Coercive Relief – Reflections on Supervision and Enforcement Constraints

JEFF BERRYMAN* AND ROBYN CARROLL**

This article draws on an emerging body of empirical research that indicates that parties place a greater emphasis in some situations on actual rather than substitutionary performance. It examines the case law on the enforcement of keep open clauses in Canada, Australia and other common law jurisdictions to highlight the disconnect between doctrinal orthodoxy on the enforceability of such clauses and party remedial preferences. The article explores the constraints of supervision and enforcement and concludes there is scope for enhancing party preference for performance through coercive remedies.

INTRODUCTION

This is a think piece about possibilities. It is modest in its proposal. We simply suggest that common law courts ought to revisit traditional restraints placed on the use of coercive remedies and be more willing to grant coercive remedies to enforce contractual obligations and agreed remedies than generally is the case. We use the term coercive remedies in apposition to substitutionary remedies. Coercion is the use of direct force, or its credible threat, to bring about compliance of a demand.[1] Equitable remedies, injunction and specific performance, although not exclusively[2], are coercive in that they are sanctioned by contempt proceedings leading to imprisonment until the contempt is purged or forgiven. Substitutionary remedies, of which damages is the predominant form, create a new duty to pay damages in substitution for actual performance. However, upon further breach of the duty to pay damages other forms of coercion may be engaged, as in sequestration of property. There is immediacy in decree, non-compliance and contempt in the equitable remedy which is lacking in a damages remedy. Immediacy is one reason a party may prefer coercive relief over substitution: other reasons might include a plaintiff's belief that it protects their interest in performance and provides vindication more markedly than an award of damages.

In Part One, we lay out some preliminary observations on what we know and

* Professor of Law, Faculty of Law, University of Windsor, and of the Faculty of Law, University of Auckland (fractional chair).

** Professor of Law, Faculty of Law, University of Western Australia.

1 GD. Lamond, "Coercion and the Nature of Law", (2001) 7 *Legal Theory* 35, at 40.

2 For example, replevin.

don't know about remedial choice. We hope to lay some seeds of doubt over current common law orthodoxy toward remedies, and in particular doctrinal restraints placed on any singular remedy. In Part Two we draw on English, Canadian, Australian, and other common law cases to illustrate how current orthodoxy toward coercive relief may miss the mark in that explanatory accounts of what courts say they do no longer meets the expectations of litigants or just demands created by the societal context surrounding the dispute. We examine the application of this orthodoxy to cases where coercive relief is sought for breach of contractual obligations to keep open and carry on a business. In Part Three, we explore ways that courts could reimagine their inquiries concerning the use of coercive remedies.

Part One – Known unknowns

Donald Rumsfeld, the former US Secretary of Defense under President Bush, famously divided human perception of knowledge into three categories; known knowns, things we know that we know; known unknowns, things we know we don't know; and unknown unknowns, things we don't know that we don't know. And, as Rumsfeld was later to regret, unknowns have a habit of becoming known with the passage of time. Much in the law of remedies falls into the known unknowns category, and one of the major unknowns is why people choose the remedies they do. While there are episodic studies on what litigants request and their success rates in various jurisdictions, these studies rarely drill down on the factors that motivate litigants with respect to choice of remedy.[3] A lack of empirical knowledge on what motivates a person over choice of remedy means that we have an incomplete picture of the litigation process, and of law, and whether we can determine whether citizens and societal needs are being met. In the absence of useful information about choice of remedy the law has adopted a path in which choice is usually circumscribed by a multitude of substantive legal doctrines.[4] But the reasons for circumscription are not always evident, and, increasingly, new 'knowns' require us to question current orthodoxy.

Consider the law of contracts and appropriate choice of remedy for breach. Orthodox doctrine states that damages for breach are granted as of right. The expectation interest is primarily protected. Rules limiting damages, which have a particular bite on the recovery of consequential losses, include remoteness, causation and mitigation. Depending upon jurisdiction further rules are placed

3 One notable exception is Tamara Relis, "It's Not About the Money!": A Theory on Misconceptions of Plaintiffs' Litigation Aims" (2007) 86 *Univ. of Pittsburgh L. Rev.* 701.

4 Even where empirical studies do provide evidence of the actual practices, norms and expectations of parties to commercial contracts, the penetration of the findings of these studies into the law is the subject of debate. For analysis of the general relationship between contract law and commercial activity and doubts about the level of penetration see Catherine Mitchell, *Contract law and Contract Practice: Bridging the Gap between Legal Reasoning and Commercial Expectation* (Hart, Oxford and Portland, Oregon, 2013.) at 6.

upon recovery of damages for non-pecuniary losses and punitive damages. The specific enforcement of contracts and orders aimed at either preventing breach or the further incursion of losses, invoke equitable relief; relief that is regarded as discretionary, and which has an additional layer of rules governing availability. The current state of remedies for contract breach can be explained from any number of perspectives; i.e. historical[5], socio-economic[6], theoretical[7], and economic[8]. However, apart from historical accounts other explanatory narratives are being or will be challenged by recent empirical studies on contracting behaviour. Law and society scholars and 'law in action' studies can inform us about the actual practices of business people, contracting parties, lawyers and judges and how these practices reflect or are reflected in rules and doctrine. While the influence of Stewart Macaulay's pioneering empirical research on contract law 'in action' is well documented[9] we can now look to studies that throw light on contracting practices and preferences about remedies.

What, for example, are we to make of a recent study by Eisenberg and Miller,[10] which suggests that there is a high incidence of commercial parties choosing to include specific performance clauses in their contracts with the expectation that they will be enforced. In their empirical study of 2,347 contracts made by public corporations filed with the US Securities and Exchange Commission in compliance of a requirement to keep shareholders informed, they found that 45% of contracts for the acquisition or assets and merger of corporations and 57% of employment contracts included specific performance clauses. Eisenberg and Miller suggest that in both types of contracts there is a high likelihood that damages are difficult to quantify.[11]

Other small empirical studies are also shedding new light on contracting behaviour. Wilkinson-Ryan and Baron[12] devised an experimental study which

5 See H. Hazeltine, "Early History of Specific Performance of Contract Law in English Law" reproduced in *Rechswissenschaftliche beitrage Juristische festgabe des auslandes zu Josef Kohlers* (1909); A.W.B. Simpson, A *History of the Common Law of Contract: The Rise of the Action of Assumpsit* (Oxford: Clarendon Press, 1975), D. Cohen, "The Relationship of Contractual Remedies to Political and Social Status: A Preliminary Inquiry" (1982) 32 *U.T.L.J.* 31, who points out the inextricable link between land ownership and political enfranchisement at the time, and J. Berryman, "The Specific Performance Damages Continuum: An Historical Perspective" (1985) 17 *Ottawa L. Rev*. 295.

6 P.S. Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford: Clarendon Press, 1979).

7 Stephen Smith, *Contract Theory* (Oxford; OUP, 2004).

8 R.A. Posner, *Economic Analysis of Law*, 6th ed. (New York: Aspen Law & Business, 2002) at 10-17

9 J. Braucher, K. Kidwell, W.C. Whitford (eds), *Revisiting the Contracts Scholarship of Stewart Macaulay: on the Empirical and the Lyrical,* (Oxford and Portland: Hart Publishing, 2013).

10 T. Eisenberg & G. Miller, "Damages verses Specific Performance: Lessons from Commercial Contracts" NYU Law and Economics Research Paper No. 13-09 (SSRN http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2241654).

11 Ibid. at 54.

12 T. Wilkinson-Ryan and J. Baron, "Moral Judgment and Moral Heuristic in Breach of Contract", (2009) 6 *Journal of Empirical Legal Studies* 405.

tabulated people's responses to a number of case studies describing various breaches of contract and the degree of moral culpability that accompanied breach measured by the amount of damages that should be paid to the innocent party. Subjects were drawn from a diverse population in North America. The results demonstrated a high correlation between breach and perception of moral delinquency; that people are morally bound to perform their promises and that a person who opportunistically breaches his or her contract should be punished. For the majority of subjects a promisor who chooses to breach a contract to make gain, as against a breach to avoid loss, should be treated like a tortfeasor guilty of an intentional tort. Interestingly, where the promisor offered to engage in negotiating a fee to be released from performance, subjects set this amount below damages for breach. The study tends to confirm understandings that Stewart Macaulay noted, about how businessmen perceive contracts and the role that social norms of decency and honesty play in ensuring compliance.[13]

Another empirical study by Depoorter & Tontrup has explored the intersection of default contractual remedies, either damages or specific performance, and economic and deontological theories of contract law.[14] Their study created a laboratory approach to test subject's perceptions of contract remedies when confronted with breaches of contract where breach, depending upon an option selected, could result in real economic efficiency gains resulting in the subjects pocketing real, although modest (12 euros), money. Their study resulted in three findings: one, that when specific performance is the default remedy for contract breach, there is a strong preference for the remedy even to the point of sacrificing individual financial gains if the more efficient remedy was selected. Two, that specific performance as a default remedy induces stronger feelings of indignation and resentment when promisors breach. Three; when specific performance is a default remedy the moral imperative to perform is differently felt by promisors – weakly and still driven by efficiency arguments, and promisees – strongly building increased feelings of resentment at breach. However, when the availability of specific performance is withdrawn as a default remedy, both parties become more focused upon utilitarian arguments over the financial gains to be made from breach, and moral indignation dissipates.[15]

We are not blind to other empirical studies which suggest that even where specific relief is generally considered to be more freely available, as in European civil

13 Stewart Macaulay, "Non-Contractual Relations in Business: A Preliminary Study", (1963) 28 *American Sociological Review* 55.

14 B. Depoorter & S. Tontrup, "How Law Frames Moral Intutitions: The Expressive Effect of Specific Performance", (2012) 54 *Arizona L. Rev.* 763.

15 A study by R. Sloof, H. Oosterbeek, A. Riedl and J. Sonnemans, "Breach remedies, reliance and renegotiation" (2006) 26 *Int. Rev. of Law and Economics* 263, also used a game approach to test certain hypotheses about specific performance and contract breach. Without pretending to understand the economics of their study, we note that their conclusions are in slight contrast to Depoorter & Tontrup, in that they conclude that specific performance as a default remedy, as empirically tested in their game, is justified on efficiency arguments and performs better than any damages remedy.

law countries and under the UN Convention of the International Sale of Goods (CISG), the frequency of resort to this relief is reported still to be low. Based on their investigation of the use of specific performance in Denmark, France and Germany, and under the CISG, Lando and Rose attribute this to the costs of enforcement and the unwillingness of states to bear these costs. However, the procedure for administering these orders as reported by Lando and Rose appears to be more cumbersome than procedures traditionally used in Commonwealth common law countries.[16]

Beyond, and even before, empirical research called into question current perceptions of appropriate default rules for contract breach, the work of contract theorists, particularly rights based theorists, also brought into focus issues arising from contemporary orthodoxy. Rights based theories assert that the centrality of contract law is a promise, which is an expression of a person's free will and an exercise of personal autonomy.[17] Acts of promising are worthy of enforcement because they are necessary either as a matter of convention,[18] or because they create (as against protecting an existing right) a right akin to the creation of property,[19] both of which can be justified as necessary conditions to build trust and respect between individuals so as to lead a purposeful life. The reason for enforcing a promise is not because it advances utility (i.e. advances a social good) but because it is either intrinsically a good thing to do (i.e. it reifies the liberal ideal of acts of personal autonomy and social relationships), or, it is the morally correct thing to do.[20] Given this focus upon the importance of promising as an act, one would expect rights based theories to favour specific performance as a predominant remedy and the perfect embodiment of protecting contractual promises. Surprisingly, Fried, a strong proponent of a promissory theory, does not address this issue. Rather, he confines his discussion on remedies to why damages for breach of contract are assessed by compensating expectations and not acts of reliance.[21] Smith, on the other hand, argues that limitations on the availability of specific performance are warranted on the basis that resort to direct enforcement of contractual undertakings is an unjustified encroachment on personal liberty. The common law as developed in Western democracies has expressed reservations over coercing people to do something for another person, as against being required to desist doing something. Nevertheless, Smith agrees that specific performance should probably be more freely available in circumstances where liberty concerns are not raised. For example, as in requiring a corporation to simply instruct its

16 H. Lando and C. Rose, "On the Enforcement of Specific Performance in Civil law Countries" (2004) 24 *Int. Rev. of Law and Economics* 473.

17 This paragraph is taken from J. Berryman, *Equitable Remedies* 2nd ed. (Toronto: Irwin Law, 2013) at 281.

18 Charles Fried, *Contract as Promise* (Cambridge, Mass.: Harvard University Press, 1981) at 16.

19 Smith, above n. 7 at 74.

20 Seana Shiffrin, "The Divergence of Contract and Promise" (2007) 120 *Harv. L. Rev*. 708.

21 Above n. 18 at 19. 'Put simply, I am bound to do what I promised you I would do – or I am bound to put you in as good a position as if I had done so."

employees to perform a task they were already employed to do.[22]

Rights based theorist can also draw support from other recent behavioural research on what is termed the "psychological contract"; the parties 'subjective, idiosyncratic understandings of their contractual obligations to one another'.[23] This research demonstrates that people place a fair higher value on keeping one's promise and genuinely believe that the law specifically enforces promises and punishes breaches. The psychological contract has no bearing on the legal rights between the parties established by the legal contract, it is the promise that the parties themselves recognise.[24] Nevertheless, new social media allows far greater opportunity for individuals to have their psychological view of a contract influence contractual behaviour outside the law through resort to blogging.[25]

If recent insights from legal theory and empirical research in contract law suggest modification to remedial orthodoxy, it is also highly likely, that similar argument can be made concerning tort and property. On another occasion we have commented upon the lack of empirical research over what plaintiffs want from civil litigation;[26] a position also voiced by Richard Abel with respect to the reasons why we award damages for non-pecuniary loss in personal injury litigation.[27] Abel cites numerous instances of anecdotal evidence which 'casts doubt on the facile assertion that victims want only money for pain and suffering.'[28] Carroll and Witzleb argue that plaintiffs often seek vindication and that, in many circumstances, non-monetary relief may be a preferred way to achieve this. They document a variety of studies in the areas of medical negligence, defamation and

22 Above n. 7 at 400-3. Smith's most recent exploration is on the law of court orders. Private law can be divided into ordinary legal rights – rights that describe interpersonal relationships such as the right to contractual performance, quiet enjoyment to land and bodily integrity; action rights – the specific request made by an individual of a court to enforce a legal right as in seeking an order to enforce a debt, pay damages, issue an injunction or grant specific performance; and court-ordered rights – describing what a court is actually willing to order against an individual. (S. Smith, "The Rights of Private law", in Andrew Robertson & Hang Wu (eds.) *The Goals of Private law* (Oxford: Hart Publishing, 2009) 113). Having separated these rights, Smith suggests discrete justificatory accounts can be proffered to explain the content of each right. Subsequently, Smith has called legal rights rule-based rights, and the latter two, court orders. Smith still favours a corrective justice account of the former, but of the latter, Smith's evolving account is showing distinctly distributive tendencies, potentially legitimating a far greater regulatory role for courts.(S. Smith, "Rule-Based Rights and Court-Ordered Rights", in Andrew Robertson & Donal Nolan (eds.), *Rights and Private law* (Oxford: Hart Publishing, 2011) 221).

23 T. Wilkinson-Ryan, "Legal Promise and Psychological Contract" (2012) 47 *Wake Forest L. Rev.* 843.

24 Ibid. at 846.

25 Witness the impact of 'ratemyprofessor' and other similar consumer rating sites on modifying professional and corporate behaviour.

26 See Jeff Berryman and Robyn Carroll, "Cy-Pres as a Class Action Remedy – Justly Maligned or Just Misunderstood?" in Kit Barker and Darryn Jensen eds. *Private Law: Key Encounters with Public Law* (Cambridge University Press) Chapter 11.

27 Richard Abel, 'General Damages are Incoherent, Incalculable, Incommensurable, and Inegalitarian (But Otherwise a Great Idea)' (2006) 55 *DePaul Law Review* 253.

28 *Ibid.* at 266.

anti-discrimination law which illustrate what many plaintiffs value in addition to, or in place of, monetary relief.[29] In a small study of plaintiffs who bring actions for medical malpractice, Tamara Reils documents that, overwhelmingly, plaintiffs are motivated by a desire to satisfy extra-legal desires rather than to seek monetary compensation.[30]

Matching the infringed tort or property right to appropriate remedial response presents Herculean problems because the explanatory theories underpinning these rights has always been contested ground.[31] Rights to the use by an owner of land that compete with the rights of their neighbours not to be subjected to nuisance is one example of remedial choices with significant societal impact.[32] A more recent and poignant example in the area of property law is the decision of the United States Supreme Court to weaken the presumptive awarding of injunction relief to patent holders who appear to be operating as patent trolls or are engaged in enforcing a business method patent.[33] While we commend the decision because it allows for an inquiry into the irreparable harm and public interest that refusal of a permanent injunction will cause to the particular patent holder, it does come at a time when the social utility of patent trolls is still a much debated subject.[34]

It is hardly a startling conclusion to suggest that legal orthodoxy on remedies may not meet a litigant's perceptions of their needs. Whether something needs to be done, and, if so what, is a more difficult determination. Hammond has argued that courts should adopt a more neutral stance over choice of remedy; leaving much more autonomy to litigants to make that determination.[35] The court order project

29 Robyn Carroll and Normann Witzleb, 'It's Not Just About the Money: Enhancing the Vindicatory Effect of Private Law Remedies' (2011) 37 *Monash University Law Review* 216.

30 Above. n. 3 at 743.

31 See for example the account of G. White, *Tort Law in America: An Intellectual History* (New York: Oxford University Press, 2003) who describes the tension between compensatory goals and deterrence of risky conduct throughout the history of tort law in America; Allan Beever, *The Law of Private Nuisance* (Oxford: Hart Publishing, 2013) discussing the shortcomings of the conventional view of nuisance and appropriate remedies for breach.

32 Illustrated by the contest between homeowners and cricket players using a village cricket ground in England see *Miller v Jackson* [1977] 1 QB 966; In the US consider the economic, environmental and health implications of remedial choice in *Boomer v. Atlantic Cement Co*., 257 N.E.2d 870 (N.Y. 1970); for discussion see Doug Rendleman, Complex Litigation: Injunctions, Structural Remedies, and Contempt 178-94 (2010) and Doug Rendleman & Caprice Roberts, Remedies 1095-1118 (Eighth Edition 2011).

33 See Jeff Berryman, "When Will a Permanent Injunction be Granted in Canada for Intellectual Property Infringement? The Influence of eBay v. Merc-Exchange", (2012) 24 *Intellectual Property Journal* 159 and D. Rendleman, "The Trial Judge's Equitable Discretion Following *eBay v. MercExchange* (2007) 27 *Review of Litigation* 63.

34 See N. Siebrasse, "Business Method Patents and Patent Trolls" (2013) 54 *Can. Bus. L. J.* 38, and Jeff Berryman's comment on N. Siebrasse's paper at (2013) 54 *Can. Bus. L.J.* 58.

35 See Grant Hammond, 'Rethinking Remedies: The Changing Conception of the Relationship Between Legal and Equitable Remedies', in J. Berryman (ed.), *Remedies: Issues and Perspectives* (Ontario: Carswell, 1989), p. 93.

may bear fruit in time, although one of us has expressed reservations in the past.[36] A minimal response to Hammond's call is to place current orthodoxy as expressed in court decisions to close and critical scrutiny. In the next Part we subject to scrutiny the current orthodoxy concerning supervision and enforcement restraints on awards of specific performance.

Part Two – *Are You Being Served?*

Let us admit that we cannot draw a definitive conclusion as to how common law courts collectively approach the task of ordering coercive remedies to enforce private law rights. At best, we can chart a trend, and currently that trend seems to embody a conservative position; one less willing to engage coercive remedies. This may in fact be in contrast to the use of coercive remedies to enforce public law rights, and where the trend seems to be going in the other way. Let us also suggest that in our Commonwealth jurisprudence there has always been evident something of a schizophrenic quality in our law. For example, during the latter half of the 19th century, a period described by Horowitz as amounting to the emasculation of equity,[37] and by Atiyah as the decline and subordination of equity,[38] there remained pockets of substantive claims where equity courts professed an extreme willingness to go to any lengths to enforce contracts.[39] At other times the decision to grant specific relief may have been driven by largely unarticulated ulterior motives; dare we suggest on occasion distinctly political motives.[40] Other hints of this schizophrenic quality are detected in the frequent incantation of *pacta sunt servanda* (agreements must be kept) in contract cases[41] as against a general reluctance to coerce performance by the defendant.

The treatment accorded the enforcement of keep open clauses in commercial leases provides an example of the conservative position, and raises issues about

36 See Jeff Berryman, 'The Law of Remedies: A Prospectus for Teaching and Scholarship' (2010) 9 *Oxford University Commonwealth Law Journal* 123.

37 M. Horowitz, "The Rise of Legal Formalism" (1975) 19 *American J. of Legal History* 251 at 263.

38 Above n. 6 at 671.

39 A series of railway cases in which landowners agreed to grant rights to railway companies to lay rails in return for a variety of concessions such as sidings, culverts and stations, generated a volume of litigation, most of which the court enforced with specific performance. See *Storer v. Great Western Railway Co.* (1842) 2 Y. & C.C.C. 48: 63 E.R. 21: *Sanderson v. Cockermouth and Workington Railway Co*. (1869) 11 Beav. 497: 50 E.R. 909; *Wilson v. Furness Railway Co.* (1869), L.R. 9 Eq. 28; *Sir Edward Bulwar Lytton v. The Great Northern Railway Co.* (1856) 2 K. J. 394; 69 E.R.. 836; *Wilson v. Northampton and Banbury Junction Railway Co.* (1874), 9 Ch. App. 279.

40 For example, the decision in *Hill v. Parsons & Co.* [1972] Ch 305 (C.A.) is widely heralded as demonstrating a new liberalization concerning the enforcement of an employment contract by specific performance where the action was brought by the employee. However, the contexts of the dispute make the order very supportive of union busting.

41 In particular, see cases where a defendant has been ordered to pay damages for breach of contract well beyond the loss to the plaintiff based on diminution in the market value of their property, for example *Radford v De Froberville* [1977] 1 WLR 1262 at 1270; *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* [2009] 236 CLR 272 at 288.

the arguments used by courts to justify restraint in awarding coercive remedies. The decision of the English House of Lords in *Co-operative Insurance Society Ltd.* v. *Argyll Stores (Holdings) Ltd.*[42] is pivotal to an understanding of this evolution in practice. Prior to this decision there had been evident a trend toward greater flexibility in awarding specific performance of contracts that potentially engaged problems in supervision.[43]

In *Argyll* two experienced commercial entities had entered into a long term commercial lease in which the tenant, Argyll, was obliged to "keep open" their supermarket during usual hours of business for the locality.[44] Argyll, who ran a major chain of supermarkets throughout the U.K., was in fact the anchor tenant in the plaintiff's (Co-operative Insurance Society Ltd.), shopping complex. After undertaking a review of its business operations Argyll decided to close down its store in the plaintiff's mall. This decision was made as part of a restructuring in which twenty-seven loss-making or marginally profitable stores were closed. The defendant's store in the plaintiff's mall had been running an annual loss of £70,000. In the trial court, the plaintiff had sought specific performance requiring the defendant to continue to keep its store open for the remainder of the lease — approximately nineteen years. The trial judge rejected the plaintiff's request, confining it to damages, and citing a long-established rule against granting specific relief requiring a person to continue running a business. In the Court of Appeal, the majority granted the specific performance decree, paying particular attention to the "gross commercial cynicism" and "wanton" and "unreasonable conduct" of the defendant.[45]

The House of Lords reversed the Court of Appeal and restored the trial judge's original order. In doing so, Lord Hoffmann, with the other lords concurring, sought to clarify the law regarding specific performance and difficulties with supervision. On one level Lord Hoffmann confirms the position that the prospect of constant court supervision is not the reason for restraint in granting the decree. However, what does justify restraint is the interplay of coercive powers — committal for contempt, and the prospect of repeated breaches of the order requiring a multiplicity of suits. In Lord Hoffmann's opinion, the threat of committal for contempt adversely impacts on the defendant's commercial reputation, creating an inimical climate in which to operate a business. Further, the seriousness of the finding will result in a heightened sense being accorded the litigation, leading to expensive and possibly repeated actions before the court over a prolonged period of time. Lord Hoffmann used the latter reason as a justification for distinguishing between orders that required a defendant to carry on an activity, as in running a business, and orders that required the defendant to achieve a result, as in

42 [1998] 1 A.C. 1.

43 *Giles (C.H.) & Co.* v. *Morris* [1972] 1 W.L.R. 307 (C.A.), *Shiloh Spinners* v. *Harding* [1973] A.C. 691 at 724 (H.L.), and *Posner* v. *Scott-Lewis* [1987] 1 Ch. 25.

44 The following eight paragraphs on the implications of *Argyll* on Canadian law are drawn from Jeff Berryman *Equitable Remedies* 2nd ed. Above note 17 at 294 *et. Seq.*

45 Above note 34 at 18.

completing a building. The prospect of repeated applications is viewed as being more real in the former than in the latter. In addition, it is probably harder to frame an order to ensure compliance in regard to an activity as against a result. It is not enough that the contractual obligation is described in sufficiently precise terms so as to escape scrutiny under the doctrines of contractual uncertainty — a higher level of exactitude is required. Lord Hoffmann was also concerned that granting specific performance would arm the plaintiff with a means to extract a higher price in return for releasing the defendant from the "keep open" obligation. The lease did allow for an assignment, an act that had in fact taken place before the appeal to the House of Lords. On this point, Lord Hoffmann reiterated that damage compensation was a measure of the plaintiff's actual losses rather than a mechanism to extract profits made by the defendant through breach, and should not be undermined by an order for specific performance.

The *Argyll* decision has been criticized by Professor Tettenborn.[46] He argues that, with respect to Lord Hoffmann's first argument, the need for precision of language in the order, the requirement would appear to be satisfied in the facts of this case, as much as it has been satisfied in cases on the enforcement of building contracts where specific relief has often been made available. With respect to Lord Hoffmann's second argument, the prospect of repeated breaches, Tettenborn argues that in the facts of *Argyll* there was no evidence to support the view that the defendant would do other than comply with the order, if only out of a regard for economic self-interest and commercial reputation. These findings had underpinned the majority decision in the Court of Appeal and had not been refuted by Lord Hoffmann. Rather, Lord Hoffmann had resorted to a principled objection based on hypothetical difficulties should a defendant fail to observe a court's decree, or, if required to run a business, face insolvency at some later stage. As Tettenborn points out, courts have other means at their disposal, such as costs, to deter repeated unmeritorious applications by the plaintiff for committal.

The net effect of the *Argyll* decision is to elevate concerns over the prospect of repeated applications by the plaintiff to ensure compliance while dismissing judicial concerns about the actual resources needed to supervise a specific performance decree. Based on these concerns, the House of Lords has made a demarcation between specific performance of an "activity" as against a "result" that makes it very problematic to ever get specific performance requiring a defendant to continue operating a business. One immediate rejoinder is the obvious point that some activities, while spanning a long time, can be quite simple in nature and clearly susceptible to an order.[47] It also begs the question, when does

46 See A. Tettenborn, "Absolving the Undeserving: Shopping Centres, Specific Performance and the Law of Contract" [1998] *Conv. & Prop. Law* 23. See also the criticism of *Argyll* by Spry, *The Principles of Equitable Remedies: Specific Performance, Injunctions, Rectification and Equitable Damages* 7th ed. (Sydney: LBC Information Services, 2007) at 668.

47 For discussion, see Maree Chetwin, "Relational and Discrete Contracts and Remedies Requiring Supervision" (2014) paper submitted to UWALRev for special issue on

a "result" become an "activity"?

The few Canadian cases so far that have discussed *Argyll* have simply endorsed its principles and reflect its conservative approach to awarding specific performance. In *Centre City Capital Ltd.* v. *Bank of East Asia (Canada)*,[48] the plaintiff requested specific performance of an obligation to occupy leased premises and operate a bank in the plaintiff's building. At the time of the suit, the plaintiff had commenced an action for an interlocutory mandatory injunction; the defendant was making lease payments but had deferred taking actual occupancy. The court denied relief on the basis that the order envisaged 'would require supervision, numerous rulings by the court as to whether the Order is being followed, motions for contempt and various other scenarios.'[49] It would appear that problems with supervision are still potent arguments in Canada against the awarding of specific relief, based on the experience in post-*Argyll*.[50]

What is lost sight of in many of the judgments that take a conservative approach to granting specific performance of keep open clauses and other contractually agreed terms is that arguments about supervision only surface after a finding that damages are considered an inadequate remedy.[51] It is against this background, of an imperfect remedy at law being granted, that problems with supervision should be reconsidered for at least two reasons. Firstly, it seems to further an injustice if the plaintiff is denied a more perfect remedy than damages simply because of a perceived problem about future supervision. Second, it is even more intolerable that the problems are speculative and hypothetical and based on the perceptions of judges about litigants generally rather than being particularized to the problems confronted by the individual adversaries before the court.

Part of the difficulty in *Argyll*[52] concerning problems with supervision may have been the opinion of the House of Lords that once a specific performance decree has been awarded it is considered final. This opinion results in the inability of the litigants ever returning to court to seek a change in the court's order based on changed circumstances and where the continued enforcement of the order would

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Remedies.

48 [1997] O.J. No. 5218 (Gen. Div.).

49 Ibid. at para. 13.

50 See the discussion in *A.L. Scott Financial (Newton) Inc. v. Vancouver City Savings Credit Union* (2000) 72 B.C.L.R. (3d) 383 (C.A.) at [10], and *Longwood Station Ltd. v. Coast Capital Savings Credit Union* (2007) 51 C.P.C. (6th) 160 (B.C.S.C.).

51 Assessing damages in keep open lease clauses can be very problematic. There are a variety of clauses. Often, the rental payment, or part thereof, is determined as a percentage of the store's revenues. Thus the impact of the loss of one store, particularly an anchor store, on the revenue of other stores in a shopping complex can be difficult to gauge. In addition, the keep-open clause can also reflect the shopping mall owner's desire to keep a certain store mix so as to make the total venture desirable to consumers. These less tangible attributes are difficult to quantify. See A.M. Kaufman, "Operating Clauses in Shopping Centre Leases: Lights Out for the Vacating Tenant" (1991) 18 *C.B.L.J.* 245.

52 Above n. 42 at 18.

constitute oppression. Of concern in *Argyll* was the issue that if a defendant was required to continue operating its store at a loss it may at some subsequent time face insolvency. In the actual case there was no suggestion that the defendant, a national food chain, would face insolvency if forced to keep open the store in question. This aspect of the judgment has been criticized by Tettenborn.[53] It also appears to be inconsistent with the House of Lords' own judgment in *Johnson* v. *Agnew.*[54] There, the non-performance of a specific performance decree remained a continuing breach of the contract, conferring upon the plaintiff the right to bring an action in common law for breach and to seek damages.[55] In Ontario, the Court of Appeal[56] has affirmed the notion that once specific performance has been decreed the contract comes under the management and control of the court, and presumably can be changed at any time on the suit of either party. Thus, it seems quite appropriate for a court to grant specific relief, where the problems with supervision remain hypothetical and constitute speculation, until such time as any difficulty is incurred by the parties. At that stage, the court could reassess its decision to persevere with the contract and bring the relationship to an end by requiring the plaintiff to crystallize its loss in damages. Where problems with supervision arise immediately (the inability to describe what has to be done would be one instance), the court should refuse the specific performance decree forthwith.

There are more reasons not to follow the direction of *Argyll* in Canada. *Argyll* itself can be contrasted with the decision of the Quebec Superior Court in *Cie de construction Belcourt ltée v. Golden Griddle Pancake House Ltd.,*[57] a case with similar facts. The plaintiff sought enforcement of a lease obligating the defendant to reopen and operate its pancake house restaurant. Like Safeway in *Argyll*, the defendant argued hardship if it was required to reopen the restaurant requiring considerable expenditure. This argument was summarily dismissed. The defendant was fully aware of the costs of opening and operating in the plaintiff's premises when it entered the lease. Similarly, the Court dismissed the argument that if forced to reopen it would be difficult to gauge compliance by Golden Griddle of the obligation to run a pancake house. As the court concluded, "[t]he prestige and self-interest of the Defendant in this case is undoubtedly such that it will not readily destroy the value of its trade mark and its franchises by permitting the restaurant which bears the words GOLDEN GRIDDLE both on its signage and menus to be operated in a shoddy manner."[58] Part of the reasons that explains the different approach of the Quebec courts is the reliance upon the

53 See Tettenborn, above n. 46 at 36; and Spry, above n. 46 at 671.

54 (1979), [1980] A.C. 367 (H.L).

55 Ibid, at 394 and 396.

56 See *Lubben* v. *Veltri & Sons Corp.* (1997), 32 O.R. (3d) 65 (C.A).

57 [1988] R.J.Q. 716.

58 Ibid at [84]. See also Rosalie Jukier, "Taking Specific Performance Seriously: Trumping Damages as the Presumptive Remedy for Breach of Contract", in Robert Sharpe and Kent Roach eds., *Taking Rights Seriously* (Ottawa: Canadian Institute for the Administration of Justice, 2009) at 85.

Civil Code provisions which favour specific enforcement. The decision in *Golden Griddle* has been consistently followed in Quebec.[59]

Even within Great Britain, *Argyll* is not followed in Scotland. In *Highland & Universal Properties Ltd. v. Safeway Properties Ltd.*[60] the same defendant as in *Argyll* wished to close its supermarket while continuing to pay the lease until it could be lawfully terminated. The court granted the landlord specific performance requiring the defendant to maintain operating the supermarket for at least a further eleven years. Again, the court gave short shrift to the argument that if ordered to remain open the defendant would run the store down making it difficult for the court to supervise its order. As the court noted, it had not been the experience in Scotland that these orders gave rise to obvious difficulties in enforcement or supervision. Nor is it the case in the United States that a universal rule against specific performance of commercial leases prevails. In *Metropolitan Sports Facilities Commission v. Minnesota Twins Partnership*[61] the Minnesota Court of Appeal upheld the trial judge's award on an interim injunction requiring the Minnesota Twins baseball team to continue playing in the city owned arena, and thus complying with the terms of their lease. The Court openly recognized the special nature of, and importance of, a professional baseball team in the city and the adverse effect that withdrawal from the arena would have on the community and associated commercial activities. Ultimately, the litigation led to the preservation of the sports team in Minnesota.[62]

Court awards of specific performance in cases decided in Quebec, Scotland and also Ireland[63] provide evidence that that arguments concerning the difficulty of supervision and compliance problems are overblown. There are reasons why landlords insist on including 'keep open' or 'continuous operating' clauses in commercial leases. An anchor tenant, or the right mix of retail and service stores in a mall, has a role designed to ensure financial success by maximizing the attraction of patrons to the commercial retail operation. Where the rents paid contain a component based upon the tenant's turnover, the appropriate retail mix has importance to both landlord and other tenants. It is for these reasons that

59 See particularly, *Carrefour Langelier v. Cineplex Oden Corp* [1999] Q.J. No. 5216 (Sup. Ct.).

60 [2000] S.C. 297, [2000] S.L.T. 414 (Scot Court of Sessions).

61 638 N.W. 2d 214 (Minn. Ct. App. 2002) discussing other cases enforcing commercial leases as well.

62 See also *Edmonton Northlands v. Edmonton Oilers Hockey Corp.* (1993) 15 Alta. L.R. (3d) 179, aff'd 17 Alta. L.R. (3d) 382, granting interlocutory injunction enforcing a long-term lease and thus preventing the hockey club from playing games other than at the plaintiff's stadium.

63 In *Wanze Properties (Ireland) Ltd v Five Start Supermarket and Tesco (Ireland) Ltd* HC, 24 October 1997, the Irish High Court granted an interim injunction requiring a tenant to reopen its premises in circumstances 'factually assymetrical' with *Argyll*, see Solène Rowan, *Remedies for Breach of Contract: A comparative Analysis of the Protection of Performance*, Oxford: Oxford University Press, 2012) at 160 who cites this case and O. Breen, 'Landlord and Tenant – A New Lease of Life for the Doctrine of Specific Performance' (1999) 50 *NILQ* 102 who reports that there was no final hearing on the issue.

damages are an inadequate remedy. These arguments were persuasive in the Canadian decision in *Nickel Developments Ltd. v. Canada Safeway Ltd.*[64] The Court was prepared to grant a declaration indicating that an anchor tenant owed obligations both to the landlord and other tenants such that it was required to keep operating a supermarket while it was a tenant in the plaintiff's mall. For business reasons, the defendant tenant had decided to close its operation in the plaintiff's mall, but continued to pay lease payments to keep competitors from leasing the premises. The defendant ran another supermarket where it was consolidating its operations in Thompson, a small community in rural Manitoba.

Australia courts have similarly shown that they are willing to grant specific relief to compel an anchor tenant to continue to operate a business in premises leased from the plaintiff.[65] In *Diagnostic X-Ray Services Pty. Ltd. v Jewel Food Stores Pty. Ltd*,[66] the plaintiff sought a mandatory injunction requiring the defendant to continue to operate a petrol station that along with a supermarket was part of a suburban shopping centre at least until the trial of the proceedings or until the defendant assigned or sublet the petrol station. Justice Beach concluded that the circumstances were exceptional and distinguishable from the facts in *Argyll* and *Ruffy Investments Pty Ltd v Payless Superbarn (Vic) Pty Ltd*,[67] a previous Australian case in which his Honour had applied *Argyll*. In so deciding and in granting the relief sought Beach J commented on the fact that much emphasis was placed in *Diagnostic* on the fact that an injunction would require supervision by the court. This, he concluded, was highly unlikely for the practical reason that the defendant had operated the petrol station quite successfully for the previous seven years and if ordered, could do so without the supervision of the court.

Previously, and more generally, the High Court of Australia made the point in *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia (No 3)* [68] that difficulty of supervision is a matter of degree rather than an absolute restriction.[69] In their judgment Brennan CJ, McHugh, Gummow, Kirby and Hayne JJ refer to the speech of Lord Hoffmann in *Argyll* as signalling that the concept of 'constant supervision by the court' by itself is no longer an effective or useful criterion for refusing a decree of specific performance. *Patrick Stevedores* was an appeal to the High Court against an exercise of the power conferred on the Federal Court by the section 23 of the *Federal Court Act 1976* (Cth) to grant interlocutory injunctions in respect of conduct that threatened to contravene the *Workplace*

64 (2000) 156 Man. R. (2d) 170 (C.A.).

65 More generally, on the basis of a review of recent Australian cases in which applications for urgent and interim injunctions were sought, Aitken has concluded that the rigidity once afforded to the primacy of the common law remedy of damages is breaking down. Lee Aitken, 'When are Damages an Adequate Remedy?' (2004) 78 *Australian Law Journal* 544.

66 (2001) 4 VR 632.

67 (2000) V Conv R 64,375 at 54-617.

68 (1998) 195 CLR 1, at 46-47.

69 Ibid. at 46.

Relations Act 1996 (Cth). The High Court went on to point out that courts are well accustomed to exercising supervisory jurisdiction upon applications by trustees, receivers, provisional liquidators and others with responsibility for the conduct of administrations in the exercise of the court's equitable jurisdiction.[70]

We have illustrated in this Part, by reference to the enforcement of keep open clauses, that there is a disconnect between what is widely understood to be current orthodoxy on the availability of specific performance of such clauses and what parties expect will be their available remedy when they contract over the inclusion of such provisions or seek coercive enforcement of the contract. Further, that current orthodoxy is more often shaped by supposition and historical precedent concerning traditional barriers that have inhibited courts in awarding coercive remedies than by empirical evidence. In her analysis of the scope for English law to develop principles for the availability of specific remedies beyond the exceptional Rowan concludes, as do we, that 'at least some of the objections to widening the availability of specific relief are surmountable'.[71] In the next Part we point out reasons for not overstating the concerns identified in this Part and ways that these concerns can be ameliorated.

Part Three – Reimagining the use of coercive remedies

Returning to things we know we know, we conclude that it is safe for Seddon, Bigwood and Ellinghaus to say that the "bar" to specific performance that is raised if constant supervision of superintendence is required to ensure obedience by the defendant is, arguably, 'the most intractable and ubiquitous reason for denying the remedy' for breach of contract. We agree with their conclusion that because of this, courts have been motivated more recently to say that this bar may have been overstated.[72] We know that the focus of concern in modern cases is less on the potential for courts to be involved in supervision *per se* and more on the hazards associated with requiring a defendant to comply with a court order to involving carry on an activity.

There is a variety of reasons for courts to revisit the traditional restraints placed on the use of coercive remedies to enforce contractual obligations. As noted in Part One, the work of contract theorists can be called upon in support of an approach that strengthens the possibility that contractual rights will be vindicated

70 Ibid. at 47.

71 Above note 63 at 20. Rowan pays particular attention to the constant supervision objection and concern about the severity of contempt proceedings. Rowan's work examines the level of commitment of English law to the protection of the performance interest in contracts. In large part this is achieved by comparing English and French law on remedies for breach of contract and by suggesting ways that English law could be developed to strengthen the protection of performance. Her examination confirms that the protection of the performance interest through specific remedies in English law is limited.

72 Seddon, Bigwood and Ellinghaus, *Cheshire and Fifoot's Law of Contract* 10th Australian Edition (LexisNexis) at 1199.

by a court order and the parties' interest in performance of the contract protected. The emphasis in this article is on the emerging body of empirical research that suggests that parties do place a greater emphasis on actual, as against substitute performance. Of course, the position of the parties regarding remedies *ex ante* may be quite different *ex post* the event causing loss, and which party is identified as plaintiff or defendant in the ensuing litigation. Between these two positions courts have always reserved a discretionary to exercise coercive power so as to balance the relative merits and just result between the litigants.

In Part Two we refer to the potential for injustice if a plaintiff is denied a more perfect remedy than damages simply because of a perceived problem about future supervision. And to the fact that it is even more intolerable that the problems identified by the courts are speculative and hypothetical and based on the perceptions of judges about litigants generally rather than being particularized to the problems confronted by the individual parties before the court. To further unsettle current orthodoxy we refer in this Part to the absence of data that orders for specific performance do result in repeated applications to court and contempt proceedings; to evidence that parties to some contracts strive to influence the remedial outcome in event of a dispute by incorporating terms in their contract, and to various ways that courts could demonstrate a greater willingness to enforce contractual obligations and agreed coercive remedies.

Without empirical data on point it is difficult to assess how realistic are the concerns and whether predictions of contempt proceedings and severe consequences for the defendant are likely to result. In the absence of data about proceedings after an award of a coercive remedy it is possible to speculate that the concerns expressed by the courts, most notably in England and Canada, are overstated. There also appears to be an absence of evidence that a promisor against whom specific performance is ordered will refuse to comply with the order.[73]

We do know that in some areas of commercial contracting parties stipulate in advance for specific relief. It is here that the case for giving due weight to party preference is strongest.[74] What we don't know is how often and in what circumstances a party will pursue an agreed remedy in preference to damages. We put to one side at this point the likelihood that in many cases plaintiffs will decide that they will be better off with a damages remedy – a point made by Lando and Rose above.[75] Two examples confirm that parties sometimes are explicit about their remedial preference in the event of a breach of contract. Parties to lease agreements sometimes insert keep open clauses into their contracts and variously

73 Rowan, above note 63, cites *Beswick v Beswick* [1968] AC 58 and *Sky Petroleum Ltd v VIP Petroleum Ltd* [1974] 1 WLR 576 as examples of where specific performance was ordered and there is no record of the order being disobeyed or otherwise giving rise to difficulties.

74 For a discussion of other arguments that support courts giving effect to party agreements for specific relief see Robyn Carroll, 'Agreements to Specifically Perform Contractual Obligations', (2012) 29 *Journal of Contract Law* 155 esp at 174 – 177.

75 Above n. 16.

stipulate for specific relief in the event of breach, or state that the parties' preference is for injunction or specific performance, or to include an admission that damages are inadequate.[76] These clauses are included notwithstanding the legal reality that the parties are unable by agreement to oust the discretion of the courts to decide whether specific relief will be granted or refused.[77] This is further evidence of the disconnect referred to in Part Two between what is widely understood to be current orthodoxy on the availability of specific performance of such clauses and what parties expect when they contract over the inclusion of such provisions or seek enforcement of the contract by an award of a coercive remedy.

Clauses for specific performance are also used in long term commodities supply contracts.[78] From a buyer's perspective, the remedy of specific performance is often more valuable than damages, for example, in a long term supply contract for iron ore or coal. Parties will be aware the buyer will need to satisfy the court that damages will not be an adequate remedy. In that event, well drafted clauses in the contract can address factors which might otherwise weigh against equitable relief, namely impossibility, hardship and the need for constant supervision to implement the order. Irwin makes two points in support of clauses of this type used in the Australian context. Firstly, he observes that Australian courts now 'routinely engage in what could be characterized as "constant supervision" in the context of, for example, corporate administration.'[79] Second, he opines that a well drafted long term supply agreement which sets out reasonably clear and objective obligations with respect to the supply of the commodity may lead a court to conclude that there is unlikely to be the need for any extensive or continuous discretion arising from the order for specific performance. To support an order for specific performance the court 'could make a number of different orders over time and impose independent audit or supervision arrangements.'[80]

In referring to clauses that stipulate the parties remedial preferences and suggesting that court's should endeavour to honour these clauses by granting specific relief we acknowledge that parties are free to apply for an award of damages for breach from the outset. Even if specific relief is granted it is always open for the parties to return to court should there be difficulty in administering the order. At that stage the court can consider making further orders or awarding damages.

In contracts where parties do not include provisions for or in aid of specific relief, the argument can be made generally for an expansion of the factors relevant to whether specific remedies should be granted and to give weight to the remedial preference of the party who seeks specific relief. As Rowan argues: [81]

76 Carroll, above n. 74 at 182.
77 *Warner Brothers Pictures Inc v Nelson* [1937] 1 KB 209 at 221.
78 Barry Irwin, "Getting Out: Termination", in K Dharmananda and L Firios, *Long Term Contracts* (The Federation Press 2013) at 59.
79 Ibid. at 77.
80 Ibid.
81 Above n. 63, at 67.

> "[C]ourts could become more sensitive to the preferences of the injured promisee, rather than presuming indifference between performance and damages. Instead of the focus being solely on factors such as 'uniqueness' and the availability of substitutes in the market, due weight could be given to all the circumstances of a case."

These circumstances include the extent of loss suffered by the promisee, inconvenience, the delay in obtaining a substitute, the difficulty of assessing damages, the importance of the obligation, the nature of the contract and the 'consumer surplus,' (the subjective value of performance). Adopting this approach the possibility of substitute performance, while material, need not necessarily be decisive. [82]

This line of reasoning urges courts to look closely at the facts of the case at hand and avoid the potential for specific relief to be denied to a party based on judges' perceptions about litigants in general rather than by reference to the situation of the individual parties before the court. Assumptions about the 'nature of the contract' and the problems that will follow inevitably from an award of specific performance in particular types of contract need to be challenged and tested. Recently, Chetwin has analyzed the availability for specific relief to enforce obligations arising in franchise agreements enforcement of performance. The case law, particularly in Australia and New Zealand, reveals the potential for parties and courts to challenge assumptions about supervision and enforcement.[83] There are features of the franchise contract that mean that often they will be unsuited to enforcement by an order for specific performance, stemming from the fact that a franchise contract creates a relationship between the parties which is built on trust, requires reciprocity and is of an ongoing nature. Chetwin argues that, nonetheless, classification of the contract as either relational or transactional does not answer the question whether specific performance is appropriate and concludes that there is no particular reason why the remedy of specific performance ought not be available if the wording of the order is sufficiently precise. In each case it is necessary to inquire whether, in fact, there are likely to be ongoing difficulties resulting from a breakdown in the relationship and if not, whether the obligations of the parties to the franchise agreement can be stipulated with sufficient certainty such that potential supervision by the court is not a bar to relief.[84]

The preceding discussion and examples highlight the need for it to be possible to state with certainty the obligations to be performed by a defendant who it is proposed be made the subject of an order for specific relief. Only this way will a plaintiff overcome the justifiable concerns of the courts about supervision and enforcement where the order contemplates an ongoing activity within a contractual relationship. The fact that Australian courts have long recognised that specific

82 Ibid.
83 Above n. 47.
84 Ibid. (final page)

relief can be granted to enforce building contracts where the work to be done is sufficiently defined indicates that courts are alive to the possibility of enforcement of activities of some types at least.[85] Inevitably, views will differ in an adversarial contest as to whether the requisite degree of certainty has been be achieved by the contract drafter or can be specified by the court. Dealing with issues of contractual uncertainty concerning the nature and extent of obligations under a contract is core business for commercial courts. One way that certainty can be achieved is through the implication of terms, in particular of the duty to co-operate[86] and a duty to act reasonably in the performance of contractual obligations.[87] Implication of terms is one way that courts can demonstrate their willingness to enforce the parties' contractual obligations, including dispute resolution and agreed remedies clauses.

Concerns about uncertainty as to what needs to be done to comply with the court's order can be dealt with by granting liberty to apply. We submit that courts ought to tolerate some degree of uncertainty and accept the possibility that court supervision may be required, if only to test whether the difficulties advanced in opposition to specific relief by the defendant are borne out. In terms of the order itself, there are sophisticated dispute resolution clauses in modern commercial contracts that provide examples of the terms in which an order could be drawn to create a series of procedural steps to be satisfied before the matter could be brought back to court. If the matter does return to court, case management processes now used in civil and commercial courts in Australia, England and other common law jurisdictions can be used to decide whether the issues raised post-award by the parties require court orders or whether they can be dealt with by other court processes. Modern case management processes will most likely see parties referred to mediation with a view to resolving their dispute before trial, or at least narrowing the issues. The court can appoint a court officer to case manage or mediate ongoing supervision issues with power for that officer to refer the matter to a judge for final determination if necessary. These processes are well known within building disputes tribunals and other civil disputes tribunals where

85 *Hewett v Court* (1983) 149 CLR 639 at 668; *Thomas v Harper* (1935) 36 SR (NSW) 142, at 148.

86 In Australia, see *Butt v McDonald* (1896) 7QLJ 68, per Griffith CJ at 70-71; *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd* (1979) 144 CLR 596, 607 (Mason J); *Campbell v Back Office Investments Pty Ltd* (2009) 238 CLR 304, 358 [169] (Gummow, Hayne, Heydon and Kiefel JJ).

87 For example, see *Renard Constructions (ME) Pty Ltd v Minister for Public Works* where Priestley JA implied a duty on a principal with power to terminate a construction contract to exercise that power reasonably, (1992) 26 NSWLR 234, 263. More recently, in *1144 Nepean Highway Pty Ltd v Abnote Australasia Pty Ltd* [2009] VSCA 308, the Victorian Court of Appeal dismissed an appeal against an injunction granted that compelled a landlord to execute an agreement with an expert appointed pursuant to a dispute resolution clause in a lease agreement with the applicant tenant. The dispute resolution clause made clear the power of appointment but was silent on the question of the expert's terms. The Court of Appeal implied a term that the appointment would be on terms which are reasonable 'having regard to the qualifications he has, the function he is to perform, the expertise he is to bring to his task and the responsibility which he is to undertake' at [29].

disputes are tightly case managed and rarely proceed to trial. Costs associated with referrals to mediation or other processes and with enforcement proceedings by the court would be borne by the defaulting party. Clearly there are resource implications for courts in undertaking a higher level of supervision that at present and this will inevitably factor in the court's capacity to undertake this role in the face of repeated post-award applications.

CONCLUSION

As we say at the outset, this paper is modest in its proposal. We suggest that courts should give greater weight to party autonomy and that where that results in a request for coercive relief, then courts should be willing to embrace a more nuanced response; looking for reasons to grant rather than deny relief; adopting a wait and see position concerning compliance rather than assume or fear recalcitrance; and be willing to engage other ways to support a plaintiff's choice of remedy. As a basis for this proposition we point to empirical evidence that in some areas of contracting parties prefer specific performance over damages and in some commercial contracts the parties endeavor to ensure performance of contractual obligations through express stipulations in their contracts. This evidence should be afforded legal significance in the exercise of discretion to award private law remedies and in giving due weight to party expressions of remedial intent. In the absence of strong empirical evidence in Commonwealth jurisdictions concerning why parties choose what particular remedy, nor good empirical evidence about difficulties, perceived or otherwise, of implementing any particular remedy, we suggest that courts should accord greater significance to party autonomy when exercising discretionary powers to award the appropriate remedy.[88] Nor should courts readily assume that monetary awards adequately compensate promisees. We do not suggest that the court's exercise of discretion ought to be significantly curtailed. Rather that courts should not be too ready to equate monetary awards with performance and too readily to find that the potential for ongoing supervision and enforcement of performance is a reason to refuse coercive relief. We point out that argument about supervision and enforcement only surface after a finding that damages are considered an inadequate remedy and therefore the court is looking for a remedy that will protect the rights of the innocent party. Rather than make assumptions about future supervision as a problem we suggest that there are ways that courts can support party choice of remedy even where some level of supervision will be involved. In so doing the gap between party choice, expectations and self-determination will be narrowed.

88 We see our approach informed by what can be learnt from the phenomenon of evidence based policy making, and which one of us has applied in a slightly different situation. See Jeff Berryman, "Challenging Shibboleths: Evidence Based Policy Making, the Supreme Court of Canada and Anton Pillar Orders" (2010), 36 *Advocates' Quarterly* 509.