THE DEFENCE OF BREACH AND THE POLICY OF PERFORMANCE

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> Error is viewed … not as an extraneous and misdirected or misdirecting accident, but as an essential part of the process under consideration – its importance … being fully comparable to that of the factor which is normally considered, the intended and correct logical structure.
>
> John von Neumann[1]

I INTRODUCTION

In a textbook[2] and in a number of papers[3] published over the last eight years, I[4] have sought to defend the English law of remedies for breach of contract against the attacks currently being made on its basic structure in the wake of the House of Lords' decision in *AG v Blake (Jonathan Cape Ltd Third Party)*,[5] which, the Court of Appeal has told us in *Experience Hendrix LLC v PPX Enterprises Inc, Edward Chalpin,*[6] 'marks a new start in this area'.[7] I have been fortunate enough to receive a number of comments on this defence, and in this paper I should like to respond to those of Gillian Black[8] on Philip Wylie's and my paper[9] on the *Hendrix* case. Though I am obliged in relatively minor ways to dispute Ms Black's interpretation of Mr Wylie's and my argument, I do so reluctantly, and only because I think it necessary to do so in order to set up the vital but usually insufficiently appreciated policy issue which I believe Ms Black's criticism has brought to the fore.

Leaving aside the value of Ms Black's comments on *Hendrix* in themselves, the virtue of her paper is, in my opinion, that it gives weight to the role of breach in the practical operation of commercial law, and so goes some way towards a proper consideration of the economic policy that should underlie the law of remedies for breach; though, as I shall argue, she by no means goes far enough. This policy issue is what really matters in the current debate, though one would not realise this from the tone of the

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[1] J von Neumann, 'Probabilistic Logics and the Synthesis of Reliable Organisms from Unreliable Components' in C E Shannon and J McCarthy (eds), *Automata Studies* (1956) 43, 43.

[2] D Harris et al, *Remedies in Contract and Tort* (2nd ed, 2002) at chs 1, 17.

[3] My latest effort in this vein is D Campbell, 'The Relational Constitution of Remedy: Co-operation as the Implicit Second Principle of Remedies for Breach of Contract' (2005) 11 *Texas Wesleyan Law Review* 455.

[4] Much of my thinking on the topic of this paper has been formed in the course of joint work with Hugh Collins, James Devenney, Donald Harris, Roger Halson and, of particular relevance to this paper, Philip Wylie.

[5] [1997] Ch 84 (Ch D); [1998] Ch 439 (CA); [2001] 1 AC 268 (HL (E)).

[6] [2003] EWCA Civ 323.

[7] [2003] EWCA Civ 323, [16].

[8] G Black, 'A New Experience in Contract Damages? Reflections on *Experience Hendrix v PPX Enterprises*' [2005] *Juridical Review* 31. Unattributed page references in parentheses are to this paper. Ms. Black was good enough to send me a copy of her paper in draft and the Editor of the *Review* to send me a copy of it in proof.

[9] D Campbell and P Wylie, 'Ain't No Telling (Which Circumstances are Exceptional)' (2003) 62 *Cambridge Law Journal* 605.

majority of the academic literature, which is, unfortunately, academic in the bad as well as the good senses; nor from cases such as *Blake* and *Hendrix*, in which our appeal courts have, as I have put it elsewhere, 'embarked on a legislative programme not seen since the days of Mackenzie Chalmers, with the difference that he did it above board'.[10] Ms Black's paper is unusual amongst attacks on the existing law of remedies in that it goes at least some way to raising the fundamental issue of policy. The attacks that have been mounted on the existing law of remedies usually fail explicitly to address that issue,[11] and so are driven by an implicit policy, the implications of which they do not understand. The problem is that this implicit policy seems so very, very obvious that it is believed to go without saying. I have reached the conclusion that one needs to begin any discussion of this implicit policy at its own level of 'obviousness'; so let's begin.

To one who comes to the study of the English law of remedies for breach with conventional ideas about contract, the remarkable feature of that law, and of the corollary laws of all those jurisdictions which have a law still based on the English, is that, in those words of Farnsworth which I have quoted many times, it 'shows a marked solicitude for men who do not keep their promises.'[12] The basic remedy is not the compulsion of performance, but rather compensation of the claimant by compulsory payment of damages. Compulsory performance is an exceptional remedy.[13] What is more, compensation is quantified so as to protect the claimant's net expectation, and quantification on this basis will tend to keep the defendant's costs of breach to a minimum, which can often be zero. What is even more, a law of remedies of this nature often gives the defendant an incentive to breach. Whenever the costs of compensation are smaller than the costs of performance, the defendant has an incentive to breach, and this turns out to be a very common case indeed in commercial law.

Ms Black reviews the various intellectual arguments that form the indispensable background to *Blake*, notably the 'performance interest' of Professor Friedmann,[14] and the 'unjust enrichment by a wrong'[15] derived from one of the versions of a general law of restitution put forward by the late Professor Birks. The remedial response which obviously suggests itself to those who believe the existing law to be 'seriously defective'[16] and in need of radical reform would be to greatly increase the availability of specific performance. But this has not played a major part in the current attacks,[17] which have mainly argued for

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[10] D Campbell, 'The Extinguishing of Contract' (2004) 67 *Modern Law Review* 817, 832.

[11] I will not discuss Ernest Weinrib's explicit attempt to anathematise consideration of the function of private law in *The Idea of Private Law* (1995) at chapter 1. I have said a little about Weinrib's views in D Campbell, 'Classification and the Crisis of the Common Law' (Review of P Birks (ed), *The Classification of Obligations* (1997)) (1999) 26 *Journal of Law and Society* 369, 371-3.

[12] E A Farnsworth, 'Legal Remedies for Breach of Contract' (1970) 70 *Columbia Law Review* 1145,1216.

[13] See below n 65.

[14] D Friedmann, 'The Performance Interest in Contract Damages' (1995) 111 *Law Quarterly Review* 628.

[15] P Birks, *An Introduction to the Law of Restitution* (rev. edn. 1989) 39-44.

[16] *Blake* [1998] Ch 439, 457E (CA).

[17] A major problem for those who wish to prevent breach is, of course, the existence of the court's explicit discretion to refuse to award specific performance even when a case has been made out for it, which restitutionary 'damages' will avoid, if, as damages, they are available as of right. I have discussed this aspect of the debate in D Campbell, '*Hamlet* without the Prince: How Leng and Leong Use Restitution to Extinguish Equity' [2003] *Journal of Business Law* 131.

the increased availability of non-compensatory damages. These damages would reduce or remove (or even make negative) the difference between the costs of breach and performance, and so reduce or remove the defendant's incentive to breach.

In my opinion, this negative attitude to breach is quite wrong. As I have argued in the works to which I have referred, including in a paper 'In Defence of Breach', on the title of which this response draws,[18] I believe that breach of contract is an indispensable institutional component of the market economy, and a major reason why that economy is superior to any other alternative of which we can conceive. It would be a grave mistake to seek normally to prevent breach; indeed, it would be impossible to do so within the framework of a market economy. As I have had my say about all this on many previous occasions, I intend here only to focus on what Ms Black, albeit unintentionally, makes clear: if one looks at these matters from the perspective, not of abstract ratiocination about doctrine and its classification, but of practical effect on commercial law, then criticism of the law of remedies for breach of contract just because it does not effectively prevent breach is misconceived.

But the point is that this is not the way remedies are approached by those now so critical of the existing law. I will argue here that what lies behind arguments such as Friedmann's and Birks', and behind Ms Black's criticism of Mr Wylie's and my paper, is a simple, indeed crude, belief that breach should, *ceteris paribus*, be prevented. In essence, these arguments are a modern revival of *pacta sunt servanda*, [19] and, therefore, cases such as *Hendrix*, which follow *Blake's* expansion of the remedies available to a claimant, are welcomed. When evaluated as an economic policy, *pacta sunt servanda* is untenable. This is why the existing law of damages eschews it, and why it can underpin the sometimes astoundingly elaborate doctrinal structures from which attacks on that law have been launched only when it is maintained, not as an explicit policy, but as a visceral commitment justifying the pursuit of 'practical justice'[20] in defiance of the existing law.

II The Sliding Scale and the Current State of the Argument for Restitution

The particular interest of *Hendrix* among the still small number of cases which have followed *Blake* was that it seemed to offer an elegant refinement of the emerging law of 'restitutionary damages' as a general response to breach of contract.[21] If I may put the point very briefly (for it is set out at length in Mr Wylie's and my paper), *Hendrix* seemed to offer a way of marrying the 'hypothetical release damages', brought into the law of remedies for simple breach of contract in *Wrotham Park Estate Co Ltd v Parkside Homes Ltd*,[22] with the complete 'account of profits', brought into that law by *Blake*, within a single theoretical framework based on general restitutionary damages. By regarding hypothetical

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[18] D Campbell and D Harris, 'In Defence of Breach: A Critique of Restitution and the Performance Interest' (2002) 22 *Legal Studies* 208.

[19] B Coote, 'Contract Damages, *Ruxley*, and the Performance Interest' (1997) 56 *Cambridge Law Journal* 537, 542: there is 'wide acceptance of the phrase "*pacta sunt servanda*"'.

[20] *Blake* [2001] 1 AC 268, 292C (HL). The latest sacrifice of legal argument to direct 'pursuit of the justice of the outcome' by the appeal courts is made in *Borders (UK) Ltd and others* v *Commissioner of Police of the Metropolis and another* [2005] EWCA Civ 197, [2005] All ER (D) 60 (Mar) [28], which, as the author of the principal judgement tells us, 'has to make up in justice what it lacks in logic' (ibid). With James Devenney I have discussed this case in 'Damages at the Borders of Legal Reasoning' (2006) 65 *Cambridge Law Journal* 207.

[21] As we shall shortly see, 'restitutionary damages' has an importantly different meaning in the terminology carefully elaborated by Ms Black, above n 8, 32-4.

[22] [1974] 1 WLR 798.

release damages as partial disgorgement of the defendant's profits from breach, and an account of profits as total disgorgement, these remedies, which undoubtedly have very disparate doctrinal foundations, can be seen as together constituting a 'sliding scale' of restitutionary damages.

Now, it was no part of Mr Wylie's and my intention to argue for the sliding scale, to which, as Ms Black notes, we 'are vehemently opposed' (p 44). Ms Black misses the main reason we are opposed to it, and I shall return to this, but she is good enough to say that 'it cannot be denied that there is force' (p 45) in one ground of our opposition to the sliding scale: that there is no principled way to say where on the sliding scale awards should be made. On our interpretation of *Hendrix*, that case contemplates a scale of the moral turpitude displayed by a defendant in breach. George Blake's attempt to profit from his treason constituted 'exceptional circumstances' justifying the account of profits or total disgorgement awarded in *Blake*,[23] but the defendant's unauthorised release of recordings in *Hendrix* was not 'exceptional to the point where the Court should order a full account of all profits', and so the claimant was confined to hypothetical release damages or partial disgorgement.[24] Mr Wylie and I believe we show that the argument for this distinction in *Hendrix* is very poor, and that the law of contract gains very great strength from normally wisely refusing to attempt to make such distinctions.

Ms Black's defence of *Hendrix* in light of this is to say that it does not attempt to construct a sliding scale. I am afraid I think this is wrong, and leave it to the reader to compare Ms Black's and Mr Wylie's and my interpretation of the case. Ms Black is herself happy to do without the sliding scale, for she much prefers to regard hypothetical release damages and an account of profits as 'two discrete awards' (p 44). She in essence adopts the approach which, though also to be found in the work of other commentators on restitution, has been most closely identified with the Ph.D. thesis of Dr James Edelman, in which 'gain-based damages', rather then general 'restitutionary damages', are divided into 'restitutionary damages' in a narrower sense, which reverse an unjust transfer of value from the claimant to the defendant, and 'disgorgement damages', which look to strip the defendant of a profit made from a wrong such as a breach, even though that profit cannot be said to be subtracted from the claimant.[25] Perhaps what distinguishes Dr Edelman's statement of this position from other statements of it is the strength with which he maintains that a coherent concept of 'restitution' must be confined to reversals of unjust transfers, and so disgorgement damages cannot be restitutionary, for, indeed, 'whether a transfer of value occurs or not is irrelevant'[26] to disgorgement damages. Treating hypothetical release damages as restitution and the account of profit as disgorgement in this sense, they certainly would constitute, as Ms Black says, 'two discrete awards', and, as there therefore could be no continuous sliding scale subsuming them both, then Mr Wylie's and my 'objections to the scale become irrelevant' as criticisms of the 'discrete awards' themselves (p 44).

This is, one might concede for the purposes of argument, logically right, but I am obliged to say outright that Mr Wylie's and my main objection to the sliding scale is not that it can be constructed but is a bad thing, but is that that scale cannot be constructed. We say at the outset that 'the sliding scale which would coherently unite both [remedies] is the purest chimera',[27] and it is not so much that we do not like the concept of the sliding scale, but that the best evidence of the poverty of the concept is that it is purely abstract and

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[23] *Blake* [2001] 1 AC 268, 285G (HL(E)).
[24] *Hendrix* [2003] EWCA Civ 323 [44, 55].
[25] J Edelman, *Gain-based Damages* (2002) ch 3.
[26] Ibid 72.
[27] Campbell and Wylie, above n 9, 606.

cannot be the basis of coherent law. We argue that 'the distinction between hypothetical release damages and an account of profits does not in practice disappear',[28] and that, 'because the gap between the hypothetical release and an account of profits cannot actually be smoothed away', 'the entire edifice [of the sliding scale] collapses'.[29] My own views on this are really rather like those of Professor Hedley, which Ms Black, I am afraid, badly misrepresents when she cites them in criticism of Mr Wylie and me (p 45), for, like us, Professor Hedley is not rejecting the sliding scale in order to argue that general restitutionary damages can be put on a better basis, but to indicate the weakness of the entire attempt to construct a coherent law of obligations based on restitution. What Mr Wylie and I were objecting to was not so much the sliding scale but the impulse behind dreaming up the sliding scale, and it tells us something of the current state of the restitutionary scholarship that Ms Black is so quick to discard the sliding scale.

The reason why the sliding scale has, as a matter of fact, appeared attractive to influential advocates of restitution such as Professor Burrows (p 45) and Lord Nicholls,[30] is that it is a further stage in the formally coherent reclassification of the entire law of obligations on a unified restitutionary basis that has been so powerfully advocated by the late Professor Birks. The law of restitution has by no means 'lacked [its] Atkin';[31] indeed, it has had three Atkins in Professor Birks, Lord Goff and Professor Thomas, or six if one includes the, as it were, substitutes for these three in Professor Burrows, Lord Nicholls and Professor McKendrick. This is not the place to repeat what I have argued on many previous occasions, that the efforts of even these outstanding figures have been, as they are bound to be, ultimately fruitless. The law certainly has changed so that, in relationship to our concerns here, we currently are 'reluctantly' obliged to recognise the existence of restitutionary damages for simple breach of contract.[32] But, on the evidence of the case law since *Lipkin Gorman v Karpnale Ltd*,[33] to claim that this change has done anything to reduce the amount of 'discretionary remedialism'[34] in the law is, I am afraid to say, laughable.

No doubt the most obvious, as it were, internal evidence of the failure of the unifying restitutionary reclassification is that, in his later work, Professor Birks purported to make two fresh starts,[35] both of which are markedly poor, especially by comparison to the brilliance of *An Introduction to the Law of Restitution*. But the position taken by Dr Edelman also constitutes internal evidence of this failure, for it is an attempt to extend the

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[28] Ibid 609.
[29] Ibid 623.
[30] Ms Black claims 'that there is little, if any, judicial support for Campbell and Wylie's application of a sliding scale' (p 43). This is, of course, right, because the idea is so novel. But it is wrong of Ms Black to deny that Lord Nicholls is an advocate of the sliding scale (n.b. pp 43-4), for he has explicitly said that he is. I must say that Ms Black should have addressed Lord Nicholls' unambiguous extra-curial advocacy of the sliding scale reported in a collection of recent papers on the issue to which she makes repeated reference (A Burrows and E Peel (eds), *Commercial Remedies* (2003) 129), for this was discussed in Mr Wylie's and my paper (above n 9, 609), and, more importantly, Ms Black otherwise places great weight on Lord Nicholls' views. For a criticism of Mr Wylie's and my interpretation of *Hendrix* that does address these views see R Cunnington, 'Rock, Restitution and Disgorgement' (2004) 1 *Journal of Obligations and Remedies* 46, 48.
[31] Lord Wedderburn, 'Rocking the Torts' (1983) 46 *Modern Law Review* 224, 229.
[32] *McGregor on Damages* (17th ed, 2003) para12.004.
[33] [1991] 2 AC 548.
[34] P Birks, 'Three Kinds of Objection to Discretionary Remedialism' (2001) 29 *University of Western Australia Law Review* 1.
[35] P Birks, 'Misnomer' in W Cornish et al (eds), *Restitution: Past, Present and Future* (1998) ch 1 and P Birks, *Unjust Enrichment* (2003).

scope of gain-based damages whilst giving up Birks' unifying reclassification. As Birks' classification is a failure, those advocating general 'restitutionary' or 'gain-based' damages might find Dr Edelman's tactic attractive as it seems to avoid the difficulties to which Birks' effort gave rise, such as, in this case, the problems of the sliding scale. But it is not just that these particular problems are minor compared to others described principally by Professor Hedley. It is that the step taken by Dr Edelman represents a collapse in the confidence that so characterised, and made attractive, the argument for general restitution in the work of Professor Birks.

No informed commentator on the law of obligations would deny that that law is marked by many inconsistencies which should be eliminated, and the law of remedies for breach of contract based on the expectation interest is no exception to this. The impulse underlying Birks' reclassifying effort was a better, more coherent law, and in respect of contract, his claim essentially was that remedies based on restitution are able to be classified much more coherently than those based on expectation. Even those[36] who, like me,[37] think Birks' own goal of unified coherence was so extremely overstated as to be a distracting utopia, can hardly deny that reduction of the many inconsistencies that unarguably do exist in the law of the expectation interest gave Birks' writings their attraction. The attraction of an effort like Edelman's is, I am afraid, much less strong. Faced with the flaws which are becoming glaringly evident in Birks' grand architecture, Edelman is trying to redraw the plan on a much less ambitious basis. But can the basic attraction of the plan survive the revising down of the specification?

So far as I am aware, to its credit, modern Anglo-Saxon legal scholarship offers no case to parallel the efflorescence of Birks' classificatory scheme. One has to look to the social sciences to find a theory of which its author so lost control of his basic idea that that idea was, in short order, all but buried in the elaboration necessary to try to keep it alive. Birks' writings since the revised edition of *An Introduction to the Law of Restitution* always call to my mind the efforts of Marxists after, say, Engels' *Socialism: Utopian and Scientific* (including Engels himself) to keep life in economic determination, or structural sociologists after Parsons to keep life in action theory. Especially when subjected to such devastating criticism of its rococo over-elaboration as that mounted by Professor Hedley,[38] one can forget that the basic idea was very simple. It was to make 'restitution' embrace not merely 'giving back', but also 'giving up'. Before he emphatically transferred his allegiance from the word 'restitution' to the words 'unjust enrichment',[39] Birks used to insist that the underlying Latin 'restituere/restitution' could embrace both of these situations,[40] and the core classification at the heart of his fresh, early work, was that between 'enrichment by subtraction' and 'enrichment by wrongdoing'.[41] The former certainly was grounded in authority, and the latter was intended to be able to borrow on this quality to sanction its attempt to extend restitution to cover giving up situations.

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[36] R Kreitner, 'Multiplicity in Contract Remedies' in N Cohen and E McKendrick (eds), *Comparative Remedies for Breach of Contract* (2005) ch 2.

[37] Campbell, above nn 11, 17.

[38] S Hedley, *Restitution: Its Division and Ordering* (2001) and S. Hedley, 'The Taxonomic Approach to Restitution', in A Hudson (ed), *New Perspectives on Property Law, Obligations and Restitution* (2004) ch 7.

[39] Birks, above n 35.

[40] P Birks, 'Equity and the Modern Law' (1996) 26 *University of Western Australia Law Review* 1, 28.

[41] Birks, above n 15, 22-4. It is possible to trace the influence of this thinking back to Professor Birks' 1982 Current Legal Problems lecture: P Birks, 'Restitution and Wrongs' [1982] *Current Legal Problems* 53.

In Edelman, this is unravelled. Restitution is confined to its bounds prior to Birks, to giving back situations, and disgorgement is confined to giving up situations. At a time when Birks had lost much of his initial momentum in the twists and turns of quadration, which Hedley showed us was a maze rather than a workable plan, this was a reassuring drawing back.[42] In many cases broadly related to contract, disgorgement damages have, of course, long been available. The clearest one is breach of many fiduciary duties, as Edelman recognises. We are on relatively solid ground here. But Edelman wants disgorgement to be extended to breach of simple contract just as much as Birks, and to the fiduciary situation he adds a new occasion for disgorgement: in essence, cynical breach when compensatory damages will leave the defendant with a profit. But, as I have argued previously,[43] this is quite untenable, and it was given up somewhere between the Court of Appeal's and the House of Lords' judgments in *Blake* itself. Once one sees this, one has to ask why we should allow the extension of damages sought by Edelman, and recognise there is no good answer, for Dr Edelman has sawn away the branch on which he sat. In Birks, for good or ill, the apparent logic of the promised unified classification drove the extension of the restitutionary remedy to giving up situations.[44] What drives the similar extension in Edelman?

In my opinion, which I shall state baldly, the driving impetus is simply a thoroughgoing dislike of breach which is largely due to a failure to understand its economic function or its legal form. Breach is seen a 'civil wrong' by a 'wrongdoer' which should normally be 'prevented'. Compensatory damages very often do not do this, and so restitutionary and disgorgement damages should be more widely available, with *Blake* being welcomed because it makes them so.[45] As I have mentioned, if one thinks the law of remedies for breach of contract should normally try to prevent breach, the law is inexplicable, except as markedly incompetent. Though he recognises 'powerful arguments for treating breach of contract in the same way as other wrongs',[46] Dr Edelman does not go quite this far, and perforce acknowledges that a claimant must show he has 'a "legitimate interest" in the performance of the contract'[47] in order to obtain more than the compensatory damages, which normally will not prevent breach (much less secure performance). His discussion of breach of contract exudes puzzlement at this and ends by effectively confessing that 'it is very difficult to tell when the law will consider that a claimant has a legitimate interest'.[48] This puzzlement is what is left if one wants to prevent breach, but is sufficiently learned in the law to know that the law does not normally seek to do this, and is sufficiently scrupulous not to just attempt to ride roughshod over the 'obstacles' posed by the existing law.[49]

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[42] Edelman, above n 25, 36-41.
[43] Harris et al, above n 2, ch 17.
[44] It is significant that Birks was prepared to frame the unified scheme in the terminology of 'disgorgement' if that terminology could be 'universally adopted': Birks, 'Misonmer', above n 35, 12-13.
[45] Edelman, above n 25, ch 5.
[46] Ibid 149.
[47] Ibid 150.
[48] Ibid 189.
[49] Edelman's discussion of exemplary damages clearly hearkens for the extension of those damages towards a wider class of breaches: J Edelman, 'Exemplary Damages for Breach of Contract' (2001) 117 *Law Quarterly Review* 539. However, in what we can see is a characteristic style of argument, he does not just go the whole hog but tries to identify, and then extend, the category of 'extreme' breaches to which exemplary damages are appropriate: ibid 545. Now, this has the positive effect of making Edelman's discussion a model of restraint by comparison to some others, but it does leave the tricky problem of identifying the 'extreme' cases, and, in my opinion, neither Dr Edelman nor the case law around *Farley v Skinner (No. 2)*

If one gives up Birks' classificatory scheme, then, unless one comes up with another theoretical scheme, such as Professor Friedman's performance interest, which really rests on conflating contractual and proprietary obligations,[50] one is left without a justification for *Blake*. There are, of course, justifications for the 'light sprinkling of cases where courts have made orders having the same effect as an order for an account of profits'[51] which are drawn on as authority for *Blake's* extension of the restitutionary or disgorgement remedy to breaches of simple contract, but these all turn on the breach having a more than simple contractual elements, such as Dr Edelman's breach of fiduciary duty. But there is no justification in authority for what is done in *Blake*, which, as I have noted the Court of Appeal has told us, 'marks a new start in this area'.[52] The actual justification for *Blake*, which, feeble as it is in my opinion, has worked to a surprising degree, is Birks' drive towards a unified classification of wrongs which, in respect of contract, draws on the general dislike of breach which follows from the common failure to understand its function and form. This failure (amongst other things) has caused Birks' classification to fall apart. By now giving up those parts of the classification which are most problematic, Dr Edelman may avoid their problems,[53] but he also gives up the drive.

Ms Black's attempt to draw on Dr Edelman manifests the consequences of this. She rejects the sliding scale, and therefore avoids its problems. But this leaves a gaping hole in her argument, for, as we shall now see, she, like Dr Edelman, advances no reason whatsoever why one should prefer her view that there are two distinct remedies to the general extension of restitutionary damages envisaged by Birks.

III THE SIGNIFICANCE OF ALL THIS

I am afraid I must now disappoint the reader by saying that what has gone before has been merely preliminary to setting up my principal response to Ms Black's paper. That paper is, I think, an important contribution because it is not content to remain at the level of abstract principle at which most discussion of restitutionary damages has been conducted, but rather explores the commercial significance of expanding general restitutionary damages, and following her down this line promises to make the issues clearer. She tells us at the outset that it is 'commercial reality' (p 32) that requires this expansion, and to Mr Wylie's and my argument that making restitutionary damages generally available for breach of contract would cause commercial law to 'collapse', she responds 'that commercial law is in greater danger of collapse if these remedies are not available' (p 49). I am not above pointing out that commercial law so far seems not to have collapsed in the absence of these

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[2002] 2 AC 732 makes any more progress towards solving this problem than he or the case law around *Blake* has made towards solving the problem of identifying the legitimate interest.

[50] D Friedmann, 'Restitution of Benefits Obtained Through Appropriation of Property or the Commission of a Wrong' (1980) 80 *Columbia Law Review* 504, 513.

[51] *Blake* [2001] 1 AC 268, 284C (HL(E)).

[52] *Hendrix* [2003] EWCA Civ 323 [16].

[53] It is, in my opinion, better to say he merely defers consideration of the problems, for, of course, one can do without the sliding scale, but if one nevertheless wants restitutionary (*Wrotham Park* hypothetical release or partial disgorgement) damages and disgorgement (account of profit or total disgorgement) damages, one still has to say when each are available, and Dr Edelman does not manage to do this. This all emerges from Professor Burrows' criticisms of Dr Edelman, made, of course, with the sliding scale in mind: A Burrows, *The Law of Restitution* (2nd ed, 2002) 461-2.

remedies,[54] but I commend Ms Black's attitude to these issues. Whereas Professor Birks was interested in the expansion of restitution (or perhaps, ultimately, in the tidiness of doctrines) for reasons which are academic in, as I have said, both the good and the bad senses, Ms Black is interested in improving the way contract serves commercial parties. She advocates the expansion of general restitutionary damages because it would enhance the performance interest, and Ms Black agrees with Professor Friedmann that 'the essence of contract is performance',[55] adding that 'this is particularly the case in Scotland, where the primary remedy is specific implement' (p 47).

The way Ms Black develops this point is horribly confused, and it is important to point this out because it is entirely expressive of the confusion which is central to the concept of the performance interest. I cannot quote more or less all of page 49 of her paper as I should like, but will quote selectively from that page. Ms Black begins by saying that 'Commercial reality and business certainty require a contractual framework where both parties have the comfort of knowing that their commercial agreements will be enforced'. It is important to know what one means by 'enforced'. If it means the routine enforcement of primary obligations, as surely Ms Black's argument requires, I cannot agree with this. But if it means the routine enforcement of secondary obligations to provide a remedy, typically compensatory damages, I can agree with it. I think any fair reading of page 49 of Ms Black's article will show she unproblematically asserts the necessity of the former by quite indefensibly talking in terms of the latter. She thinks she is posing rhetorical questions when she asks 'Why negotiate and enter into legal contracts if you have no enforceable remedy in the event of a breach?' and 'What is the point in putting a contract in place if you then have no redress when the contract is breached?' But these questions really go to the heart of the matter, for the very structure of the common law of remedies tells us that that law has worked by strongly distinguishing between literal enforcement of primary obligations and effective remedy of breach by enforcement of a secondary obligation to provide a remedy, the remedy normally being compensatory damages and not literal enforcement at all.

Such is the extent of the confusion in Ms Black's mind over this that she unfortunately throws away her ace when she tries to back up her scholarly argument by direct reference to practical commercial wisdom. She seizes on that part of a commentary on a paper of Professor McKendrick's by Mr Sam Eastwood, a commercial litigation partner at Norton Rose, in which he says:

> Try telling a client who has paid lawyers hundreds of thousands of pounds to negotiate a contract that his interest in seeing it performed is not sufficiently 'legitimate'. What person enters into a contract not caring if the other side performs his side of the bargain?[56]

But this is not, I am afraid, Mr Eastwood telling us that he advises his clients that, as claimants, they can routinely literally enforce the defendant's obligations, for were he to do

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[54] I am also not above pointing out that the most social theoretically profound explanation of the nature of remedies for breach of contract, that of Durkheim, appears to show that the 'organic' social solidarity of the market economy does not require, indeed must eschew, the 'mechanical' enforcement of obligations: E Durkheim, *The Division of Labour in Society* (1984) ch 7. It is not fair to upbraid a contract scholar for failing to deal with Durkheim's views, but nothing of first rate importance is going to be said about these issues by anyone who is unaware of it. Within the legal literature see J H Gebhardt, '*Pacta Sunt Servanda*' (1947) 10 *Modern Law Review* 161.

[55] Friedmann, above n 14, 629.

[56] S Eastwood, 'Breach of Contract, Restitution for Wrongs and Punishment: Comment' in Burrows and Peel (eds), above n 30, 126.

so, he would not occupy the position he does. It is not even Mr Eastwood wishing he could do this and welcoming *Blake* because it gives him more power to do so. It is a criticism of the concept of the 'legitimate interest' advanced by Lord Nicholls' *in Blake*,[57] for Mr Eastwood believes that that concept is but a 'nebulous' guide to determining when the courts should prevent a defendant 'making or retaining [a] profit'; that 'Lord Nicholls' non-exhaustive list of circumstances which have to be taken into account add little certainty to our future advice'; and that *Blake* 'is therefore not a useful precedent, particularly for commercial cases'.[58] Of course, Mr Eastwood's commentary is also, therefore, a criticism of the legitimate interest pursued by Dr Edelman, and when this is acknowledged, then I believe I have finessed Ms Black's ace.

The point of all this is that Ms Black's thinking exemplifies the inadequately reasoned equation of satisfactory remedy with literal enforcement which is driving the advocacy of the performance interest and of general restitutionary damages which will more effectively prevent breach. In the restitutionary literature it is allowed that there may be situations in which restitution for wrongdoing is impractical and has to be given up,[59] and similar caveats have been entered about the extent to which the performance interest should be protected.[60] This is, however, merely accepting a situation which one would put right if one could; there is no concession of a positive role for breach, merely an acknowledgement that it cannot be wholly eliminated. But breach is an *essential* part of the institutional structure which generates the efficiency of the law of contract as the legal institution regulating market exchange, for it has the *positive* role of introducing flexibility into a market which allocates goods through countless economic exchanges when, inevitably, some of those allocative decisions prove to be wrong. Drawing on the seminal works of Holmes, Fuller and Perdue, Farnsworth, Birmingham, Goetz and Scott, and other largely US writers, I have on many previous occasions tried to explain to UK audiences that it is by no means accident or mischance that has led the law of remedies for breach of contract to be based on compensation of lost expectation, for that law has a most remarkably sensible (if, of course, imperfect) structure. I do think that Ms Black should, though she does not, have addressed this argument, which is briefly recapitulated in Mr Wylie's and my paper, and which is essential to that paper. Instead, she unquestioningly takes up the performance interest and general restitutionary damages perspective in which *pacta sunt servanda* is currently being revived, and I fully accept that, were it right to take this perspective towards the remedies for breach of contract, then Mr Wylie's and my criticism of *Hendrix* would be weak, and, indeed, bizarre.

What is needed is a change of perspective. In the paper expressing my latest attempt to advance the explanation of breach as a positive legal institution,[61] I have, as I said at the time, invited considerable risk of exposing myself to ridicule by prefacing that paper with a quote from some of the work of John von Neumann which has proved to be the foundation of modern computing, which I attempted to read when trying to come to terms with game theory. Much of that work is incomprehensible to me, but insofar as I understand the matter, one of von Neumann's contributions to the conceptualisation of

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[57] *Blake* [2001] 1 AC 268, 285H (HL(E)). The phrase had been used in the Court of Appeal: *Blake* [1998] Ch 439, 457E (C.A.).
[58] Eastwood, above n 56, 126-7.
[59] Birks, above n 15, 24.
[60] Friedmann, above n 14, 629-32.
[61] Campbell, above n 3.

computing problems was to recognise that error is ineliminable,[62] and therefore that the goal of eliminating error from calculation was illusory. One should first be aware of this, and so not put excessive faith in one's results, and then try to manage the inevitable failure. In computing, von Neumann's basic strategy was to duplicate the calculation on various computers (or parts of computers) and work from some sample of the multiple results.

Without wishing to put any weight on what is intended purely as a heuristic device, I submit that an analogue to this happens in the market economies. It is obvious that in those economies, composed of countless numbers of exchanges of varying degrees of complexity, dealing with those inevitably occurring contracts in which one party finds his costs during performance growing in an unanticipated way (telling him he made a mistake (in the lay sense) by agreeing this contract), is a major problem. The mechanism for handling this problem is central to the efficiency of the market economy.[63] The fundamental mechanism is adjustment of obligations by the parties without recourse to legal action, but this is encouraged by limiting the extent to which performance can legally be insisted upon. It is breach that is most important in setting this limit; more so than insolvency, which nevertheless itself has a crucial role, and certainly more so than discharge for common mistake and frustration, which are almost redundant because they are so rarely granted. Breach allows flexibility into the system of exchanges, allowing parties relief from unanticipatedly expensive obligations when further performance would merely be wasteful as the claimant can be compensated in damages. In this sense, *a major function of the law of contract is to allow breach*, but on the right occasions and on the right terms; in essence, on terms which encourage claimants to cover in the knowledge that the defendant will compensate lost net expectation. This is to say, properly regulated breach, breach which does involve adequate compensation, is the fundamental part of contract.

If I am broadly right, then we can see that the confusion in Ms Black's argument merely reproduces the confusion in Professor Friedmann's. The key passage in Professor Friedmann's influential article is:

> The essence of contract is performance. Contracts are made in order to be performed. This is usually the one and only ground for their formation … This interest in getting the promised performance … the performance interest … is the only pure contractual interest [and] is protected by

[62] The mechanical reliability of the computing machines available to von Neumann was very much poorer than that of contemporary computers, but the basic point still holds of course.

[63] A comparison with the extreme rigidities characteristic of the centrally planned command economies is useful. In such economies an analogue to specific performance played the major role as a remedy for failure to comply with obligations under the plan because satisfaction of the plan was the goal of economic action: B Grossfeld, 'Money Sanctions for Breach of Contract in a Communist Economy' (1962-3) 72 *Yale Law Journal* 1326 and Wang Liming, 'Specific Performance in Chinese Contract Law: An East-West Comparison' (1992) 1 *Asia-Pacific Law Review* 18. Of course, as much as in any system, obligations were entered into under imperfect information and with limited computational power, and so their performance was subject to unexpected rises in costs. Though a whole legion of (semi-)illicit devices for modifying the plan would seem to have arisen (bribes to those who held scarce goods, lying about plan fulfilment, etc), the absence of a general possibility of an analogue to breach to deal with these rises would appear to have caused an inflexibility which was a major weakness of these economies: J Kornai, *The Socialist System* (1992). I have tried to say something about this in the context of the views I hold about the role of breach in the market economies in D Campbell, 'Breach and Penalty as Contractual Norm and Contractual Anomie' [2001] *Wisconsin Law Review* 681.

> specific remedies, which aim at granting the innocent party the very performance promised to him, and by substitutional remedies.[64]

This passage seems to be taken to be axiomatic in most of the current literature, but, in my opinion, it contains as many serious fallacies about contracts and remedies as it would be possible to cram into so small a space. Contracts are not made in order to be performed. It is promises to exchange that are made in order to be performed. Contracts are made in order to obtain security against non-performance by generating latent secondary obligations to provide a remedy in the event of breach. Of course, when parties express their promises to exchange in the form of a contract, it is (to some extent) in the contract that the parties specify their mutual primary obligations, but those promises could be expressed in other ways, and the decision to express them in the form of a legally enforceable contract entirely rests on the attempt to obtain the security of a remedy in the event of breach. The essence of contract is, then, not performance but (breach or) remedy.

And once this is realised, then another point follows. When one wishes to evaluate the efficiency of a contractual remedies rule, it is absolutely vital to appreciate that, for competent commercial parties, it does not necessarily matter whether the contract is performed or enforced. The institution of contract is the general form of regulation of economic exchange, but, in a most important sense, the legal institution is not what is essential. It is the economic exchange, and particularly the surplus that the parties intend to realise through their exchange, that is essential. The actual performance of the contract is incidental to the obtaining of the surplus, indeed it is a cost of obtaining that surplus, and an understanding of contract remedies turns on seeing that expectation of surplus is what matters, not actual performance of the obligation. In a contract which is performed, expectation is protected by performance. In a contract which is breached in good faith, something has happened to make performance more costly, and though the overriding goal remains protection of the claimant's expectation, this should, in order to avoid waste, be done as cheaply as possible, and alternatives to performance should be considered. Both the law of contract's general recourse to compensatory damages rather than literal enforcement, and its stress on mitigation in the quantification of damages, can be explained only on this basis. If one starts from the belief that the essence of contract is performance, then, as I have acknowledged and acknowledge again, the structure of remedies for breach of contract appears wholly misguided, which is, indeed, Ms Black's basic position. The view of breach I hold explains the structure of the law of remedies by showing the virtues of that structure, and surely this is *prima facie* more plausible than dismissing that structure, which is the legal foundation of modern economic life, as flatly wrongheaded. But there is no consideration at all of my position in Ms Black's paper.

I think a claim we have seen Ms Black make in her paper provides a most convenient opportunity to put all this to the test. The central claim of my defence of breach is that it is essential to the operation of market economies, and the corollary of this must be that those economies cannot operate if specific performance, in the sense of the literal enforcement of the defendant's primary obligation, is the normal remedy for breach of contract.[65] When, as we have seen, Ms Black tells us that 'in Scotland … the primary

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[64] Friedmann, above n 14, 629. Cf. Friedmann's criticism of efficient breach: D Friedmann, 'The Efficient Breach Fallacy' (1989) 18 *Journal of Legal Studies* 1.

[65] One must always say this subject to a caveat about debt, because though enforcement of debt no doubt is the main use which is made of the court to enforce a remedy, it poses no problem for my position as it arrives, by a much shorter procedural route, at the outcome that would be produced by quantification of compensatory damages: Harris et al, above n 2, 11.

remedy is specific implement' (p 47), she is cutting to the chase in a very useful way. I believe I know what the formal law is in Scotland, and I see Ms Black's point, but I do not think the normal remedy actually is literal enforcement of the defendant's primary obligation. If this were so, then I fully acknowledge this would pose telling counter-evidence to my views. But it is not so, and I do think those now promoting the performance interest might dwell on the implications of this more than they appear to do.[66]

The problem that would be posed for my views were specific implement to be found actually to be the normal remedy in Scotland would be magnified were specific performance found actually to be the normal remedy in civilian jurisdictions, where we are usually told this is indeed the case.[67] I must confess I have a much poorer grasp of the situation in those jurisdictions, but such evidence as I have read leads me to believe that, again, whatever the formal law may be, what the Anglo-Saxon law would call compensatory damages are the normal remedy in these jurisdictions.[68] This is a very inadequately researched issue, with the basic lexicon posing very grave problems of common interpretation between systems,[69] but at a time when some form of harmonisation of contract law in the EU is beginning to take place, perhaps one might hope for some necessary clarification.[70] I believe clarification of what actually happens will support my position.

IV CONCLUSION

In sum, I do not feel that Ms Black's dispensing with the sliding scale really speaks to the point Mr Wylie and I sought to make about recent advocacy of the performance interest and restitutionary damages by criticising that scale. The main line of criticism taken by Ms Black makes me fear Mr Wylie and I accidentally intruded upon on a sort of family dispute which is no concern of mine (though it is of more concern to Mr Wylie). It is not the sliding scale but the sweeping condemnation of breach that lies behind it, and behind the promotion of general restitutionary damages and the performance interest, that I sought to criticise.

Perhaps the most sensible thing that has so far been said about *Blake* was said by Catherine Mitchell: 'we have been there before'.[71] She reminds us that, in the '70s and

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[66] When she read this in draft, Gillian Black was good enough to point out that earlier in her paper (p 34) she had said that though, in Scotland, specific implement was the primary remedy 'in theory at least', 'in practice, if not in theory', damages are the primary remedy. I was wrong to skate over this, but, in truth, I think the difficulty one has in seeing in what sense specific implement is, in these circumstances, 'the primary remedy', corroborates my argument.

[67] In a recent example, Professor Smith believes 'the apparent movement in the common law world towards a wider availability of specific performance' 'presages a *rapprochement* between common law and civilian approaches': L Smith, 'Understanding Specific Performance' in Cohen and McKendrick (eds), above n 36, 233. It is not merely that I think such a movement would be a mistake. It is that I do not believe it would effect a *rapprochement*.

[68] H Lando and C Rose, 'The Myth of Specific Performance in Civil Law Countries' (2004) 15 *American Law and Economics Association Annual Meetings* <http://law.bepress.com/alea/14th/art15/> at 27 November 2006. I am grateful to Jon Morgan for first drawing this paper to my attention.

[69] G H Treitel, *Remedies for Breach of Contract* (1988) para 40.

[70] H Beale et al, *Cases, Materials and Text on Contract Law* (2002) sec 6.2. gathers together much relevant information in a book which is part of a series intended to promote this harmonisation.

[71] C Mitchell, 'Promise, Performance and Damages for Breach of Contract' (2003) 2 *Journal of*

’80s, ‘an expanding tort law’ was said to be ‘the price of a rigid contract law’.[72] But, oh dear, the price of the expansion of tort law was far too high, for it turned out that what had been seen as mere rigidities of contract actually were very important merits of the contractual allocation of risk, and it took the pain of enduring absurdities like *Junior Books Ltd. v Veitchi*[73] to make us understand this. As we still do not generally understand the merits of basing remedies for breach of contract on the expectation interest, we are now addressing other ways in which the current law of contract is thought to be ‘seriously defective’. The results will be very similar, and the important thing is, as I have previously argued, to quickly recognise that *Blake* is the *Junior Books* of remedies,[74] and so cut down the period of ‘very expensive mischief’ which we will now have to endure until we do so.[75]

Penetrating the dense thicket of conceptual confusion created particularly by Professor Birks in order to expose the weakness of current criticisms of the existing law of remedies has not been easy, with even so brilliantly acute a critic as Professor Hedley being drawn into arcane disputes I am sure he would rather have avoided. I cannot hope to improve on what Professor Hedley has said. I can only offer a simpler line. In my opinion, the entire argument for generalising restitutionary damages for breach of contract boils down to this: breach is a ‘wrong’ perpetrated by a ‘wrongdoer’ against an ‘innocent’ claimant, and there should be more effective rules to prevent it than the existing compensatory damages rules. And there you have it. Now, to set up this belief as an explicit policy is difficult, and the attempt to do so has generated extraordinary theoretical and doctrinal confusion, for the attitude that underlies arguments such as Friedmann’s, Birks’ and Ms Black’s involves an absurd paradox.

If one believes that breach should normally be prevented, the existing law of remedies for breach of contract seems hopelessly inadequate, as it does not seek to do anything of the sort. To those who generally wish to prevent breach, the solicitude to the defendant identified by Farnsworth is inexplicable, other than as evidence that the law is seriously defective, in need of radical reform, and ripe for creative adjudication which seeks to avoid applying it. But, far from being inexplicable, this solicitude is the key to what is so very good about the law of remedies, and the creative adjudication which proceeds in ignorance of this has produced some very poor law indeed. Serious reflection on why the law is as it is would show that there are good reasons for it being as it is. These reasons obviously are open to challenge, but, with few honourable exceptions,[76] the current attacks on the law do not attempt to challenge them. Instead, they are simply not understood and are ignored, as the enforcement of performance is implicitly assumed to be the ‘policy’ of contract.

However, when one takes the ultimately practical attitude commendably adopted by Ms Black, the issues become clearer. I think more or less everything Ms Black says about the ‘commercial value’ of restitutionary damages is wrong. But if her paper has the effect of shifting the discussion away from abstract ratiocination about wrongfulness to consideration of the real impact of the development of restitutionary damages on

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Obligations and Remedies 67, 86.

[72] B Markesinis, ‘An Expanding Tort Law: The Price of a Rigid Contract Law’ (1987) 103 *Law Quarterly Review* 354.

[73] [1983] 1 AC 520.

[74] D Campbell, ‘The Treatment of *Teacher v Calder* in *AG v Blake*’ (2002) 65 *Modern Law Review* 256, 269.

[75] Campbell, above n 37, 377.

[76] Of which Friedmann’s paper on efficient breach, above n 64, is the best known.

commercial law and practice, then it will be a valuable paper indeed, even though that value will be manifested in the collapse of Ms Black's own substantive position.