically efficient. To put this differently, instead of requiring judges to look into the procedural

⁷⁹ See Smith, above n 4, 400, 402.

⁸⁰ Khouri, above n 3, 756.

⁸¹ David Baumer and Patricia Marschall, ‘Willful Breach of Contract for the Sale of Goods: Can the Bane of Business be an Economic Bonanza?’ (1992) 65 *Temple Law Review* 159, 165. In addition, 86 participants said that they would always or almost withhold future business from a party who had wilfully breached: at 166.

⁸² This view is also supported in Ian Ayres and Gregory Klass, ‘Promissory Fraud Without Breach’ (2004) *Wisconsin Law Review* 507, 513–4 (citations omitted) (emphasis in original), arguing that:

[T]here are good reasons why promisors want to implicitly say that they intend to perform simpliciter, rather than that they intend to perform or pay damages, or that they do not intend not to perform, or nothing at all about their intent. Promisees care about promisor intent because they care deeply about whether or not the promisor will perform. If a promisee thinks that the promisor does not intend to perform and is seriously considering the option of paying damages instead, he is much less likely to rely on her promise, be it by entering into a binding contract or by otherwise ordering his behavior as if performance were going to happen. But the whole point of promising is to convince others to rely on one’s future actions. Thus promisors have a natural incentive to communicate with their promisees an intent to perform. This fact explains why most promises represent an intent to perform and why the law should adopt a default interpretation that recognizes this fact’.

⁸³ Khouri, above n 3, 756.

⁸⁴ [1905] AC 239, 253.

form of the contract, Kimel's view requires them to look into the actual content of each contract so as to decide the existence and scope of contractual obligation based on the concept of economic efficiency.⁸⁵ If it is possible to breach the contract efficiently, then such a breach will be allowed and encouraged. The promisee's right to performance will not be recognised and only their right to compensation will be protected. The promisor will be allowed to revisit the decision they previously made by intentionally placing himself under an obligation to perform — subject, of course, to the payment of damages. The incorporating of Kimel's view into the law would mean that the judges would not adequately respect the intention of the parties involved — that is, what they have actually said or written in their contract — and their freedom to determine their rights and obligations.⁸⁶ The traditional and still orthodox notion of the nature of contractual obligations is that they are voluntarily assumed.⁸⁷ Their content is thus a matter for the parties who have voluntarily and freely entered into the contract, not the state.⁸⁸ The principle of freedom of contract rejects the interference of the state in the terms of contracts. As Sir George Jessel MR said:

[I]f there is one thing which more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of Justice.⁸⁹

It is clear, therefore, that Kimel's view is inconsistent with the idea of freedom of contract. It may be argued, however, that the court may often supplement or place some limitations on the obligations expressly agreed upon between the parties. In view of this, there are already restrictions upon freedom of contract. That being so, then the fact that Kimel's view of contractual obligations consists of another restriction upon — or undermining of — freedom of contract is insignificant. If there was nothing wrong with other pre-existing restrictions upon freedom of contract or with its undermining, then what can be wrong in this instance?

The answer is that Kimel's view introduces intervention despite the fact that the express terms of the contract leave clear how parties understand their agreement and how the dispute or problem between them should be resolved. Thus, the intervention cannot be reasonably justified in this instance. Take the case of *Harvela Investments*

⁸⁵ Khouri, above n 3, 757.

⁸⁶ Ibid; Daniel Friedmann, 'The Efficient Breach Fallacy' (1989) 19 *Journal of Legal Studies* 1, 23.

⁸⁷ A 'voluntarily assumed obligation' is created by an action which indicates that one intends to place oneself under an obligation to do something. See Neil MacCormick and Joseph Raz, 'Voluntary Obligations and Normative Powers', (1972) *Proceedings of the Aristotelian Society*, Supplementary Volumes 46; Joseph Raz, 'Promises and Obligations' in Peter Hacker and Joseph Raz (eds), *Law, Morality and Society* (Clarendon Press, 1977) 210.

⁸⁸ See Hugh Collins, *The Law of Contract* (Butterworths, 4th ed, 2003) 25; Smith, above n 4, 59; Laurence Koffman and Elizabeth Macdonald, *The Law of Contract* (Tolley, 4th ed, 2004) 3–4.

⁸⁹ *Printing and Numerical Registering Co v Sampson* (1875) LR 19 Eq 462, 465.

Ltd v Royal Trust Co of Canada Ltd.⁹⁰ In that case, the first defendants invited the claimants and the second defendant to submit a single sealed offer for the shares and stated that they would accept the highest complying offer. The first defendants were effectively offering a simple contractual arrangement whereby the shares would be sold to the highest bidder amongst those who submitted offers. The claimants tendered a fixed bid of \$2175 000 and the second defendant tendered a referential bid of \$2 100 000 or \$101 000 in excess of any other offer, whichever was the higher. The first defendants accepted the second defendant's bid, treating it as a bid of \$2 276 000, but the Court held that the first defendants were obliged to accept the claimants' bid.

The referential nature of the second defendant's bid rendered it invalid, as it was not within the terms of the contract to bid (because it was not a single offer). Obviously, there is no lacuna in the provisions of the contract, because it expressly provides for the situation which has occurred. In this light, the first defendants were contractually bound to sell the shares to the claimants. Kimel's view, however, introduces intervention by allowing the first defendants to breach the contract with the claimants and enter into a contract with the second defendant (subject, of course, to the payment of compensatory damages), despite the fact that the terms of the contract are clear and offer excellent guidance.

It must be realised that the courts do not usually interfere with the obligations expressly agreed between the parties unless faced with situations not dealt with by the express terms of the contract. For example, John contracts to sell his car to Mike, who offers \$2500 to purchase it, but for reasons unforeseen by both parties, the car is totally destroyed an hour after the conclusion of the agreement. What is the legal position in cases of this type? How should the dispute be resolved? There is clearly a lacuna in the provisions of the contract, because it does not expressly provide for the situation which has occurred. In such cases, the courts step in to fill the gaps left by the parties in sensible and reasonable ways, using a legal rule, the doctrine of frustration of contract, which dictates that in the event of certain unexpected contingencies the court may consider the contract as being terminated.⁹¹ In this view, the contractual obligations of both parties are automatically terminated and neither is obliged to perform. Thus, neither can be held liable for breaching the frustrated contract.⁹²

⁹⁰ [1986] AC 207.

⁹¹ See, for example, *Javad v Aqil* [1991] 1 WLR 1007.

⁹² Collins, above n 88, 298–9; Koffman and Macdonald, above n 88, 434–5. See, eg, *National Carriers v Panalpina (Northern)* [1981] AC 675; *Davis Contractors Ltd v Fareham UDC* [1956] AC 696, 698. The statutory law of sales cancels further performance of the contract if the goods perish without fault of either party before ownership has passed to the buyer (see, eg, *Sale of Goods Act 1979* (UK) c 54 s 7; United States *Uniform Commercial Code* ('UCC') § 2-615. Intervention is also introduced to protect various types of relatively weak or vulnerable contract parties, for example, consumers (see, eg, *Unfair Contract Terms Act 1977* (UK) c 50), employees (see, eg, *Employment Protection (Consolidation) Act 1978* (UK) c 44; *Employment Act 1989* (UK) c 38; *Trade Union and Labour Relations (Consolidation) Act 1992* (UK) c 52, s 37(1)(a)), tenants (see, eg, *Rent Act 1977* (UK) c 42; *Landlord and Tenant Act 1985* (UK) c 70)). For further examples, see Kimel, above 4, 118–9.

Accepting that parties should enjoy the freedom to choose the terms of their own contract entails an acceptance that, in all contracts, the duty of the defendant to perform (which is correlative to the claimant's right that the defendant perform) should not be regarded as equivalent to an option to either perform or pay damages. This in turn requires the recognition of performance and compensation as two distinct contractual rights and therefore interests.

B The Notion of Breach

A further simple explanation of why Kimel's view should not be embodied in the law — and therefore why we should accept that there are two distinct contractual rights and interests — is found in the notion of breach of contract. More specifically, in the ordinary understanding, a breach of contract is a breach of the duty to perform the original (primary) obligation (eg, deliver goods, produce goods, perform a service, and so on). Thus, its premise is that the defendant has a duty to perform. If no duty exists on the part of the defendant to perform their (primary) original obligation, then there can be no such thing as a breach of contract.⁹³ Breach, thus understood, presumes a duty to perform, because in the absence of such a duty there is plainly nothing that can be breached. That the defendant has an obligation to perform and that the claimant, correspondingly, has a right to the performance of the defendant is what establishes the primary interest of the claimant in performance.⁹⁴ It gives effect to that interest.

Failure to realise the distinctiveness of the claimant's performance interest leads to the position where the defendant's failure to perform would not in itself constitute a breach of duty. Thus, a claim for compensation would be in the nature of a claim to enforce a primary interest instead of a claim with regard to a secondary interest established upon a breach of duty.⁹⁵ Primary rights are distinct from the secondary rights which arise upon breach of duty. They give effect to different interests. That English contract law incorporates the notion of breach of contract and recognises distinct rights and interests in performance and in compensation is clear: judges do not typically describe a contractual obligation as an obligation to either perform or pay damages in lieu of performance. Rather, they maintain that there is an obligation to perform a contract and describe its breach as a wrong.⁹⁶ As Oliver LJ stated in *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd*: 'the purpose of a contract is performance and not the grant of an option to pay damages'.⁹⁷

Nevertheless, Kimel's view gives the contracting parties the choice either to perform the contract or to pay damages for losses resulting from breach. It is clear that for Kimel compensatory orders enforce the original (primary) obligation. Both specific

⁹³ See Webb, above n 22, 46.

⁹⁴ Ibid.

⁹⁵ Ibid 49.

⁹⁶ Smith, above n 4, 119.

⁹⁷ [1983] QB 284, 304.

performance and damages are regarded as forms of *true* specific performance. In this view, there is no difference between performance and compensation, between primary and secondary obligations. Kimel perceives compensatory damages and specific performance as giving effect to the same interest: the performance interest. In practical terms, the theory perceives this as the sole contractual interest and reimbursement orders as substitutional remedies which give effect to the performance interest, thus leaving no place for a secondary (compensatory) interest. Adopting Kimel's view that a claim for compensation is in the nature of a claim to enforce a primary interest, instead of a claim with regard to a secondary distinct interest established upon a breach of duty, results in an absurdity. The result is that we must deny that a contract imposes a duty to perform on the part of the defendant and that the contract may in fact be breached. The notion of breach of contract has no place in Kimel's view — it is a fiction.

So, in the example of the employee who has breached their contract with the employer by selling and disclosing confidential information, it would be erroneous to view the secondary right as a substitute method of protecting or giving effect to the primary interest. The employer's right to receive damages for the financial losses resulting from the breach of primary duty does not protect their interest that the employee not sell and disclose the confidential information. The same conclusion applies in respect of the primary right in the sense that it would be erroneous to view both the primary and secondary rights as protecting a single interest of the employer — that the employee should ensure that the employer's financial loss is made good. In fact, to view them in this way would result in paying 'insufficient attention to the existence of the primary right and duty and the fact that causing [such financial loss] is treated as a breach of duty by the [employee]'.⁹⁸

One must realise that the employee's primary duty is not to infringe the employer's protected primary interest, and accordingly not to cause them any financial loss. It should not be understood as a duty simply to pay monetary damages in order to reimburse the employer if the employee causes them such financial loss. If it were, then the act of selling and disclosing the confidential information which caused the financial loss would not be seen or perceived as a breach of duty. A conflation of the primary and secondary interests in the sense of understanding the employer's interest as being in the protection of the confidential information or, should that information be disclosed by the employee, in ensuring that the employee's behaviour causes the employer no loss, leaves no scope for any notion of breach of contract.⁹⁹ As a matter of principle, therefore, accepting that all contracts may be breached entails an acceptance that all contracts impose a duty to perform. This in turn requires the recognition of performance as an interest distinct from the compensation interest.

⁹⁸ See Webb, above n 22, 43.

⁹⁹ Ibid.

VII CONCLUSION

To sum up, it can be stated that there are two distinct contractual interests and two distinct ways in which the promisor can cause harm to the promisee, each of which is protected by a different remedy and for a different purpose. First, the promisee has an interest in seeing the contract they are involved in being performed. If a promisor breaches this interest, then they cause intangible harm to the promisee. The performance interest seeks to restore to the promisee the privilege of limiting the promisor's freedom of choice of how to act, which was undermined by their (the latter's) behaviour, thereby giving the promisee the performance they contracted for. It neither prevents nor repairs the financial loss that the promisee has suffered due to the promisor's breach. This interest is protected if a prohibitory injunction, a specific performance remedy, or a cost of cure award is available to the promisee. Second, the promisee has an interest in not being left worse off by reason of the promisor's breach of primary duty to perform. The compensation interest protects the promisee against another kind of harm, namely, tangible harm: the financial loss which flows from the violation of the promisee's primary right to performance. Understood in this way, the secondary interest is a separate interest, not merely an alternative formulation of the primary interest: receiving compensatory damages for non-performance is not the same as receiving the performance itself.

Since there are these two distinct contractual interests and, therefore, two distinct ways in which the promisor can cause harm to the promisee, Kimel must be taken to have adopted an artificially narrow concept of harm in order to secure his desired conclusion. By talking about wrongful losses, as if it is the only harm that the promisee can possibly suffer as a result of the violation of their right to performance, Kimel assumes that there is just one contractual interest. The danger here is that when the promisee brings a claim to give effect to their primary right to performance, it will be understood to be the same as a claim to repair losses caused by the promisor's wrongful breach and that it is, therefore, this right to which compensation for the financial loss flowing from the violation will give effect. However, the claim is really there to undo the intangible harm that the promisor has caused to the promisee.

