

The Performance Interest in New Zealand's Law of Contract

**A dissertation submitted in partial fulfilment of the degree of Bachelor of Laws (with
Honours)**

University of Otago

2014

James Brownlee Watson

Acknowledgements

I would like to thank:

My supervisor Jess Palmer for her insight and guidance,

The staff that contributed comments at my seminar,

Ruth for helping me right at the end,

My family for all of the love and support over the years,

And Dara for her kindness, love and encouragement

Table of Contents

Acknowledgements.....	ii
Contents.....	iii
Chapter I: Introduction.....	1
Chapter II: The rise of the ‘performance interest’.....	2
(a) Overview.....	2
(b) Where did the new terminology originate.....	2
(c) How often is the ‘performance interest’ terminology being used?	5
(d) Does the increasing use of the ‘performance interest’ mean anything?	6
(e) Conclusion.....	7
Chapter III: The Performance Interest, <i>Altimarloch</i> and the Cost of Cure or Diminution in Value Debate	8
(a) Overview.....	8
(b) Justification.....	8
(c) <i>Altimarloch</i> : the decision.....	10
(i) Facts.....	10
(ii) Judgments.....	10
(d) The deeper implications of <i>Altimarloch</i>	13
(i) Embracing the performance paradigm.....	13
(ii) Different takes on the place of performance in the hierarchy of contract values.....	13
(iii) <i>Altimarloch</i> : an acceptance of the Australian- and a rejection of the English- Approach?	17
(e) Conclusion.....	24
Chapter IV: Evaluation of the performance paradigm.....	25
(a) The performance oriented approach to contract gives effect to contracting parties’ bargains more faithfully.....	25
(i) Performance and subjective preference.....	25
(ii) The performance approach can more accurately determine the nature of the contract.....	30

(b) The interplay of remoteness principles with the measure of damages calculus.....	32
(c) The performance-oriented approach will lead to more predictable law.....	34
(d) Conclusion.....	36
Chapter V: Performance Damages : Transcending the Compensatory Paradigm?	37
(a) On what ground does <i>Altmarloch</i> give rise to these possibilities?	38
(b) Analysing the secondary literature.....	39
(i) What are ‘performance damages’.....	39
(ii) How the real benefit of performance damages has been obscured.....	41
(iii) What is the pay-off of acknowledging performance damages?	43
(c) Conclusion.....	45
Chapter VI: Conclusion.....	46
Bibliography.....	47

Chapter I: Introduction

This dissertation is about unpacking the implications of a recent flare up in a centuries-old debate: what is the essence of the contractual obligation? In an influential article,¹ Professor Friedmann proffered an answer: that the essence of contract is *performance*, and that an emphasis on the value of parties performing their contractual obligations should permeate all areas of contract law. As a consequence of this view, Friedmann concluded that the language of contract law is inadequate and misleading. The primary interest a party receives upon contracting should not be called the ‘expectation interest’, as Fuller and Purdue had earlier contended,² but rather the ‘performance interest’ as this terminology more accurately reflects the character of the contractual obligation as a whole.

This may all seem arcane and of no practical relevance. But recently, as Part II outlines, the ‘performance interest’ terminology has started to gain prominence. This gives rise to the question: has there been a concomitant acceptance of the arguments Friedmann raised in coining this terminology? If so, what implications may this have for contract law as a whole?

Part III attempts to answer these questions by focusing on the law of damages, and in particular by scrutinising *Marlborough District Council v Altimarloch Joint Venture Ltd*,³ an important, though under-analysed,⁴ recent New Zealand Supreme Court decision. Part III ‘A’ argues that New Zealand contract jurisprudence, as a result of this decision, *has* firmly committed itself to a performance-oriented view of the contractual obligation. Part III ‘B’ contends that this is a positive development which may have a significant impact on the law of damages. Further, Part III ‘C’ suggests that *Altimarloch* is of significant theoretical importance. This case may result in the recognition that, in certain circumstances, the object of damages awards in contract is not to compensate for loss but rather to vindicate a contracting party’s primary right to performance.

The main conclusion this dissertation reaches is that grasping this theoretical insight is crucial for understanding which sorts of arguments courts that are operating with a performance-oriented view of the contractual obligation will be amenable to when the correct measure of damages is a live issue.

¹ Daniel Friedmann “The Performance Interest in Contract Damages” 111 Law Quarterly Review 628.

² LL Fuller and WR Perdue, “The Reliance Interest in Contract Damages” (1936) 46 Yale Law Journal 52

³ [2012] NZSC 11; [2012] 2 NZLR 726.

⁴There is only one substantive article on the purely contractual aspects of this case: Marcus Roberts, “Contractual Damages and the Supreme Court – *Altimarloch* and the Shifting Sands of ‘Reasonableness’” (2013) 19 NZBLQ 11.

Chapter II: The rise of the ‘performance interest’

(a) Overview

This chapter covers some important preliminary ground. First it defines the ‘performance interest’ and situates the development of this terminology in one of the key debates in contract law theory: whether contract law serves instrumentalist efficiency aims or embraces the moral dimensions associated with promising. It also surveys the extent to which the performance interest terminology has been accepted in secondary literature and in case law, and concludes that the terminology is becoming more prominent.

(b) Where did the new terminology originate?

The phrase ‘performance interest’ was coined⁵ in 1995 by Daniel Friedmann in his article “*The Performance Interest in Contract Damages*”.⁶ He defined the term thus:⁷

The essence of a contract is performance. Contracts are made in order to be performed.⁸ This is usually the one and only ground for their formation. Ordinarily, a person enters into a contract because he is interested in getting that which the other party has to offer and because he places a higher value on the other party's performance than on the cost and trouble he will incur to obtain it. This interest in getting the promised performance (hereafter the ‘performance interest’) is the only pure contractual interest.

The *Performance Interest* is a modern contribution to a debate which has been continuing for centuries: what is the nature of the contractual obligation?⁹ It takes the form of a prolonged

⁵ The terminology had been used earlier, in Herbert A. Holstein "Vices of Consent in the Law of Contracts" (1938) 13 Tul.L.Rev. 560. But Holstein used ‘performance interest’ in an unaffected manner without intending to turn the phrase into a term of art. Therefore Friedmann is given credit for ‘consciously’ coining this terminology.

⁶ Friedmann, above n 1.

⁷ At 629.

⁸ Citing *Cebave NV v Bremer Handelsgesellschaft mbH* (The Hansa Nord) [1976] QB 44 at 71.

⁹ This debate is usually associated with the likes of Oliver Wendell Holmes’ “The Path of the Law” (1897) 10 Harv. L. Rev. 457; F. Buckland’s “The Nature of Contractual Obligation” (1944) 8 CLJ 247 and Charles Fried’s “Contract as Promise: a Theory of the Contractual Obligation” (Harvard University Press, Cambridge, 1981). But there is a much earlier pre-history to these arguments, dating back to Roman legal scholars: see Wim Decock *Theologians and Contract Law: The Moral Transformation of the Ius Commune* Wim Decock (Martinus Nijhoff Publishers, Leiden, 2013) at 162-202.

critique of an influential¹⁰ article written by Fuller and Purdue, *The Reliance Interest in Contract Damages*.¹¹

In *Reliance Interest*, the authors famously argue that the primacy the law of contract accords to the ‘expectation interest’ of contracting parties, a phrase which the authors coined¹² and which has since become the standard terminology for referring to the overall contractual interest,¹³ is unjustified and cannot be accommodated within a damages regime which purports to be compensatory. For to award the plaintiff the value of his ‘expectancy’, Fuller & Purdue argued, is to give him something he never had. This is “a queer kind of ‘compensation.’”¹⁴ They conclude that the ordinary measure of contract damages is only justifiable because of the difficulties in proving loss associated with the reliance and restitution interests.¹⁵

The *Reliance Interest* trades off of a view of contract made famous by Oliver Wendell Holmes.¹⁶ Holmes argued that that the duty to keep a contract simply meant “that you must pay damages if you do not keep it - and nothing else.”¹⁷ This was an aspect of Holmes’ ‘bad man’ realism: he would brook no reference to morality in describing the law, preferring to address law ‘cynically’, from the perspective of a man who only cared about what the courts would in fact decide in any given case.¹⁸ Like Holmes, Fuller & Purdue exclude outright the possibility that the reason an innocent party should receive the ‘expectation measure’ of damages from the breaching party can be found in morality, specifically the moral imperative that promises ought to be kept.¹⁹

¹⁰Apparently the most cited contract law article ever written. See Ewen McKendrick, *Contract Law: Text, Cases, and Materials* (5th ed, Oxford University Press, Oxford, 2012) at 814. And the 43rd most cited law review article of all time: Fred R. Shapiro, “The Most-Cited Law Review Articles Revisited” (1996) 71 Chi.-Kent. L. Rev. 751 at 769.

¹¹ LL Fuller and WR Purdue, above n 2.

¹² As acknowledged by Andrew Burrows, *English Private Law* (3rd ed. Oxford University Press, Oxford, 2013) at 21.17.

¹³ See Friedmann, above n 1, at 654. Fuller and Purdue’s terminology was specifically endorsed in *Newmans Tours Ltd v Ranier Investments Ltd* [1992] 2 NZLR 68 at 27. See Maree Chetwin “Beyond Fuller and Purdue’s classification: Welcome Steps or Troublesome Taxonomy” (2010) 40 JCL 271 at 273-274.

¹⁴ LL Fuller and WR Purdue, above n 2, at 53.

¹⁵ At 62.

¹⁶As Barbara Fried put it: Holmes’ view of contract is “the backdrop against which Fuller and Purdue mounted their famous argument for the moral superiority of restitution or reliance damages over expectation damages.” See “The Holmesian Bad Man Flubs His Entrance” (2011) 45 Suffolk Law Rev. 627 at 632.

¹⁷ Holmes, above n 9, at 462.

¹⁸ At 459 and 462.

¹⁹This is one reason why Fuller and Purdue thought it was “no easy thing to explain why the normal rule of recovery should be that which measures damage by the value of the promised performance” – an acceptance of the *pacta sunt servanda* principle would have provided them with a straightforward reason for justifying ‘the normal rule of recovery’. See LL Fuller and WR Purdue, above n 2, at 57. This point is more fully explicated in S.A. Smith “‘The Reliance Interest in Contract Damages’ and the Morality of Contract law” (2001) *Issues in Legal Scholarship*, 1. <www.bepress.com/ils/iss1/art1> at 6-7.

Friedmann disagrees entirely with Fuller & Purdue's analysis, his main gravamen being with the Holmesian underpinnings of their argument. Friedmann argues that the entitlement a contracting party has to receive performance from the other party cannot be described as a mere 'expectancy'. The term 'expectancy' is usually reserved for contingencies "which fall short of right[s]"²⁰ whereas Friedmann argues that a right to performance is exactly what a contracting party receives - that is the very reason a party enters a contract.²¹ The structure of private law backs up this analysis: both specific performance and the tort of inducing breach of contract are premised upon there being a primary right to performance.²² Accordingly, he prefers the 'performance interest' terminology to 'the expectation interest': a party to a contract does not merely *expect* performance; they have a *right to it*.²³ Further, Friedmann argues that Holmes' view is unacceptable from a normative perspective. To breach a contract is a moral wrong: via contract parties are free to determine the scope of their legal obligations, and, having done so, these agreements ought to be kept.²⁴

The conclusion that can be drawn from this is significant. Underlying the different terminology employed by Fuller and Purdue ('expectation interest') and Friedmann ('performance interest') are very different views of the contractual obligation. On one view the contractual obligation has moral dimensions and is geared toward ensuring that contracting parties receive the performance they bargained for. On the other, contract is amoral and the typical contractual measure of damages is not justified in principle, and is only redeemed by policy concerns.

These differing views can diverge into radically different accounts of contract law as a whole. For instance, the amoral view of contract is closely linked to an instrumentalist view of contract: contract is not about keeping promises but about achieving certain ends, especially economic efficiency.²⁵ On this account when greater economic gains can be made by not performing a contractual obligation breach should be encouraged.²⁶ By contrast the moral view is associated with a promissory account of contract, which sees contracts as having "a moral life apart from

²⁰ Friedmann, above n 1, at 634.

²¹ At 629.

²² At 629-632. A similar point is made by Brian Coote in "Contract Damages, Ruxley, and the Performance Interest" (1997) 56 C.L.J. 537 at 542-543.

²³ Friedmann, above n 1, at 634.

²⁴ This is implicit in Friedmann's 1995 article, but made explicit in his earlier article "The Efficient Breach Fallacy", (1989) 18 J. Legal Stud. 1 at 23.

²⁵ See Charles Fried "The Convergence of Contract and Promise" (2007) 120 Harv. L. Rev. F. 1 <<http://www.harvardlawreview.org/media/pdf/cfried.pdf>> at 4.

²⁶ See Dawinder S. Sidhu "The Immorality and Inefficiency of an Efficient Breach" (2006) 8 Tenn. J. Bus. L. 61 108. for an account of the link between 'efficient breach' and the Holmesian view of contracts.

their impact on the promotion of efficiency”.²⁷ It is not financial concerns but the “moral force” of promising which is the animating spirit of contract law.²⁸ On this view it is especially important that contracts be kept, even when efficiency imperatives point towards breach: “after all, we do not need the institution of promising in order to get people to act in their self-interest”.²⁹

(c) How often is the ‘performance interest’ terminology being used?

The phrase ‘performance interest’ has quickly become commonplace in secondary literature. In 2001 Friedmann commented that his terminology was “gaining ground”.³⁰ Since then scholars have written that “[t]he ‘expectation interest’ has been replaced by the ‘performance interest’”³¹ and that ‘performance interest’ is “a label now used in place of the more traditional ‘expectation interest’”.³² When it comes to journal articles this verdict rings true: one can find scores of contract articles which use the phrase ‘performance interest’.³³ Several textbooks also now use ‘performance interest’ terminology, a further indication it is close to achieving the status of orthodoxy.³⁴

However, assertions that the ‘performance interest’ has replaced the expectation interest need to be qualified. In case-law the ‘expectation interest’ terminology remains dominant. Surveying five different jurisdictions there are only eighteen judgments which use the phrase ‘performance interest’: New Zealand (5),³⁵ Australia (2),³⁶ the United Kingdom (6),³⁷ Singapore (4),³⁸ Hong

²⁷ Frank Menetrez “*Consequentialism, promissory obligation and the theory of efficient breach*” (2000) 47 UCLA LR 859 at 883.

²⁸ At 859.

²⁹ At 884.

³⁰ Daniel Friedmann “A comment on fuller and perdue, the reliance interest in contract damages” (2001) 1 Issues in Legal Scholarship 23 <<http://search.proquest.com/docview/209279569?accountid=14700>>.

³¹ David McLauchlan, “Reliance damages for breach of contract.” (2007) NZLR 417 at 418.

³² Solene Rowan “For the recognition of remedial terms agreed inter partes” (2010) 126 LQR 448.

³³ As well as the many articles mentioned in this and later chapters, a small selection of articles written this year using the performance interest terminology include: Tareq Al-Tawil “Damages for breach of contract compensation: cost of cure and vindication” (2013) 34(2) Adel L. Rev 351; Luca Ficetola (2011) “Comparing Remedies for Breach of Contract in Italian and English Law” Social Science Research Network <<http://ssrn.com/abstract=1990791>>. and L. Murphy “The Practice of Promise and Contract” (2014). *New York University Public Law and Legal Theory Working Papers*. Paper 458.<http://lsr.nellco.org/nyu_plltwp/458>.

³⁴ Examples include J. Beatson ‘Anson’s Law of Contract’ (27th ed., Oxford University Press, Oxford, 1998) at 564; Hugh Beale *Chitty on Contracts* (31st ed, Sweet and Maxwell, London 2004) at 26-041 and Ewen McKendrick *Contract Law: Text, Cases and Materials* at (6th ed, Oxford University Press, Oxford, 2014) 817.

³⁵ *McKinlay Hendry Ltd v Tonkin & Taylor Ltd* HC Wellington CIV-1999-485-78, 22 March 2004; *Cedenco Foods v Akiaki Ltd* HC Napier CIV 2007-441-439, 22 November 2007; *Marlborough District Council v Altmarloch Joint Venture Ltd*, above n 3; *Steffensen v BGW Investments Ltd (formerly Broadbase Otago Ltd)* [2014] NZHC 1828; *Morrison v Vero Insurance New Zealand Ltd* [2014] NZHC 2344.

³⁶ *UI International Pty Ltd v Interworks Architects Pty Ltd* [2007] QCA 402; *Body Corporate for Sun City Resort CTS 24674 v Sunland Constructions Pty Ltd & Ors (No 2)* [2011] QSC 42.

Kong (1)³⁹ and Canada (0). In contrast, since 1996 in New Zealand alone there have been 29 reported cases in which ‘expectation interest’ has been used.⁴⁰

(d) Does the increasing usage of ‘performance interest’ mean anything?

This question is difficult to answer because ‘performance interest’ is used in different senses. Some academics⁴¹ and judges⁴² treat ‘performance interest’ and ‘expectation interest’ as perfect synonyms, using the terms interchangeably. If this usage is valid then the new terminology is of no significance, and may in fact be a confusing development - why have two phrases for exactly the same concept?⁴³

However those who use the two phrases as synonyms seem to be oblivious to the different and incompatible arguments which underpin each. The more interesting, and more common, usage of ‘performance interest’ is to be observed in secondary sources which use the phrase consciously, instead of ‘expectation interest’, and are aware of the arguments which justify it.⁴⁴ The way these authors use ‘performance interest’ signals a commitment to the value of performance and to the arguments which Friedmann outlined in coining the terminology. When

³⁷ *Alfred McAlpine Construction Ltd v Panatown Ltd (No.1)* [2001] A.C. 518 (HL); *So to Bed Ltd v Dixon* [2001] F.S.R. 47 (HC); *Smithkline Beecham Plc v Apotex Europe Ltd* [2006] EWCA Civ 658, [2006] 3 W.L.R. 1146 (CA); *Earl's Terrace Properties Limited v Nilsson Design Limited, Charter Construction Plc* [2004] EWHC 136; *Bovis Lend Lease Ltd (formerly Bovis Construction Ltd) v RD Fire Protection Ltd* [2003] EWHC 939 (TCC); 89 Con. L.R. 169; *Giedo Van Der Garde BV, Giedo Gisbertus Gerrit Van Der Garde v Force India Formula One Team Limited (Formerly Spyker F1 Team Limited (England))* [2010] EWHC 2373 (QB).

³⁸ *Chia Kok Leong and Another v Prosperland Pte Ltd* [2005] SGCA 12 (16 March 2005); *Seah Boon Lock and Another v Family Food Court* [2007] SGHC 80; *Family Food Court (a firm) v Seah Boon Lock and Another (trading as Boon Lock Duck and Noodle House)* [2008] SGCA 31; *Indulge Food Pte Ltd v Torabi Marashi Babram* [2010] SGHC 22.

³⁹ *Linfield Ltd v Taobo Design Architects Ltd & Others & Brooke Hillier Parker (third party)* [2004] HKEC 1135, (2004) HCCT 68/2001.

⁴⁰ Identified in LexisNexis by the search term “expectation interest”. This is consistent with Maree Chetwin’s analysis in “Comparative analysis of some aspects of assessment of damages for contractual breaches in England and Wales, Australia and New Zealand.” (2011) 3.2 International Journal of Law in the Built Environment 113.

⁴¹ Roy Kreitner “Multiplicity in Contract Remedies” in N Cohen and E McKendrick (eds.) *Comparative Remedies for Breach of Contract* (Hart Publishing, Oxford, 2005) 19 at 24; Richard Taylor and Damian Taylor *Contract Law Directions* (Oxford University Press, Oxford, 2013) at 261.

⁴² Examples of dicta in which the two phrases are treated as synonyms can be seen in *McKinlay Hendry Ltd v Tonkin & Taylor Ltd*, above n 35, at [54]; *Earl's Terrace Properties Limited v Nilsson Design Limited, Charter Construction Plc*, above n 37, at [76] and *Family Food Court (a firm) v Seah Boon Lock and Another (trading as Boon Lock Duck and Noodle House)*, above n 38, at [48].

⁴³ McLaughlan, above n 31, at 418 levels this criticism in a general way, noting “an unhealthy obsession with finding new ‘interests’ or creating new labels for existing ones”.

⁴⁴ Examples include Charlie Webb, “Performance and compensation: an analysis of contract damages and contractual obligation.” (2006) 26 OJLS 41; Brian Coote, above n 26 and “The Performance Interest, Panatown, and the Problem of Loss” (2001) 117 LQR 81; David Winterton “Money Awards Substituting for Performance” [2012] LMCLQ 446 and James Edelman, *Gain-Based Damages – Contract, Tort, Equity and Intellectual Property* (Oxford, Hart Publishing, 2002).

used like this, ‘performance interest’ is not otiose and can sidestep the criticism mentioned above.

Ultimately, whether the increased weight which is being placed on the value of performance in the recent academic literature and the consequent increase in prominence of the ‘performance interest’ terminology is of any relevance depends on what is happening in the courts. If judges follow the commentators and start to consider performance to be the essence of contract then this may have real practical implications.

(e) Conclusion

The performance interest terminology originates from an article written by Daniel Friedmann in 1995. The terminology was consciously adopted by Friedmann because he believed that it more accurately reflected the nature of the contractual obligation than the arguments which underlie Fuller & Purdue’s ‘expectation interest’. Usage of ‘performance interest’ has since become commonplace in secondary texts, where several authors use the phrase to signal a commitment to the view that the main reason parties enter into a contract is to receive performance from the other parties. Does all of this matter? It may not. But if judges *are* taking account of the increased emphasis which is being placed on the value of performance in the secondary literature, then this terminological debate could well have important practical implications. The next chapter will begin to assess whether or not that is the case, focusing on the recent Supreme Court decision *Marlborough District Council v Altimarloch Joint Venture Ltd*.⁴⁵

⁴⁵*Altimarloch*, above n 3.

Chapter III: The Performance Interest, *Altimarloch* and the Cost of Cure or Diminution in Value Debate

(a) Overview

This chapter will focus on the recent decision of the New Zealand Supreme Court, *Marlborough District Council v Altimarloch Joint Venture Ltd.*⁴⁶ In this case the Supreme Court split 3:2 on a basic issue of contract damages: whether the cost of cure or diminution in value measure should be awarded. *Altimarloch* is significant in the context of this dissertation. Judges in the majority and the minority both use the performance interest terminology, which makes the case a good bell-weather for assessing whether the substantive arguments which underpin the new terminology are influencing the way judges reason, or whether the impact of the academic literature is strictly limited to terminological change.

After introducing the facts of *Altimarloch*, this chapter proceeds in three parts. Part ‘A’ examines the deeper impacts of this case and argues that the majority in *Altimarloch* have embraced a ‘performance-oriented’ conception of the contractual obligation and that this brings New Zealand law into line with Australian case-law, though represents a rejection of the English position. In Part ‘B’ this development is critically evaluated. Part ‘C’ canvasses the theoretical impact of *Altimarloch* and concludes that this case rejects the orthodox stance that the object of damages awards in contract is to compensate for loss, and may represent a move towards a new sub-set of damages, *performance damages*.

But a preliminary issue must be addressed: why focus on the law of damages?

(b) Justification

Two factors justify this dissertation’s focus on the law of damages. First, the fact that there have been a spate of cases reaching appellate courts about basic, first principle, issues of damages suggests that this may be a fruitful area to investigate.⁴⁷

Secondly, the law of damages has long been recognised as being of “great importance” in illuminating the nature of the contractual obligation as a whole.⁴⁸ This is because it is difficult to

⁴⁶ [2012] NZSC 11.

⁴⁷ Which will be addressed below.

⁴⁸ Jonathan Morgan, *Contract Law Minimalism: A Formalist Restatement of Commercial Contract Law* (Cambridge University Press, Cambridge, 2013) at 15. A similar point is made by Coote in “Contract Damages, Ruxley, and the Performance Interest”, above n 22, at 541 and E. Allan Farnsworth, “Damages and Specific Relief” (1979) 27 Am. J. Comp. L. 247 at 247.

apply the central tenets of the law of damages without committing oneself to a concept of the contractual obligation.⁴⁹

Take the “ruling principle”⁵⁰ from *Robinson v Harman* that:⁵¹

“...where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed”

This principle is silent on a key question: what constitutes compensable loss in the eye of the law? Is loss simply the quantum that a plaintiff is financially worse off as a result of breach; or does loss embrace the amount it will take to secure for the plaintiff equivalent performance?⁵² This is a “basic ambiguity”,⁵³ the solution of which has been described as “intractable”⁵⁴ and apt to separate “moral sheep from economic goats”.⁵⁵ This ambiguity is raised squarely in cases where the plaintiff is claiming damages on a cost of cure basis but the defendant asserts that only the diminution in value measure should be awarded. It mirrors the key debates canvassed in Chapter II about whether contract law merely fulfils an instrumentalist function or is committed to a moralistic, promissory notion of contract.

What is termed ‘loss’ in the law of contract is thus, as Fuller & Purdue said, “the reflection of a normative order...[the product] of an unstated ought”.⁵⁶ So if judges are expressing a commitment to a performance-oriented concept of the contractual obligation, as this section seeks to evaluate, then this should be evident in the law of damages, and especially so in cases where the proper measure of damages is a live issue.

Altmarloch is a clear illustration of the deep ambiguity inherent in the *Robinson v Harman* principle. Despite all of the substantive judgments in *Altmarloch* affirming this principle, or an inconsequential variation thereof, and that the assessment of damages is a matter of fact,⁵⁷ the court split 3-2 on the issue of which measure the application of this principle would yield.

⁴⁹ Coote, above n 22, at 540.

⁵⁰ *Wertheim v Chicoutimi Pulp Company* [1911] AC 301, 307.

⁵¹ *Robinson v Harman* (1848) 1 Ex 850, 855; 154 ER 363, 365 (per Parke B).

⁵² Winteron, above n 44, at 447-450.

⁵³ Coote, above n 22, at 540.

⁵⁴ Andrew Phang “Subjectivity, objectivity and policy: Contractual damages in the House of Lords” [1996] JBL 362 at 362.

⁵⁵ “Common Sense on Cost of Cure” 1995 72 LMCLQ 456.

⁵⁶ Fuller and Purdue, above n 2, at 53.

⁵⁷ At [23] per Elias CJ at; at [156]-[157] per Tipping J; at [186]-[188] per McGrath J.

(c) Altimarloch: the decision

(i) Facts

Altimarloch Joint Venture Ltd (AJVL) purchased a property for \$2.675 million, with the intention of developing a vineyard. This intention was known to the vendor's agents.⁵⁸ The vendor's agents had represented to AJVL that resource consents for Class 'A' (1,500 m.cu per day), 'B' and 'C' water permits would be transferred with the property.⁵⁹ But after AJVL had purchased the property, and after it had embarked on its viticulture development, it was discovered that only half of the Class 'A' and none of the Class 'B' rights could be transferred.⁶⁰ AJVL sued the vendors under s 6 of the Contractual Remedies Act 1979.⁶¹ Subsequent to this discovery AJVL purchased additional 'A' water rights for \$320,000 which entitled it to draw 400 m.cu per day of water.⁶² The value of the property was found to be worth \$2.55m without the rights represented and \$2.95m with the rights represented.⁶³ To build a dam enabling AJVL to have access to the quantity of water it would have been able to access had the representations been true, was found to cost \$776,751 at the time of proceedings, though it would have only cost \$280,000 at the point when the shortfall was first recognised in 2004.⁶⁴

(ii) Judgments

In the High Court⁶⁵ Wild J held that the cost of cure was the correct measure of damages. This amounted to \$1,055,907⁶⁶ in the circumstances. This award was upheld in the Court of Appeal, without any prolonged discussion of whether this was the correct measure.⁶⁷

⁵⁸ At [192] per Tipping J.

⁵⁹ The class 'B' rights for water permits for 795 m.cu per day and the class 'C' rights were for water permits for 4800 m.cu per day. *Altimarloch Joint Venture Ltd v Moorhouse* HC Blenheim CIV-2005-406-91, 3 July 2008 at [46].

⁶⁰ As the Court of Appeal noted, the class A permit rights were the most important as they entitled the holder to take water from nearby, whereas the class 'B' and 'C' permits could only be utilised with a storage dam. *Vining Realty Group Ltd v Moorhouse* [2010] NZCA 104 at [1].

⁶¹ The effect of this section is that misrepresentations which induce parties to enter a contract to attract the contractual measure of damages: at [185] per McGrath J.

⁶² *Marlborough District Council v Altimarloch Joint Venture Ltd*, above n 3, at [16].

⁶³ *Altimarloch Joint Venture Ltd v Moorhouse*, above n 59, at [235]. Although, as Elias CJ notes at [17] this calculation was not reassessed after AJVL purchased the additional water rights, which suggests that the property may have been worth more than \$2.95m had it held the water rights represented. For this reason Roberts, above n 4, at 22 describes the \$400,000 diminution in value measure as "surely much too low".

⁶⁴ *Marlborough District Council v Altimarloch Joint Venture Ltd*, above n 3, at [193].

⁶⁵ *Altimarloch Joint Venture Ltd v Moorhouse*, above n 59, at [223].

⁶⁶ This amount included the cost of AJVL's additional purchase of 'A' water rights.

⁶⁷ *Vining Realty Group Ltd v Moorhouse*, above n 60, at [60]. See Elias CJ's (veiled) criticism of the paucity of the paucity of the High Court's and Court of Appeal's reasoning on this point at [29] and [30].

Supreme Court

The Supreme Court analysed the measure of damages issue in more depth, finding, by a majority,⁶⁸ in favour of the respondent.

The minority:

Elias CJ delivered the leading judgment for the minority,⁶⁹ who held that the diminution in value⁷⁰ measure should be awarded. There are two strands to the Her Honour's reasoning.

First, her Honour emphasised that the usual measure of loss in cases of misstatement in property transactions is the DIV measure.⁷¹ The cost of cure⁷² is only the prima facie measure where the breach consists of failure to perform in contracts for the supply of services, construct buildings or keep premises in repair.⁷³ Factors which may displace the diminution in value measure include if the subject matter of the contract is not a marketable commodity⁷⁴ and if a plaintiff's "performance interest"⁷⁵ would not be captured through damages representing the economic loss on the bargain. But no such factors were present in this case.

Secondly, Elias CJ considered that even if the COC *were* engaged, this measure would be displaced in the circumstances of this case.⁷⁶ The disproportion, in dollar terms, between the cost of cure (\$1.055m) and the value of the property without the water rights (\$2.55m), the price paid for the property (\$2.675m), and the DIV measure (\$400,000) was enough to render the curative measure unreasonable in the circumstances.⁷⁷ That AJVL had not already built the dam was a factor which reinforced this conclusion, and its intention to do so was considered irrelevant.⁷⁸ Another counter-veiling factor was that construction of a dam was not "necessary to produce conformity with the contract" - the dam was a mere proxy to achieve functional equivalence with

⁶⁸ Comprising Tipping, Blanchard, and McGrath JJ.

⁶⁹ Anderson J simply concurred with the Chief Justice on the measure of damages issue at [236].

⁷⁰ Hereinafter 'DIV'.

⁷¹ See Her Honour's judgment at [24], [27] [28], [32] and [34].

⁷² Hereinafter 'COC'.

⁷³ At [27].

⁷⁴ At [28], [36], [37].

⁷⁵ At [25] and [27]. The role that the 'performance interest' played in Her Honour's reasoning will be addressed below.

⁷⁶ At [39].

⁷⁷ At [32] and [41].

⁷⁸ At [40].

“the delivery of rights to take water” which AJVL *had* contracted for.⁷⁹ The parties could reasonably not have expected functional equivalence to be achieved “at any cost”.⁸⁰

The majority

Although acknowledging that the cost of building the dam was high in the context of the agreement as a whole,⁸¹ the majority considered that the lower courts’ awards should be upheld.

The majority considered that COC was the correct *prima facie* measure in this case. As Tipping J outlined, the DIV measure will not be “feasible” when the subject matter of the contract is not “readily substitutable”.⁸² In such cases a “performance measure”,⁸³ here the building of the dam, will usually be engaged. Applying this approach the subject of this contract was viewed by the majority as not being ‘readily substitutable’. There was no evidence that there were similar properties available, nor that it was reasonable for the purchasers to sell the property even if there was such a property available.⁸⁴ This meant that the curative measure was engaged.⁸⁵

And, for the majority, this measure was not displaced on the facts. *Prima facie* the curative measure, once engaged, will be reasonable, and the fact that the water rights were vital to the viticulture enterprise – the very purpose which animated the contract in the first place – reinforced this conclusion.⁸⁶ The marked difference between what the DIV and COC measures would yield did not impugn the reasonableness of damages being awarded on the latter basis, because constructing a dam was the cheapest way AJVL could achieve functional equivalence with the water rights that the property was represented as having.⁸⁷ And in any event this dollar difference between the two measures was due “in large part” to the inflation that occurred as this case wound its way through the courts.⁸⁸ Also, Tipping J disagreed with the Chief Justice’s view that the fact that AJVL had not built the dam shed light on the reasonableness of that measure.⁸⁹ Finally, his Honour held that if the purchaser did not intend to effect the cure that of itself

⁷⁹ At [37].

⁸⁰ At [42].

⁸¹ Blanchard considered the quantum this measure of damages would yield “admittedly high” and Tipping J acknowledged that this measure would yield “substantially more” than the DIV measure: at [66] and [171].

⁸² At [157] and [158].

⁸³ Per Tipping J. Blanchard J also referred to the curative measure as ‘performance damages’. The significance of this language will be addressed in Part III C.

⁸⁴ At [167].

⁸⁵ At [167].

⁸⁶ At [167] per Tipping J and at [192] per McGrath J.

⁸⁷ At [171] per Tipping J.

⁸⁸ At [171].

⁸⁹ At [169].

would render the curative measure unreasonable, but this was not a live issue in the case at hand.⁹⁰

(d) The deeper implications of *Altimarloch*

(i) Embracing the ‘performance paradigm’

The result in *Altimarloch* is not extraordinary. There have been several other cases in which the curative measure has been awarded when it is significantly higher than the DIV measure.⁹¹ But *Altimarloch* is extraordinary in that it is the first time a superior court in this country has addressed in depth the principles which inform such decisions. The argument that this section advances is that in setting out these principles, the majority in *Altimarloch* clearly endorsed a performance oriented conception of the contractual obligation. By contrast, the minority reasoning proceeded from a narrower, economic view of the contractual obligation, which sees economic gain as the main reason people enter contracts and hence as the base-line for assessing damages. This is significant. The differences between the two views about the contractual obligation amount to different *paradigms*, different lenses through which to make sense of contract law as a whole.

This section aims simply to describe the different paradigms which the majority and minority were operating in.⁹²

(ii) Different Takes on the Place of Performance in the Hierarchy of Contract Values

Several strains in Elias CJ’s reasoning indicate that her Honour approached the stipulation about water rights in the contract at issue in *Altimarloch* as if it were solely of economic value.⁹³ The most telling is the limited role AJVL’s ‘performance interest’ had in the damages calculus in her Honour’s view.

⁹⁰ At [161].

⁹¹ See for instance *Rowlands v Callow* [1992] 1 NZLR 178 (HC) where Tipping J awarded damages on the cost of cure basis for fixing a driveway which had been built too steeply (it was described as “a vehicular goat track” at 2). This measure of damages yielded \$41,000, even though constructing the driveway was \$26,000. To similar effect is *Stevenson Precast Systems Ltd v Kelland* HC Auckland CP303-SD01, 9 August 2001; [2001] BCL 807 where the cost of curing defective panels was awarded, which yielded \$414,800 when they could be replaced at between \$20,000-\$50,000.

⁹² The strengths and weaknesses of the different paradigms will be assessed in Part ‘B’ below.

⁹³ Although, as Roberts, above n 4, has noted at 17, the Chief Justice’s view that “[i]f sufficient water rights had been available for purchase, this could well have been a case where, depending on the reasonableness of price, cost of cure in such purchase could be an appropriate way to value the loss in the bargain” treats the transfer of the water rights as being of inherent worth to AJVL. This is difficult to square with the rest of her reasoning which treats the water rights as having only economic value.

At several points throughout her judgment Elias CJ indicates that the performance interest is only relevant when there is no financial loss associated with the contract (for instance when there would be no diminution in value as a result of non - or faulty performance). For instance, her Honour cites⁹⁴ *Radford v De Froberville*⁹⁵ as an example of where the importance of recognising a plaintiff's interest in having the contract performed dictated that the curative measure be awarded. In that case a wall stipulated for in a contract had not been built. The wall added no value to the property, hence an application of the DIV measure would yield no damages. Her Honour cited⁹⁶ an example drawn from *Ruxley Electronics and Construction Ltd v Forsyth*⁹⁷ to the same effect.

Thus in the Chief Justice's view, contract damages first and foremost are designed to alleviate the economic detriment which an innocent party suffers as a result of breach. On this account the primary interest which is given effect by contract damages is economic in nature, and performance values are subsidiary to these economic concerns.

By contrast, that a party to a contract should receive the performance that they contracted for was *the key* concern for the majority, not merely a residual factor that was only engaged when there was no economic loss.

This 'performance' concern underpins the distinction Tipping J drew⁹⁸ between contracts with substitutable and non -substitutable subject matter, with the former attracting DIV measure and the latter the curative measure. The importance of Tipping J's analysis here is that where the subject-matter of a contract is readily substitutable the innocent party will be able to obtain equivalent performance from the market with the DIV measure, whereas if the DIV measure were to be awarded where the subject-matter of the contract is non-substitutable the innocent party is unlikely to be able to do so. Thus an award of damages on a DIV basis in cases of non-substitutable subject matter is likely to leave the innocent party undercompensated from a perspective which sees obtaining performance as being of primary importance. So on the majority's view a sensitivity to the economic position of the plaintiff before and after breach is misguided, and only incidentally relevant to the damages calculus. In cases where the DIV is awarded it is only happenstance that this award accords with an innocent party's financial loss.

⁹⁴ At [25]

⁹⁵ *Radford v De Froberville* [1977] 1 WLR 1262 (Ch); [1978] 1 All ER 33.

⁹⁶ At [27].

⁹⁷ [1996] 1 AC 344 (HL)

⁹⁸ At [157]-[166]. Blanchard and McGrath JJ appear to accept this distinction at [66] and [192] respectively.

The true explanation of awards on this basis is that they represent the quantum that in the circumstances will secure performance for the innocent party.

The differing emphasis on performance in the minority and majority judgments is also evident in the way that the respective judges approached the issue of the ‘reasonableness’ of the damages award. All judges accepted that an award of damages must be ‘reasonable’.⁹⁹ But on the minority view there is much more scope for an award of damages to be deemed unreasonable. As Elias CJ said, had the COC been engaged she would not have awarded that measure on the basis that it was unreasonable because it was disproportionately costly.¹⁰⁰

Whereas on the majority view once it shown that the COC measure is engaged *prima facie* that award will be reasonable because it secures the innocent party the performance they contracted for, and a criterion which is divorced from performance concerns, namely, a consideration of the dollar value of different measures, has no place in their analysis. As Tipping J said “[t]he question of reasonableness must be assessed against the premise that parties enter into contracts with the expectation of performance, not with the expectation of compensation for breach”.¹⁰¹ There is also a strain of moralistic reasoning here. For instance Tipping J stated that “those who are in breach of contract cannot complain if they are required to pay by way of damages the financial equivalent of performance”.¹⁰²

Thus, for the majority, the criterion of reasonableness is much more modest and has less scope to render the COC measure inapposite. Precisely what *would* render the curative measure inappropriate for a court which is operating within the performance paradigm will be addressed below.¹⁰³

In summation, *Altmarloch* raises sharply the differences between two competing accounts of the contractual obligation. One view, endorsed by the majority, sees obtaining performance from the other party/ies to the contract as the prime reason people contract with one another, and hence the primary interest that ought to be vindicated upon breach. On this account the economic loss on a bargain is of limited importance, only becoming relevant when the subject matter of the

⁹⁹ For instance see Elias CJ at [17], Blanchard at [66] (implicit in his Honour’s comment that the performance measure in this case was “not disproportionate”); Tipping J at [158]; and Anderson at [236] by implication because His honour “entirely agreed” with the Chief Justice.

¹⁰⁰ At [32] and [41].

¹⁰¹ At [171].

¹⁰² At [171]. This is also evident in Blanchard J’s comment at [66] that AJVL was “entirely an innocent party”.

¹⁰³ In Part ‘B’.

contract is substitutable, because only then will this quantum have any relationship with the performance values which contract law seeks to uphold. The other view, endorsed by the minority, sees the worth of a contract primarily as economic in nature, and the difference between the objective market value of the performance rendered and that due under the contract as the best gauge of what an innocent party has 'lost'. On this account, the value of performance to the innocent party is subsidiary to the value that a market will ascribe to the contractual obligation, and the 'performance interest' is rarely of relevance in assessing damages.

Herein lies the true importance of *Altmarloch*. The different views of the minority and majority amount to different *paradigms*, different lenses through which to understand the law damages, and perhaps the law of contract as a whole. Which paradigm a judge is operating in can have significant practical consequences, as the case itself demonstrates: the main differences between the majority and minority, for instance when the curative measure is engaged, and when it can be displaced, can be ascribed to the different paradigms the respective judges were operating in.

Having established that the majority committed themselves to a performance-oriented view of the contractual obligation, the next section examines how the majority's stance comports with the views of the highest courts in Australia and England. This is an inherently important matter to consider, and will also help to explicate the differences between the performance paradigm and the economic paradigm.

(iii) *Altmarloch*: an Acceptance of the Australian – and a Rejection of the English - Approach?

The minority and majority in *Altmarloch* approve both English and Australian case law. But, on a proper analysis, the recent House of Lords case, *Ruxley Electronics & Construction Ltd v Forsyth*,¹⁰⁴ is inconsistent with Australian case law. This gives rise to some confusion. If Australian and English case law is inconsistent, with which jurisdiction were the majority really aligning themselves with? Answering this question is important, both for a clear understanding of the implications of the majority's stance and for determining the future precedential value of English decisions in the area of contract damages.

In light of this, this section argues that, whatever their rhetoric, the *decision* of the majority in *Altmarloch* represents an endorsement of the Australian stance on contract damages and a rejection of the English stance. This is because the performance paradigm in which the majority

¹⁰⁴ *Ruxley Electronics & Construction Ltd v Forsyth* [1996] 1 AC 344 (HL).

were operating is inconsistent with the narrow view of the contractual obligation which permeates the speeches of the House of Lords in *Ruxley*. Regrettably, Tipping J did not engage with *Ruxley* in any depth, and to the extent that his Honour approved that case his judgment lapsed into inconsistency. On the other hand, despite the Chief Justice aligning her judgment with the Australian case law, her reasoning seems inconsistent with much of this law.

Embracing the Australian Approach

The majority's decision is consonant in three key ways with three High Court of Australia cases on the principles of contract damages: *Bellgrove v Eldridge*,¹⁰⁵ *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd*,¹⁰⁶ and *Clark v Macourt*.¹⁰⁷ In each of these cases substantial damages were awarded in excess of a plaintiff's financial loss because of the emphasis the respective courts placed on the importance of performance. Further, in none of these cases is the disparity between the COC and DIV measures given any weight. Finally, as with the majority in *Altimarcloch*, a strain of moralistic reasoning – an affirmation of the importance of promissory morality in contract – is discernible in these three cases, which gives an insight into the normative foundations of the respective court's reasoning.

Bellgrove concerned a building which had been constructed defectively had had become unstable. The innocent party was awarded the cost of cure, which amounted to \$4,950, even though she had only paid \$3,500 for construction of the building.

The High Court's sensitivity to performance concerns is evident in the way it rejected the argument that the DIV measure should be awarded. The respondent had argued that "the building as it stood was saleable" because there was a market for houses in the condition that the house at issue was in, and that the *Robinson v Harman* principle dictated that the DIV measure should be awarded in these circumstances.¹⁰⁸ The Court disagreed "emphatically" with this submission, holding that the DIV measure would not represent the plaintiff's loss in "any real sense".¹⁰⁹ Rather, the Court emphasised that the plaintiff was entitled to have a building erected which accorded with the contract and have it erected "*on her land*".¹¹⁰ The underlying reasoning here is that although there may have been a market for houses with unstable foundations like the respondent's, if the respondent were to sell her house in that market this would not put her in

¹⁰⁵ (1954) 90 CLR 613.

¹⁰⁶ 236 CLR 272; [2009] HCA 8; (2009).

¹⁰⁷ (2013) 304 ALR 220; [2013] HCA 56.

¹⁰⁸ At 616.

¹⁰⁹ At 617.

¹¹⁰ At 617 (emphasis in original).

position to obtain the performance she was due under the contract: to have a house that conformed with the contract built on her land.

The Chief Justice also endorsed *Bellgrove*, yet distinguished it on the grounds that, unlike in that case, the subject-matter of the contract in *Altimarloch* – land – was a marketable commodity.¹¹¹ But, arguably, this is to misinterpret *Bellgrove*. The High Court in that case did not cavil with the suggestion from the appellant that the house was still saleable i.e. that there existed a market for houses in this condition. The court’s analysis proceeds from the basis that *even if* such a market existed the DIV measure would not accurately represent the respondent’s loss because it would not put her in a position to secure equivalent performance. Therefore *Bellgrove* cannot be distinguished on the grounds that the Chief Justice invoked, and it seems the reasoning in that case supports the majority view.¹¹² Moreover, the Chief Justice’s emphasis on the disparity between the COC and DIV measures is absent from the Court’s reasoning in *Bellgrove*, and is contrary to that Court’s emphasis on equating loss with the sum necessary to give the plaintiff performance. Therefore, despite affirming *Bellgrove*, the Chief Justice’s reasoning in *Altimarloch* seems to be squarely at odds with that case.

The decision of the majority in *Altimarloch* is also wholly in step with *Tabcorp*.¹¹³ In *Tabcorp* the defendant-tenant had breached a covenant with its landlord that it would not alter the foyer of the commercial building it was leasing without the landlord’s written consent. The value of the premises decreased by \$38,000 as a result of the unauthorised alterations. The cost of restoring the foyer was \$1.38m.¹¹⁴

In *Tabcorp* the court observed, unfavourably, that underlying the tenant’s argument that the DIV measure was apposite was the Holmesian assumption that “anyone who enters a contract is at complete liberty to break it provided damages adequate to compensate the innocent party are paid”.¹¹⁵ As a consequence of this Holmesian view the tenant’s submission ‘misunderstood’ the compensatory aims of the law of damages.¹¹⁶ To only award the diminution in value measure

¹¹¹ *Altimarloch*, above n 3, at [37]. As will be argued below this is a very narrow view of the subject-matter of the contract at issue in *Altimarloch*.

¹¹² Because, like in *Bellgrove*, had the DIV measure been awarded in *Altimarloch* this would not have enabled AJVL to purchase water rights equivalent to the water rights it would have had had the representations at issue been true. Nor would an award based on the DIV measure have enabled AJVL to put itself by other means into a position in which it would access an equivalent amount of water to that it would have been able to had the initial representations been true.

¹¹³ *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd*, above n 107.

¹¹⁴ This included consequential loss whilst this restoration would take place.

¹¹⁵ At [13] per French CJ, Gummow, Heydon, Crennan and Kiefel JJ See also the transcript of proceedings where Gummow J queried whether “Oliver Wendell Holmes ‘bad man’” was “running around” in the tenant’s submissions. *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* [2008] HCATrans 395 (2 December 2008).

¹¹⁶ At [13].

would “undermine a fundamental postulate” of the contract because it would be tantamount to saying that the contractual stipulation preventing alteration of the foyer in reality only had effect to the extent that alteration would result in the value of the premises decreasing.¹¹⁷ This would render the contractual stipulation nugatory. Therefore the Court held that the only way the benefit of this stipulation could be secured for the landlord was awarding the curative measure.¹¹⁸

The Chief Justice’s reasoning, specifically her Honour’s approach to ‘reasonableness’, is completely at odds with *Tabcorp*.¹¹⁹ In *Tabcorp* a unanimous Court noted that the tenant’s attempts to make much of the difference between the curative and DIV measure “rested on a loose principle of ‘reasonableness’ which would radically undercut the bargain which the innocent party had contracted for”.¹²⁰ Here the High Court of Australia was disparaging the very same approach to reasonableness which the Chief Justice adopted in *Altimarloch*.¹²¹

Further, there is an element of moralistic reasoning evident in *Tabcorp* which is entirely absent from the minority’s stance in *Altimarloch*, yet chimes well with the majority’s decision. The Court dismissed an argument that because the Landlord never indicated that it “valued the foyer for its aesthetic qualities”, the DIV measure was engaged, by affirming dicta from *Radford*¹²² to the effect that it is for contracting parties to choose their own contractual terms and that “[p]acta sunt servanda”.¹²³ So on the High Court’s view in *Tabcorp* a party’s interest in a contract is primarily in receiving what they contracted for, underpinned by the moral principle that promises must be kept, and this interest is not circumscribed by economic concerns.

The recent case *Clark v Macourt* also illustrates many of these same themes.¹²⁴ Here the appellant’s Assisted Reproductive Technology (‘ART’) company had agreed to buy the respondent’s ART company for \$386,950.91. One of the assets to be transferred with the business was 3.513 straws of sperm, which the respondent warranted met certain regulatory requirements. 1,996 straws of sperm did not. The High Court awarded the cost of acquiring an equivalent amount of regulation-compliant sperm (\$1,246,025.01), which could only be sourced from an American company, ‘Xytex’.

¹¹⁷ At [14].

¹¹⁸ At [20].

¹¹⁹ It is curious that the Chief Justice does not analyse *Tabcorp*, which has been described as “an important step in the continuing evolution of the *Bellgrove* principle”, in her wide-ranging judgment. Matthew Bell “After *Tabcorp*, for Whom Does the *Bellgrove* Toll? Cementing the Expectation Measure as the ‘Ruling Principle’ for Calculation of Contract Damages” (2010) 33 MULR 684 at 717.

¹²⁰ At [19].

¹²¹ A point also made by Roberts, above n 4, at 26.

¹²² *Radford v De Froberville*, above n 96, at 1270.

¹²³ *Tabcorp*, above n 107, at [16].

¹²⁴ 2013) 304 ALR 220; [2013] HCA 56.

One exceptional feature of this case is that Hayne J makes it explicit that he is endorsing the performance oriented approach to the contractual obligation. His Honour referred to the quote from Fuller & Purdue that “the loss which a plaintiff suffers... is not a datum of nature but the reflection of a normative order” and then nailed his flag to the performance mast by stating that “[t]he loss which is compensated reflects a normative order in which *contracts must be performed*”.¹²⁵

The performance oriented focus is also evident in the High Court’s reasoning, in that the majority, unlike the Court of Appeal,¹²⁶ did not accept the argument that damages should be nominal because the sperm had no (or little) inherent worth because, for ethical reasons, it could not be sold for a profit.¹²⁷ To focus on the value of the sperm in isolation from the rest of the contract – i.e. shutting one’s eyes to the fact that it was an integral part of the ART process – was to fail to accurately capture the plaintiff’s interest in having the contract performed. Because of the plaintiff’s ART enterprise the majority recognised that sperm had unique value to in the context of the transaction.¹²⁸ This is very similar to the purposive approach to ascertaining the value of a contractual stipulation taken by the majority in *Altmarloch*.¹²⁹

Finally, as in *Bellgrove* and *Tabcorp*, the Court placed no weight on the financial disparity between the cure and the consideration paid under the contract. The court was hostile to an argument that this disparity made awarding the curative measure “counter intuitive”.¹³⁰ One reason for this is founded in promissory morality – that this argument-from-intuition ran counter to the “fundamental value protected by the law of contract...that *pacta sunt servanda*, bargains are to be kept”.¹³¹ Again, this reasoning is fundamentally inconsistent with the way the Chief Justice approached the issue of reasonableness in *Altmarloch*.

¹²⁵ At [11]. Although, as Carter, Courtney, and Tolhurst note at pp 14-15 “[t]he use made of Fuller and Purdue’s article in *Clarke v Macourt* is somewhat perplexing”. This is because Hayne J seems to take Fuller and Purdue as being generally supportive of the ordinary contractual measure of recovery whereas the reality is that in the *Reliance Interest* Fuller and Purdue disagreed in principle with that measure of damages and thus “[t]he award in *Clarke v Macourt* would not have been approved by Fuller and Purdue”. See John Carter, Wayne Courtney, and Greg Tolhurst “Issues of Principle in Assessing Contract Damages” (2014) 31 JCL 171 at 185.; (2014) Sydney Law School Research Paper No. 14/86 at 14 Social Science Research Network <<http://ssrn.com/abstract=2495150>>.

¹²⁶ *Macourt v Clark* [2012] NSWCA 367 at [64]-[68].

¹²⁷ See Hayne J’s analysis at [14]-[15].

¹²⁸ This is why the appellants succeeded even though her claim in damages was for “something equivalent to the *worthless* sperm delivered to her”: cited at [103] by Keane J. The sperm was *objectively* worthless because of the ethical constraints which limited its value but in the context of the purpose which animated the transaction the sperm was very valuable to the appellant.

¹²⁹ See the text above at n 87.

¹³⁰ At [135] per Keane J. This argument was treated as being “unsupported by evidence” and one that “should not be countenanced”. Cf The House of Lord’s acceptance of intuitive arguments in *Ruxley*. See for instance Lord Bridge at 354 who thought to award only amenity damages accorded with intuitive standard of “common sense”.

¹³¹ *Clarke v Macourt*, above n 108, at [135].

Rejecting the English Approach?

The relationship between the reasoning of the majority in *Altimarloch* and the House of Lords decision in *Ruxley* is curious. Although Tipping J cites *Ruxley* with approval,¹³² his Honour's reasoning seems to contradict that decision.

The material facts in *Ruxley* were as follows.¹³³ Mr Forsyth contracted with 'Ruxley Electronics' to construct a pool 7ft 6inches deep in his garden for £17,797. He wanted a pool this deep because he was a big man and it would give him peace of mind when he was diving. In breach of contract Ruxley Electronics only built the pool to a depth of 6ft at the entry point for dives, a depth which was still safe for people to dive into. The cost of curing this defect was £21,560, and there was no DIV of Mr Forsyth's property as a result of the pool only being 6 ft deep. The House of Lords, overturning the Court of Appeal, awarded Mr Forsyth £2,500 for 'loss of amenity'. As the pool fulfilled its intended purpose,¹³⁴ and caused no DIV of Mr Forsyth's property,¹³⁵ an award of the curative measure was held to be disproportionate to the harm suffered from the breach, and thus unreasonable.

Tipping J cites *Ruxley* as a case which helps to "demonstrate the distinction" between contracts with substitutable and non-substitutable subject matter and the effect this categorisation should have on the decision of which measure of damages to award.¹³⁶ However, *Ruxley* does not fit happily into Tipping J's schema. Because the curative measure was not awarded in *Ruxley* it would seem that Tipping J is citing the decision as an illustration of a case involving substitutable subject matter. But that is doubtful. Like the contract at issue in *Bellgrove*, although the pool in *Ruxley* is in the abstract a marketable commodity it must be borne in mind that Mr Forsyth had contracted for the construction of the pool *on his land*. In *Bellgrove* this aspect of the contract was enough to render the diminution in value measure inapt – ostensibly because it meant the contract as a whole concerned non-substitutable subject matter: land is unique¹³⁷. Therefore, on

¹³² *Altimarloch*, above n 3, at [159].

¹³³ As *Janet O'Sullivan* points out in "*Loss and Gain at Greater Depth: The Implications of the Ruxley Decision*" in F Rose (ed) *Failure of Contracts: Contract, Restitutionary and Proprietary Consequences* (Hart Publishing, Oxford, 1997) 1 at pp 5-6 the different appellate courts chose to emphasise different elements of the facts of this case.

¹³⁴ See, for instance, Lord Lloyd making this observation at 361.

¹³⁵ As the trial judge found and noted at 344.

¹³⁶ At [159].

¹³⁷ The uniqueness of land underlies the New York "location of construction" rule which has developed in United States contract jurisprudence. This rule holds that where construction takes place on the plaintiff's property this will incline court's to award the curative measure. See "Contracts - Measure of Damages in a Grading Contract" (1940) 40 Colum L Rev 323 at 326 cited in Justin Orsborn in "Expectation Damages for Breach of Contract and the Principle of *Restitutio In Integrum*" (1993) 7 Auckland U L Rev 305. Tipping J himself made a similar point at [167] in saying that "[a]ll aspects of [AJVL's] choice of where to establish its vineyard must be taken into account" When

Tipping J's analysis arguably *Ruxley* should fall in the *non-substitutable* subject-matter category, and thus attract the curative measure.

So there is a dissonance between Tipping J's reasoning, which seems to contradict *Ruxley*, and his Honour giving his imprimatur to the House of Lord's decision. This is reinforced when one considers the majority in *Altmarloch*'s disavowal of the importance of the dollar difference between the different measures of damages, an aspect of the facts which was central to the House of Lord's analysis.¹³⁸ In fact it can plausibly be said that the underlying view of the contractual obligation which their Lordships were trading on in *Ruxley*, primarily concerned as it was with the financial implications of the breach, is fundamentally inconsistent with the performance-oriented take on loss which Tipping J and the majority advanced in *Altmarloch*. Of course *Ruxley* could have simply been distinguished on the facts: in that case the pool still performed the function which Mr Forsyth hoped it would, whereas in *Altmarloch* the defects in performance meant that the subject matter of the contract could not be used in the way the parties intended.¹³⁹ But, having chosen to endorse *Ruxley*, Tipping J's analysis fell into inconsistency.

That Australian and English law conflict, and therefore that Tipping J erred in affirming both, is made sharp when *Ruxley* and *Tabcorp* are considered together. The facts of these two cases are very similar. In *Tabcorp*, as in *Ruxley*, the subject-matter of the contract could still be used for its intended purpose; "the plaintiff's pecuniary loss was nominal; rectification could not be achieved without demolition and rebuilding; and the cost of such rectification was (at least in purely economic terms) wholly disproportionate to the disadvantage."¹⁴⁰ Therefore the two cases seem to squarely conflict.¹⁴¹ In fact the High Court of Australia in *Tabcorp* expressed some doubt as to

dictum is applied to the facts of *Ruxley* surely it would have the effect of rendering the subject-matter of that contract 'non-substitutable'.

¹³⁸ It is clear when their Lordships were talking about the curative measure being disproportionate to the benefit being obtained one aspect of this disproportion is that there would be no 'financial benefit' if the cure was awarded, being that there was no diminution in value of Mr Forsyth's property as a result of the breach. This can be inferred from the fact that Lord Jauncey at 354 considered that there was no evidence that "the shortfall in depth had decreased the value of the pool" to be a material fact and from Lord Lloyd's judgment at 363. This has also been noted by Adam Kramer in *The Law of Contract Damages* (Hart Publishing, Oxford, 2014) at 128.

¹³⁹ Although Part 'B' below where it will be argued that this sort of purposive analysis is invalid.

¹⁴⁰ Bell, above n 120, at 706.

¹⁴¹ The only ground on which the case could be distinguished is that in *Tabcorp*, unlike in *Ruxley*, there were no doubts as to the claimant's intention to effect the cure. But, as mentioned below, given that the Australian stance on the relevance of a plaintiff's intention to effect the cure is unsettled this is at best a debateable point of distinction.

whether the House of Lords decided *Ruxley* correctly.¹⁴² But in the end the High Court, perhaps dubiously, simply distinguished *Ruxley*.

Lastly, despite on the whole tacking toward Australia and away from England there is one aspect of Tipping J's reasoning which is more in step with the English position. This is his Honour's stance that a plaintiff must intend to spend damages on effecting the cure or else such an award will be deemed to be unreasonable, which is consistent with views expressed in *Ruxley*.¹⁴³ This can be contrasted with *Bellgrove* where the High Court considered the intention of the respondent in that case "quite immaterial",¹⁴⁴ a conclusion which was not disturbed in *Tabcorp* or *Clark v Macourt*. Nevertheless, the fact that the High Court in *Tabcorp* expressed no opinion on the lower court's view that intention was relevant to a claim for the cost of restoration has been interpreted as an oblique acceptance by the High Court of the relevance of intention.¹⁴⁵ So, even the most 'English' aspect of Tipping J's judgment may be consistent with Australian case law.

(e) Conclusion

'Intention' aside, it can confidently be said that the reasoning in *Altmarloch* is much more in step with the Australian case law, and is arguably inconsistent with the English case law. Practitioners should therefore be wary of placing too much reliance on decisions from English courts in this area of law. The performance paradigm which the majority have endorsed is not compatible with a narrow, balance sheet view of the contractual obligation which comes through from the House of Lord's decision in *Ruxley*. But, perhaps the lingering feeling at the end of this survey is that, as with the High Court in *Tabcorp*, Tipping J "missed an opportunity" to confront *Ruxley* "head on".¹⁴⁶ His Honour's attempt to incorporate *Ruxley* into his reasoning was unconvincing and served to obscure the principle that he was attempting to lay down. If Tipping J had grasped the

¹⁴² At [18] the Court noted that *Ruxley* was "on one view inconsistent with" the principles that *Bellgrove* and *Radford* stand for, principles which the court clearly agreed with [at 18]. Comments from the transcript of the case: "[y]ou [counsel for the appellant] will not get anywhere by referring me to the House of Lords case about the swimming pool because they just talk about being reasonable." also demonstrate the court's suspicion of *Ruxley*. See *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* [2008] HCATrans 395 (2 December 2008). That *Tabcorp* is inconsistent with *Ruxley* is also demonstrated by *Willshee v Westcourt Ltd* [2009] WASCA 87. In that case, the appellate court relied on the High Court's reasoning in *Tabcorp* to overturn the lower court's decision which had relied extensively on the reasoning of the House of Lords in *Ruxley*. See Bell, above n 17, at 710-713.

¹⁴³ At [161]. See Lord Jauncey at 359 and Lord Lloyd at 372 in *Ruxley* for expressions of a similar view.

¹⁴⁴ At 620.

¹⁴⁵ For instance in *Willshee*, above n 39, at [72] where it was commented that "[n]otwithstanding the decision in *Bellgrove*, under the more recent formulation of the test in *Tabcorp*, it is conceivable that the subjective intention of a plaintiff may be relevant to the application of the qualification to the "ruling principle" of damages.

¹⁴⁶ Bell, above n 17, at 707.

nettle and simply disagreed with *Ruxley* this would, with respect, have lent more clarity to his judgment and made his restatement of principle more compelling.

Chapter IV: Evaluation of the performance paradigm

Thus far it has been argued that the majority stance in *Altimarloch* represents a more ‘performance oriented’ approach to quantifying loss, and that this stance is in step with recent Australian case law, although may represent a departure from English law. This section contends that the performance focus of the majority in *Altimarloch* is a positive development. It will lead to a law of damages which gives effect to contracting parties’ bargains more faithfully. But for this benefit to be sustained the focus on the ‘purpose’ of a contract, which is central to the majority’s analysis, needs to be qualified. This section also aims to shed light on an issue which, surprisingly, has not been explored in the recent case law: the interplay of principles of remoteness with the measure of damages calculus. Finally, as well as these principled benefits, it will be argued that a performance-oriented approach to the damages calculus will result in greater certainty in the law of damages.

(a) The performance oriented approach to contract gives effect to contracting parties’ bargains more faithfully

The emphasis on performance in *Altimarloch* and recent Australian case law is more likely than the narrower, economic view, of contract to lead to a law of damages which faithfully upholds the bargains that contracting parties have struck, for two reasons. First, only the performance-oriented approach is able to account for cases in which the subject matter of the contract reflects a personal preference of one of the parties. Secondly, the performance-oriented approach will lead to a more accurate assessment of the nature of the contract in a given case, and thus a more accurate conception of the value of the breached stipulation.

(i) Performance and subjective preference

As outlined earlier, the performance oriented approach proceeds from the premise that people enter into contracts to receive performance from the other party. On this approach the diminution in value measure will only be awarded when it will enable the innocent party to secure performance equivalent to that which they were entitled to receive under the contract. If this measure will not do so, the cost of cure measure is engaged and will *prima facie* be reasonable, even if the contractual stipulation represented an idiosyncrasy on the part of the

plaintiff which the market would not value greatly.¹⁴⁷ This approach is entirely geared towards ensuring a party can obtain the performance they contracted for.

The danger giving weight to factors extraneous from performance concerns is illuminated by considering the implications of the House of Lords' reasoning in *Ruxley* and the Chief Justice's view in *Altmarloch*. This reasoning holds that in determining whether the COC measure is reasonable one factor to be taken into account is whether this measure is 'disproportionate' to the DIV measure. But the diminution in value measure imports concerns which are extrinsic to the bargain the contracting parties have struck. It is a measure which looks to the market, that is, to individuals *other than those involved in the contract* to ascertain the value of the contractual entitlement to the plaintiff.¹⁴⁸ This can be problematic where the contract at issue involves a stipulation which represents a party's personal preferences or predilections.¹⁴⁹

If a person has contracted for an ornate fountain to be erected in their garden, which is so ugly it detracts from the market value of the house;¹⁵⁰ for a certain type of bathroom tile;¹⁵¹ or for a specific depth of pool to assuage personal fears;¹⁵² to then look to a mechanism – the market – which takes no account of the personal preferences which animated the contract in the first place, in order to establish the value of the lost entitlement seems incongruent, and is liable to undermine the bargain the parties have struck.¹⁵³ Simply put, if I contracted for something that you failed to provide to then be told that 'other people would not have minded much', and be awarded damages on that basis, seems to amount to the court changing the "nature of the bargain...retrospectively".¹⁵⁴ Such a result gives the basic principle of sanctity of contract "a very hollow ring indeed".¹⁵⁵

¹⁴⁷ This is most evident from the facts and decision of the High Court of Australia in *Tabcorp*, above n 107.

¹⁴⁸ See B. Sangha and B. Moles "Can Contract Law Protect Individual Rights and Preferences?" (1998) 10 Bond Law Review 3 <<http://epublications.bond.edu.au/blr/vol10/iss1/3>> at 12.

¹⁴⁹ As several authors have noted, this stance is also difficult to reconcile with cases on the doctrine of frustration, where it has been held that an increase in the cost of performance is not enough to discharge a party from an obligation: *Davis Contractors Ltd v Fareham Urban District Council* [1956] AC 696. The rationale behind this is that 'frustration is not to be lightly invoked' and to let increase in costs discharge a party from their contractual obligations would seriously undermine the sanctity of contract (per Lord Radcliffe at 727). See Harris, Ogus and Phillips, "Contract Remedies and the *Consumer Surplus*" (1979) 95 LQR 581 at 593.

¹⁵⁰ An example from the Restatement of the Law of Contracts, based on dicta from *Chamberlain v. Parker*, 45 N.Y. 569 (1871). It is noted by Timothy Muris in "Cost of Completion or Diminution in Market Value: the Relevance of Subjective Value" (1983) 12 J. Legal Stud. 379 at 384-385.

¹⁵¹ An example mentioned by Ackner L.J. in *G.W. Atkins Ltd. v Scott* (1991) 7 Const. L.J. 215.

¹⁵² As in *Ruxley*.

¹⁵³ An argument made in Sangha and Moles, above n 149 and alluded to by James Edelman in *Money Awards of the Cost of Performance* (2010) 4 Journal of Equity 122.

¹⁵⁴ Sangha and Moles, above n 149, at 12.

¹⁵⁵ A Loke "Cost of Cure or Difference in Market Value: Towards a Sound Choice in the Basis for Quantifying Expectation Damages" (1996) 10 Journal of Contract Law 189 at 197.

The Law Lords in *Ruxley* were keenly aware of this criticism and were at pains to emphasise that subjective preferences which are instantiated in contracts are important. For instance, Lord Mustill stated that “[n]either the contractor nor the court has the right to substitute for the employer’s individual expectation of performance a criterion derived from what ordinary people would regard as sensible”.¹⁵⁶ To lose sight of that would be, in his Lordship’s view, to take a “narrow and materialistic view” of certain transactions. Lord Jauncey expressed a similar sentiment.¹⁵⁷

But the result of *Ruxley* shows their Lordships were merely paying lip-service to the importance of subjective preferences: Mr Forsyth was deprived of the ability to obtain the pool for which he had contracted on the basis that *other people* would not have been perturbed by the performance rendered. The dissonance between the sentiment expressed in the dicta above and the result of the case has led one commentator to describe the decision of the House of Lords as “slightly schizoid”.¹⁵⁸ Although their Lordships claimed to be placing weight on the subjective preferences of the plaintiff the result was one based on purely objective, market-based concerns. The same criticism can be made of the Chief Justice’s analysis in *Altmarloch*: on this analysis AJVL would have been deprived of the ability to access the quantity of water it had contracted for because the DIV measure would satisfy ‘the market’, that is, others who did not have the same predilections or purposes as AJVL.

The most egregious example of the possibility of *Ruxley*-esque reasoning undermining the bargain that parties have struck is *Tito v Waddell (no 2)*.¹⁵⁹

In *Tito* native inhabitants of the Banaban Islands agreed to relocate to another island so that their island could be mined. One condition of this agreement was that the mining company would replant the lands that it mined. This condition was not fulfilled. The plaintiffs claimed the cost of replanting, which amounted to \$A73,140/acre of land not yet replanted. It was contended in response that the correct measure of damages was the diminution in value of the land, which would amount to \$75/ acre not yet replanted.¹⁶⁰ After affirming that subjective preferences are

¹⁵⁶ *Ruxley*, above n 105, at 36.

¹⁵⁷ That “in taking reasonableness into account in determining the extent of loss it is reasonableness in relation to the particular contract and not at large”. At 358.

¹⁵⁸ R. McInnes “The *Yellow Brick Road: Ruxley* Revisited” 1998 14 Const. L.J 33 at 41.

¹⁵⁹ [1977] Ch 106; [1977] 3 All ER 129. This example is also used to demonstrate the same point in Harris, Ogus and Phillips, above n 150, at 592. James Edelman in “Money Awards for the Cost of Performance” 2010 4 J. Eq 122 at 133 takes a completely different view arguing that, as a result of *Ruxley*, *Tito* would be decided differently. It is suggested, with respect, that the learned author is falling into a similar error as Brian Coote has made discussed on the page below.

¹⁶⁰ At 341.

important, Megarry V-C declined to award the curative measure.¹⁶¹ To do so would be unreasonable since the plaintiffs were “now well established in Rabi, over 1,500 miles away; and there they have an island over 10 times the size and unaffected by mining, as contrasted with the much smaller Ocean Island with some five-sixths of it mined.”¹⁶² The tenor of this reasoning is that because the plaintiffs in their post-breach situation were objectively in just as good a position as if the contract had been performed, the curative measure was inapposite. But this is to ignore the fact that the plaintiffs, like many indigenous people, felt a strong affinity to their land. Many of them returned to the Banaba Islands notwithstanding that the Island had significantly deteriorated after the mining.¹⁶³ By invoking objective factors, divorced from performance concerns, Megarry V-C effectively deprived the plaintiffs the value of their contractual right.

As Roberts has suggested,¹⁶⁴ perhaps this shows a flaw in Brian Coote’s analysis¹⁶⁵ of when the curative measure should be awarded. Coote was concerned that the reasoning of the House of Lords in *Ruxley* could be extended to the point where courts began to accept that “contracts generally should be enforceable only to the extent that they are reasonable”.¹⁶⁶ To meet this concern he argued that the “degree of disproportion” between the cure and the good to obtained “would not be slight” for the cure to be thereby rendered unreasonable.¹⁶⁷

With respect, the flaw in this analysis is that it does not recognise that there is a tendency for courts to place very little weight on factors, like the subjective preferences of a party to the contract, which cannot be quantified in dollar terms. This means that in *any* case where the curative measure would yield more than the DIV measure the curative measure may well be considered unreasonable, and attaching qualifiers like ‘must not be slight’ is unlikely to change this. This problem is similar to that faced in environmental law when ‘environmental losses’, which are very difficult to quantify in dollar terms, are weighed against ‘development gains’ which are much more amenable to such quantification. This phenomenon has led to a series of pro-development decision-making, in which (arguably) too little weight has been placed on the value of the environment.¹⁶⁸ Coote’s analysis may lead to an analogous problem in contract law:

¹⁶¹ At 332.

¹⁶² At 336. The other ground was that the plaintiffs had shown no intention to replant.

¹⁶³ Also noted by Edelman, above n x, at 133 citing R Sigrav and S King *Te Rii Ni Banaba – The Backbone of Banaba* (University of the South Pacific, Institute of Pacific Studies, Suva, 2001).

¹⁶⁴ Roberts, above n 4, at 23.

¹⁶⁵ Coote, n 22 above. Coote’s analysis in this article was relied upon by the Chief Justice in *Altamarloch* at [42].

¹⁶⁶ Coote, n 22 above at 563.

¹⁶⁷ At 559.

¹⁶⁸ N Wheen “The Resource Management Act 1991: A ‘Greener’ Law for Water?” (1997) 1 N.Z. J. Env’tl. L. 165 at 170.

the cost of cure may often seem stark and unreasonable when compared against the subjective values which performance would uphold for the innocent party. This could lead to the very problem that Coote is trying to avoid.¹⁶⁹

Finally, it is worth noting that taking a purposive approach to the value of a contractual stipulation, that is, discerning the worth of the breached stipulation by considering the overall object that the innocent party sought to achieve or further via contracting, also has the potential to undermine the bargains that contracting parties have struck.

In *Altimarloch* adopting a purposive approach helped the court to ascertain the true worth of the breached stipulation and thus was consistent with the value of upholding a party's right to receive performance. The court noted that the importance of the water rights could only be gleaned from considering AJVL's object under the contract, to plant a vineyard. A purposive analysis can also be defendant friendly. For instance, there is a line of case law holding that where a plaintiff's interest in the contract is solely directed toward making a profit the plaintiff's interest in performance is delineated by their profit motive: if the contract is performed to the extent that the breach will have no impact on the economic bottom line of the plaintiff, then the plaintiff has no performance interest beyond that which needs to be vindicated.¹⁷⁰ Adopting a purposive analysis was valid in *Altimarloch* and is so the scenario mentioned above because in both of these situations because the contractual stipulations were simply *means* to an *end*.¹⁷¹

But if, in a given case, the stipulation which has been breached was “incorporated [into] a contract as an end in itself, reflecting a personal preference of the contracting party”¹⁷² then utilising a purposive approach can undermine the bargain that a plaintiff has struck. In such situations obtaining the stipulated performance was the *sole* purpose the innocent party sought to achieve via the contract, and therefore to abstract from the contract to posit a wider ‘purpose’ which the plaintiff wished to achieve has an air of unreality, and can lead to deleterious consequences.

¹⁶⁹ Observe, for instance, the fact that in *Ruxley* Lord Lloyd at 374 considered that Mr Forsyth was “lucky to have obtained so large an award for his disappointed expectations”.

¹⁷⁰ See for instance *Channel Island Ferries Ltd v Cenargo Navigation Ltd (The Rozel)* [1994] 2 Lloyd's Rep. 161; [1994] C.L.C. 168; **UI International Pty Ltd v Interworks Architects Pty Ltd** [2007] QCA 402

¹⁷¹ Phillips J made the same point in *The Rozel*, above, at 175 where his Honour held that the Court of Appeal's reasoning in *Ruxley*, which was broadly analogous to the majority reasoning in *Altimarloch*, “does not apply where the contractual requirement is not an end in itself, but is inserted into a commercial contract because it has financial implications”.

¹⁷² *The Rozel*, above n 171, at 175.

For instance, in *Ruxley*,¹⁷³ the House of Lords abstracted from the contract and in effect said ‘Mr Forsyth wished, via his contract, to achieve the end of having a pool that was safe to dive into’. Given that this purpose was achieved the curative measure was inapposite. But this was speculation by the court. What Mr Forsyth really wanted, for idiosyncratic reasons, via the contract was what the terms of the contract said: a pool of a certain depth. By proposing a speculative ‘purpose’ for the contract, and then finding that that purpose was satisfied, the court in effect “substitut[ed] its own ideas for what the plaintiff’s utility should have been for what it was”,¹⁷⁴ and undermined the bargain Mr Forsyth had struck.

The upshot is that purposive analysis, whilst useful, should not be applied to stipulations which are ends in themselves.

(i) The performance approach can more accurately determine the nature of the contract

To apply the *Robinson v Harman* principle a court must answer the counterfactual question: ‘what position would the plaintiff have been in had the contract been performed’. There are two ways of doing this. The performance-approach is to consider what the value of performance of the breached stipulation would have meant to the plaintiff in the context of the contract as a whole. The other way to approach the counterfactual question is to place little weight on the contracting parties’ performance concerns and instead categorise the contract according to general categories like ‘sale of goods contract’ or ‘contract for the sale land’, on the footing that different categories of contract will attract different prima facie measures. The contention advanced here is that the performance method answers the counter-factual question more accurately, and thus is more likely to adequately compensate plaintiffs. This is illustrated by critiquing the minority reasoning in *Altmarloch* and the Court of Appeal’s analysis in *Clark*.¹⁷⁵

In *Altmarloch* the Chief Justice classified the contract at issue as a contract for the sale and purchase of land. Because this sort of contract usually attracted the DIV measure her Honour held that it should attract this measure in the case before her.¹⁷⁶ But this analysis was too blunt. It failed to take into account that the water rights carried value in relation to the plaintiff’s viticultural designs, and thus led the Chief Justice to a conclusion on quantum which would have

¹⁷³ *Ruxley Electronics & Construction Ltd v Forsyth*, above n 105.

¹⁷⁴ Harris, Ogus and Phillips, above n 150, at 591.

¹⁷⁵ *Macourt v Clark*, above n 127. Cf Carter, Courtney, and Tolhurst, above n 126, at pp 25 – 32.

¹⁷⁶ See text at Part III ‘C’

undercompensated the plaintiffs.¹⁷⁷ The majority, by contrast, were unwilling to fit square pegs into round holes. They acknowledged that the contract at issue was not *merely* a sale and purchase contract but rather that, because of the plaintiff's intended use of the land and the centrality of the water rights to this use, the contract was of a different character.¹⁷⁸ This analysis – informed by an understanding of what performance was worth to the plaintiff – led to a conclusion which adequately compensated the plaintiff.

Like the majority in *Altmarloch*, the majority of the High Court in *Clarke* did not think there was any utility in characterising the contract in an abstract manner divorced from performance concerns.¹⁷⁹ Rather the majority of the court's focus was on what performance of the obligation to deliver the quantity of sperm straws meant to the plaintiff in the context of the contract as a whole. This is in stark contrast to the New South Wales Court of Appeal's approach. It was "crucial" to that court's analysis that the contract was categorised as a contract for the sale of a business and not a contract for the sale of goods.¹⁸⁰ To obtain damages under contracts in the latter category, unlike the former category,¹⁸¹ the court considered that a plaintiff must be able to point to "an amount [of the overall purchase price] which could be attributed to" the defective asset, and that amount this will constitute the plaintiffs loss.¹⁸² According to this analysis the plaintiff would have suffered no loss. But this analysis ignored the fact that the straws of sperm were of central importance to the plaintiff's ART enterprise, and that as a result of the breach the plaintiff's ability to carry out this enterprise was significantly diminished.¹⁸³ It would thus have deprived the plaintiff of the full value for the advantageous bargain she had struck.

The upshot is that the performance focus of the majority of the High Court of Australia and the Supreme Court detailed above is more dexterous and thus more likely to accurately capture the worth of the subject matter of the contract. When a performance approach was departed from the Court of Appeal in *Clark* and minority in *Altmarloch* had to resort to generalisations about

¹⁷⁷ Ibid.

¹⁷⁸ For instance McGrath J at [192] thought there was "some force" in the contention that in the context of the case the contract at issue was "analogous to one providing for transfer of machinery or equipment to be used on the land".

¹⁷⁹ *Clark v Macourt*, above n 108, at [13] per Hayne J, [30] per Crennan and Bell JJ, [108] per Keane J.

¹⁸⁰ *Macourt v Clark*, above n 127, at [8] per Barrett JA.

¹⁸¹ In which "it is immaterial that the buyer has in fact suffered no loss in consequence of the seller's breach": at [5] per Barrett JA.

¹⁸² Ibid.

¹⁸³ The flaw in the Court of Appeal's reasoning can be shown by taking it to its logical conclusion. The Court was saying that it was unsurprising that no amount of the purchase price payable could be apportioned to the sperm because of the ethical constraints on profiting from the sperm: see Tobias AJA's comments to that effect at [66]. But on this reasoning the respondent could simply have completely reneged on its obligation to transfer the sperm and the appellant would still be unable to recover substantial damages. The Court of Appeal's approach would thus 'undermine a fundamental postulate' in the contract: that the sperm *was* valuable, although objectively worthless (to borrow terminology from the High Court in *Tabcorp*, above n 107, at [14]).

the nature of the performance due under the contract. Predictably, such generalisations led to inaccurate conceptions of the worth of the contract, and to the plaintiff being undercompensated.

(b) The interplay of remoteness principles with the measure of damages calculus

Support for the legitimacy of the performance-oriented approach to loss can be drawn from the principles of remoteness, which some commentators have referred to as the “missing link” in debates about which measure of damages are appropriate.¹⁸⁴ Principles of remoteness hold that only losses which parties can be taken to have assumed responsibility for will be recoverable.¹⁸⁵ Usually, but not always,¹⁸⁶ parties can be taken to have assumed responsibility for losses which “at the time they made the contract [were] the probable result of the breach of it”.¹⁸⁷

To see the scope for the application of this principle where the correct measure of damages is at issue, consider one objection which the Chief Justice made to the majority’s award of the curative measure. Her Honour observed that the plaintiff had not contracted for the building of a dam, but for the transfer of water rights. The dam was “rather a proxy for achieving □ functional equivalence. It is not a case where the parties can reasonably have expected such result, at any cost”. This objection has led Maree Chetwin to query whether the outcome in *Altamarloch* reflects “the protection of the performance interest (or expectation interest) and the *pacta sunt servanda* principle”. Questions of remoteness do not arise where the damages a party is seeking are for precisely what the contract stipulates. But Chetwin’s perturbation arises because there is real dissonance, and some discomfort, in relying on the principle that ‘people contract in order to receive performance’ to award (extensive) damages to a party which enable it to purchase something *other than what it contracted for*.

Here, it is contended that where the claimant is seeking a quantum of damages which will enable it to purchase a ‘proxy’ to what it contracted for, whether or not these damages ought to be

¹⁸⁴ Adrian Chandler “Defective Performance of Building Contracts: Expectations in a Straitjacket” [1996] ICLR 255 at 267.

¹⁸⁵ *Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas)* [2009] AC 61 (HL).

¹⁸⁶ For instance in the famous example of the passenger who tells the taxi driver that he will miss the chance to make a \$1 million dollar contract if he does not make his appointment on time, although the taxi driver can clearly foresee the consequences of failure, if he accepts the passenger he should not be taken to have accepted the risk of the \$1 million liability (unless he charged, for instance, a \$100,000 fare). This is because “the driver has clearly not priced his services to take into account such risks as the \$1 million dollar lost profit, and it would be commercially absurd for the driver to accept that risk and charge the ordinary modest fare”. See Kramer, above n 130, at 300.

¹⁸⁷ *Hadley v Baxendale* (1854) 9 Exch 341.

awarded is within the ken of the remoteness principle.¹⁸⁸ If the party in breach cannot be taken to have assumed responsibility for the proxy which will enable the innocent party to achieve ‘functional equivalence’ then damages should not be awarded on that basis. On the facts of *Altimarloch* the damages for building a dam would arguably not have been too remote. Despite the impression the Chief Justice gives that the dam was a notion out of left field, given that the B and C water rights could only be exercised with the construction of a dam,¹⁸⁹ the idea of a dam was arguably within contemplation of both parties if the A water rights were not available.¹⁹⁰

But if the only way that AJVL could access the amount of water that was represented to it was for water to be transported to AJVL from the bottom of the South Island, at a cost greater than the diminution in value of the property,¹⁹¹ then this could very well be too remote. That the curative measure in the circumstance would be higher than the DIV measure would be an import evidential “pointer”¹⁹² inclining a court toward the conclusion that the defendant did not assume responsibility for the loss. The disparity “would raise a doubt at once as to whether [the defendant] would have assented to such liability had it been called to his attention at the making of the contract unless the consideration to be paid was also raised so as to correspond in some respect to the liability assumed”.¹⁹³

However, one can only say the cure in *Altimarloch* was ‘arguably’ not too remote because the point was not actually pursued in any sustained manner in trial.¹⁹⁴ This is surprising. When judges are operating within the performance-paradigm there are very few avenues for the curative measure to be displaced once it is engaged. Therefore it seems the appositeness of the proxy should have been a focal point of argument. The same lack of engagement with this point was evident in *Clark v Macourt*,¹⁹⁵ with Crennan and Bell JJ commenting that “there was neither cross-examination of the appellant, nor production of any evidence in chief on behalf of the respondent, directed to the proposition that the acquisition costs of Xytex sperm were not an appropriate proxy for the value of the St George sperm, had it been compliant with the vendor's

¹⁸⁸ Howard Hunter makes a similar point in “Has the Achilles Sunk?” (2014) 31 JCL 120 at 127.

¹⁸⁹ See FN 60 above.

¹⁹⁰ Roberts, above n 4, at 19 makes the same point from a slightly different angle.

¹⁹¹ If the claimed COC was lower than the DIV then the COC measure of damages would be apposite based on ordinary mitigation principles.

¹⁹² *John Grimes Partnership Ltd v Gubbins* [2013] EWCA Civ 37 at [30].

¹⁹³ *Hooks Smelting Co v Planters' Compress Co* 79 SW 1052 (1904) [Supreme Court of Kansas]. See Kramer, above n 130, at pp 287-338.

¹⁹⁴ See Tipping J at [168] and McGrath J at [193].

¹⁹⁵ Above n 108.

warranty.” This meant that any argument that obtaining sperm from Xytex was an inappropriate proxy could not be sustained.¹⁹⁶

This is perhaps the key practical finding of this dissertation: when the claimed cure is not exactly what the contract stipulates attacking the adequacy of this proxy, through an assessment of whether or not it is too remote, could be a fruitful avenue through which to argue that the cure should not be awarded. It is through this avenue of contract law that arguments about the ‘disproportion’ of the cost of cure can be made in a principled way, albeit that such arguments will not be dispositive of the remoteness question.¹⁹⁷

Finally, the next section argues that, importantly, the majority’s judgment in *Altimarloch* will lead to more predictable law.

(c) The performance-oriented approach will lead to more predictable law

Courts have “rarely outlined”¹⁹⁸ the principles they rely upon in deciding which measure of damages to award. This had led to a great deal of unpredictability and uncertainty, especially in cases where the curative measure is greater than the DIV measure.¹⁹⁹ Such uncertainty is clearly undesirable. However, here it is argued that from the majority in *Altimarloch* there can be discerned the makings of a systematic, two-stage analysis which goes some way toward remedying this problem.

The analysis proceeds as follows:²⁰⁰

1. Is the subject matter of the contract readily substitutable? If so, the DIV measure will be apposite; if not, the curative measure is engaged and will be the appropriate measure of damages to award unless displaced.²⁰¹

¹⁹⁶ At [39].

¹⁹⁷ Kramer, above n 130, at 334.

¹⁹⁸ Frank. Zaid "Conflict in the Measure of Contract Damages: Cost of Performance (Replacement) Versus Difference in Value (Indemnity)." (1971) 9 Osgoode Hall L.J. 9.1: 179 at 196. Available at <<http://digitalcommons.osgoode.yorku.ca/ohlj/vol9/iss1/5>>.

¹⁹⁹ This is especially true in cases where the cost of cure is greater than the DIV, which has led one commentator to say that the difficulty in applying the *Robinson v Harman*¹⁹⁹ principle to such cases “will probably live forever”.

²⁰⁰ It assumes that the COC measure is higher than the DIV measure. If the COC is less than the DIV then this is the measure that a court will award, based on orthodox remoteness principles. This analysis bears close similarity to a submission put forward by Mr Forsyth’s counsel, but rejected by the House of Lords. See *Ruxley Electronics & Construction Ltd v Forsyth* [1996] A.C. 344 at 350.

²⁰¹ This was the first step in Tipping J’s analysis. See Part III ‘C’ above.

2. Do any factors render the curative measure inapposite? This measure may be displaced if:
 - (i) The plaintiff does not intend to effect the cure;²⁰²
 - (ii) The plaintiff's interest in the contract is solely directed toward making a profit and the diminution in value measure will more accurately capture this interest;²⁰³
 - (iii) The quantum claimed is for a cure which is not exactly what was stipulated in the contract, and:
 - (a) The defendant cannot be taken to have assumed responsibility for this alternate cure;²⁰⁴ or
 - (b) There is an alternative cure which is cheaper to the one the defendant is claiming.²⁰⁵

Although this analysis is systematic, it is not *mechanical*. Several of the steps, for instance, in determining whether the subject-matter of the contract is substitutable, require the exercise of judgment. But the real value of *Altimarloch* in terms of promoting certainty of law is that the analysis of the majority has established a frame-work which later cases can use for determining which measure of damages is apt. In time, a body of coherent law may develop which explicates this framework more fully, and which makes calculating the correct measure of damages a less impressionistic task than it has been in the past.

The majority's approach can be contrasted with the Chief Justice's, which would result in very unpredictable law. This is because the Chief Justice provides "no guidelines" for determining what will qualify as sufficient disproportion to make the curative measure unreasonable – in *Altimarloch* the COC was approximately two-and-a-half times the DIV, but what if it had only been twice as great?²⁰⁶ At what point does the disparity become unreasonable? No guidelines are

²⁰² Which also embraces if it is not possible to effect the cure: see text below at n 244..

²⁰³ *The Rozeel*, n 171 above, is a paradigm example of this limitation being engaged. In that case a ship was re-delivered to its owner after having repairs occasioned to its generator. Although the ship was functional after the repairs the repairs had earned the ship a mention in the class memoranda of the classification society. This amounted to a breach of contract by the charterer. The cost of curing the defect was £87,500. But because the ship was 'merely a profit earning chattel' it was held that the appropriate measure of damages was the reduction in the value of the vessel.

²⁰⁴ See section 'The interplay of remoteness principles with the measure of damages calculus'.

²⁰⁵ In *Altimarloch* Tipping J at [171] emphasised that constructing a dam was the cheapest way AJVL could achieve functional equivalence with what had been represented to it, the inference being that if there was a cheaper cure available than the way a plaintiff was claiming that would render the claim, to the extent that it exceeded this cure, unreasonable.

²⁰⁶ Roberts, above n 4, at 23.

provided. This has led Robert's to dismiss the minority reasoning on this point as "a judicial sniff-test".²⁰⁷

To have a test for determining when the curative measure will be awarded which can be applied with a reasonable level of certainty is important because, despite suggestions by the judges that the facts of *Altimarloch* are "unusual",²⁰⁸ others have pointed out that this sort of fact scenario is actually fairly common.²⁰⁹ And to have a highly unpredictable test in a common scenario would clearly not be tolerable.

(d) Conclusion

This section argued that the performance focus of the majority in *Altimarloch* is a positive development. It will lead to a law of damages which is more likely to give effect to the bargains that contracting parties have struck. However, it was argued that for these benefits to be maintained the limits of a purposive analysis of contracts must be identified and adhered to. This section also contended that if the relevant court holds a performance-oriented view of the contractual obligation, raising arguments about whether the claimed cure is too remote could be one of the few realistic ways to ensure the curative measure of damages is not awarded once it is engaged. Finally, it was argued that the majority in *Altimarloch* have laid down a framework for determining which measure of damages is appropriate which, over time, could lead to a lot more certainty in this area of law.

²⁰⁷ Ibid.

²⁰⁸ Blanchard J at [66].

²⁰⁹ In A Ferguson and J McGuigan "Supreme Court Examines Interplay of Tortious and Contractual Liability" (18 December 2012) International Law Office Newsletter < <http://www.wilsonharle.com/nz-supreme-court-examines-interplay-of-contractual-and-tortious-liability/> > the authors point out that "the reality is that the facts of *Altimarloch* (innocent misrepresentation followed by delay caused by litigation) are not particularly unusual, especially in sale contracts."

Chapter V: Performance Damages: Transcending the Compensatory Paradigm?

The orthodox view is that the object of damages awards in contract is to compensate for loss.²¹⁰ Thus far this dissertation has argued that one effect of a performance-based view of the contractual obligation having been endorsed in *Altimarloch*, and in other cases, is that these courts have defined the correct measure of damages in accordance with what would put the innocent party in a position to obtain the performance which was their contractual right. Therefore, one interpretation of *Altimarloch* and this development as a whole may be that it all amounts to a broadening of the notion of ‘loss’. It is contended here that such an interpretation would be incorrect.

For there are aspects of *Altimarloch* which suggest that endorsing a performance-oriented view of the contractual obligation may have a deeper impact on the law of damages. There are hints that the majority may have tacitly endorsed arguments which have recently been made in academic literature, and that *Altimarloch* may be a harbinger for a shift *away* from the principle that the object of damages awards for breach of contract is to compensate for loss, and that this case may herald a new sub-set of damages: *performance damages*.

This possibility has been noted – and dismissed – by commentators but not addressed in any depth, a lacuna which this section aims to fill.²¹¹ In light of this, after outlining why *Altimarloch* raises the possibilities suggested above, this section will survey the arguments in favour of ‘performance damages’ that emerge from the academic literature. Then the practical implications of accepting the ‘performance damages thesis’ will be assessed. Ultimately, it will be contended that the theoretical case for acknowledging a head of non-compensatory ‘performance damages’ is compelling, and that such acknowledgment is necessary to understand how to advance arguments which are capable of persuading judges who hold a performance-oriented view of the contractual obligation when the correct measure of damages is a live issue. This benefit, however, has been obscured by some of the misguided claims which have been made about performance damages in the literature.

²¹⁰ For instance, Lord Nicholls has observed that “[l]eaving aside the anomalous exception of punitive damages, damages are compensatory. That is axiomatic.” *Attorney General v Blake* [2001] 1 AC 268 (HL) at 280.

²¹¹ Maree Chetwin notes in *Protecting the Performance Interest: Differing views of the New Zealand Supreme Court* 2012 40 ABLR 307 at 307 “that *Altimarloch* raises the question of the necessity of a separate category of performance damages”.

(a) On what ground does *Altimarloch* give rise to these possibilities?

The most obvious reason that *Altimarloch* should put people on notice of the possibility that it may herald a shift away from a compensatory conception of damages is due to terminology. Both Tipping and Blanchard JJ use the language of ‘performance damages’ to describe the measure that was apposite in that case.²¹² This phraseology is also used in secondary sources, by authors who make a wider argument that contract damages, in certain situations, do not compensate for loss but vindicate a *primary*, and not a *secondary* interest.²¹³ An inference *could* therefore be drawn from this that their Honours were intending to give their imprimatur to these academic contentions. This inference is strengthened by the fact that the way Tipping J uses this terminology comports with its usage in the secondary literature. By contrasting ‘performance damages’ with measures which are “strictly compensatory” his Honour is *also* using ‘performance damages’ as a means to denote a damages award which is not compensatory in nature.²¹⁴

Perhaps, it could be contended, to reason merely from Tipping J’s usage of this terminology to the conclusion that he is wading in on abstruse arguments about the principles underlying contract damages is a long bow to draw. But it is beyond doubt that his Honour is aware of the academic debates on this point. In *Stevens v Premium Real Estate Ltd*,²¹⁵ when discussing an issue of first principles in damages, his Honour expressed his debt to a book in which James Edelman alluded to the notion of performance damages as a head of non-compensatory damages.²¹⁶ Therefore, in light of all of this, a strong case can be made that Tipping J was using this nomenclature ‘knowingly’, with an eye to the academic literature which has arisen on this point in recent years.²¹⁷

²¹² *Altimarloch*, above n 3, Blanchard J at [66] and [76]; Tipping J at [156], [164], [168].

²¹³ For instance Charlie Webb, “Performance and compensation: an analysis of contract damages and contractual obligation.” (2006) 26 OJLS 41; Brian Coote, above n 26, and “The Performance Interest, Panatown, and the Problem of Loss” (2001) 117 LQR 81; David Winterton “Money Awards Substituting for Performance” [2012] LMCLQ 446 and James Edelman, *Gain-Based Damages – Contract, Tort, Equity and Intellectual Property* (Oxford, Hart Publishing, 2002).

²¹⁴ At [157].

²¹⁵ [2009] NZSC 15. Tipping J did not mention performance damages in his scheme of civil law damages, nor did his Honour mention the overall value which he took all of these remedies to be protecting. In this regard *Altimarloch* can be seen as the maturation of His Honours thought and Tipping J’s initial scheme from *Premium Real Estate* may now need amending.

²¹⁶ James Edelman, *Gain-Based Damages – Contract, Tort, Equity and Intellectual Property*, above n 214.

²¹⁷ This literature includes the texts cited above at FN 214 and also includes Stephen A Smith “Substitutionary Remedies” in Charles Rickett (ed) *Justifying Private Law Remedies* (Hart Publishing, Oxford, 2008) at 93, and Robert Stevens “Damages and the Right to Performance: a *Golden Victory* or not” in JW Neyers, R Bronaugh and SGA Pitel (eds) *Exploring Contract Law* (Hart Publishing, Oxford, 2008).

(b) Analysing the secondary literature

(i) What are ‘performance damages’?

The basic claim advocates of performance damages make is that the law is tending towards a situation where damages can be awarded in contract even though the plaintiff has not suffered any loss. This means that such damages cannot be described as ‘compensatory’, because compensation implies loss.²¹⁸ Rather, this head of damages vindicates a contracting party’s primary right to performance: “[l]ike specific relief, their aim is not to compensate the claimant for a loss but instead to ensure that the claimant ends up, so far as possible, in the actual position she would have been in had the breach not occurred”.²¹⁹

Three broad arguments motivate calls for this head of damages. The first is that, in certain circumstances, a non-compensatory account of damages awards has greater explanatory power than the compensatory account. For instance, commentators argue that the view that the object of damages in contract awards is to compensate for loss cannot account for the cases in which substantial damages are awarded where the plaintiff has suffered no financial loss.²²⁰ In cases like *Tabcorp* and *Altimarloch*, where the cost of cure is awarded even though it is greater than the diminution in value, the better explanation, it is argued, is that the court is not compensating the plaintiff for loss suffered but rather awarding the plaintiff *the monetary equivalent of performance*, a next-best alternative to their infringed right.²²¹ Further, it is argued that only this non-compensatory account can explain the basis of ‘*Wrotham Park*’²²² hypothetical release damages, under which head damages are awarded based on what the innocent party would have accepted to waive their contractual right, regardless of whether the innocent party has suffered any financial loss as a result of the breach.²²³

The key point here is that performance-damage advocates take a narrower, and in their view more realistic, view of ‘loss’. Although, linguistically, it is possible to bring cases like *Tabcorp* within the compensatory rubric by describing the infringement of the contractual right to performance as amounting to a ‘loss’,²²⁴ attempts to do so are considered to be “confusing”,²²⁵

²¹⁸ As noted in this dictum “[e]quitable compensation for breach of trust is designed to achieve exactly what the word compensation suggests: to make good a loss in fact suffered by the beneficiaries”, per Lord Browne-Wilkinson in *Target Holdings Ltd v Redfern* [1996] A.C. 421; 1995 3 WLR 352 at 439.

²¹⁹ Smith, above n 218, at 27.

²²⁰ Ibid at 3.

²²¹ Edelman, above n 154 at 136.

²²² *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 1 WLR 978

²²³ Stevens, above n 218, at 192-194.

²²⁴ Ibid at 193.

“fictitious”²²⁶ and an unhelpful “conflation of *injuria* and *damnum*”.²²⁷ Lord Clyde has made a similar point, observing that “[a] breach of contract may cause a loss, but is not in itself a loss in any meaningful sense.”²²⁸ Lord Clyde’s point is that if ‘loss’ is equated with ‘breach’ then the notion of loss is superfluous: to be useful ‘loss’ must refer to some detriment caused *by* the breach, and not merely refer to the act of the breach itself. All of this, as Webb has noted, is “implicit” in the *Robinson v Harman* principle. The words from Parke B’s famous dictum from that case “...where one sustains loss *by reason* of a breach of contract...” suggest a causal link between the breach and the loss.²²⁹ And causation, by definition, implies a degree of separation,²³⁰ namely that “the loss which forms the subject matter of [a claim for breach of contract] is separate from the breach of contract itself”.²³¹

The other argument which motivates performance interest advocates is a desire for logical coherence. Acknowledging ‘performance damages’, it is claimed, would lead to greater consistency between common law and equitable principles. Doing so would lead to principles of contractual damages being brought into line with the way equity responds to obligations which were not performed by fiduciaries. This new head of damages would bear similarity to principles of (substitutive) equitable compensation,²³² under which courts can compel errant custodial fiduciaries to incur the costs to ensure that trust assets were maintained as promised, regardless of whether the errant fiduciary’s actions caused any loss.²³³

Finally, as Smith has argued, there are moral dimensions to the performance-damages thesis. If courts start from the premise that promises ought to be kept, then an action for the money equivalent of performance is the best way to give effect to this moral principle. Payments of the money equivalent of performance are “the closest substitute possible for doing what the defendant should have done in the first place.”²³⁴

These are the theoretical arguments under-pinning the performance damages thesis. The next two sections will evaluate the practical benefits of acknowledging this head of damages.

²²⁵ Webb, above n 214, at 54.

²²⁶ Stevens, above n 218, at 193.

²²⁷ Ibid.

²²⁸ *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 AC 518 at 534.

²²⁹ (1848) 1 Exch 383 at 385.

²³⁰ As George Lewis said “[t]he cause must be different from the effect, otherwise we should not have two things, cause and effect...”. *Faith and philosophy: discourses and essays* (Scribner, New York, 1877) at 474.

²³¹ Webb, above n 214, at 48.

²³² On the notion of substitutive compensation in equity see Rickett, Charles --- “Equitable Compensation: Towards a Blueprint?” (2003) 25(1) Sydney Law Review 31 and Steven Elliott, *Compensation Claims Against Trustees* (DPhil thesis, University of Oxford, 2002).

²³³ Edelman, above n 154, at pp 130-132.

²³⁴ Smith, above n 218, at 13.

(ii) How the real benefit of performance damages has been obscured

This section contends that, in some cases, performance interest advocates have been making fallacious arguments which mask the true benefit of acknowledging this head of damages.

Some commentators take the view that acknowledging a non-compensatory head of ‘performance damages’ would have a radical impact on the law, leading to the money equivalent of performance being awarded significantly more often. This is evident from Edelman’s comment that “[i]t is time to recognise that, apart from exceptional circumstances, a claimant is entitled to the cost of performance of *any* obligation which was not performed”.²³⁵ Webb’s rhetoric about the effect of performance damages being acknowledged is to similar effect:²³⁶ “[t]he law of contractual remedies will then look very different and leading cases would need to be reconsidered. If we wish to continue the current prioritization of compensatory claims, an explanation is needed as to why the claimant is barred from enforcing his right to performance.” These comments have, in turn, led to performance damages being attacked on the ground that acknowledging such damages would make the cost of breach too extensive and have deleterious consequences for commercial enterprise.²³⁷

However, with respect, the mistake the above authors are making is that to argue that acknowledging performance damages would have a radical impact on the law is inconsistent with one of the contentions which underpins the performance damages thesis: that courts have already, under the guise of compensatory awards, been vindicating plaintiff’s primary performance interest. How strong could the explanatory value of performance damages be if acknowledging such awards would lead to wide-ranging changes in the law?

Moreover, to argue that acknowledging performance damages would have a drastic impact on the law would also be inconsistent with the other key argument which motivates calls for this new head of damages: that acknowledging this head of damages would promote consistency between common law and equity. If this ‘wider coherence’ argument is taken seriously then it must be considered, as Smith has done,²³⁸ whether the limits on specific equitable remedies will find analogues in ‘performance damages’. There are strong arguments that they will.

²³⁵ Edelman, above n 154, at 139.

²³⁶ Webb, above n 214, at 71.

²³⁷ See D Campbell and D Harris. “In defence of breach: a critique of restitution and the performance interest.” (2002) 22 *Legal Studies* 208.

²³⁸ Smith, above n 218.

For instance, recently it has been held that a plaintiff will not succeed in a substitutive claim²³⁹ in equity where a bare commercial trust has been breached, if the function of the trust has been fulfilled notwithstanding the breach. Instead, the plaintiff's recovery will be restricted to losses which are caused by the breach.²⁴⁰ And to similar effect is recent jurisprudence developing around when specific performance is available. Traditionally all land was considered to be unique, and therefore innocent parties in contracts for the sale and purchase of land had an "almost unfettered election to decide whether to pursue specific performance or damages".²⁴¹ But this stance has been "softened" in recent years, and now there is a line of cases holding that specific performance should not be available where the land at issue was purchased solely for financial gain.²⁴²

Further, the limitation on specific performance, that courts will not "compel [specific] performance of a materially different contract from that agreed upon"²⁴³ bears similarity to the *remoteness* limitation on the curative award.

This equity jurisprudence suggests that the limits on when awards of the money equivalent of performance will be made which exist in the present law - that such awards are highly unlikely to be made if the plaintiff's interest in the contract is solely geared toward making a profit, and will not be awarded the claimed cure is for something other than what was stipulated in the contract and the claimed cure is too remote - will be mirrored in 'performance damages'.

Further, another limitation on cost of cure awards which will also apply on performance damages is that the money equivalent of performance will not be awarded where performance of the obligation stipulated in the contract is not possible.²⁴⁴ This condition stems from the rationale underpinning performance damages: in no way can money damages be seen as vindicating the primary right to performance if performance, for whatever reason, can no longer be carried out.²⁴⁵

This 'possibility of performance' limitation itself gives rise to another potential implication of performance damages: increased incidence of *Wrotham Park*, hypothetical release damages, being

²³⁹ See Rickett, above n 233.

²⁴⁰ *Target Holdings Ltd v Redfern* [1996] 1 AC 421.

²⁴¹ "Specific Performance: Sale of Land" [2006] NZLJ 196 at 197.

²⁴² J O'Sullivan "Mitigation and Specific Performance in the Canadian Supreme Court" 2013 72 CLJ 253

²⁴³ *Landco Albany Ltd v Fu Hao Construction Ltd* [2006] 2 NZLR 174 at [41]

²⁴⁴ For instance in *UI International Pty Ltd v Internetworks Architects Pty Ltd* [(2007) QCA 402]. As Keane JA opined: "the damage to the claimant's interest in the performance of his or her contract with the builder cannot reasonably be measured by the cost of repair which cannot occur" [at 106]. See also *Scott Carver Pty Ltd v SAS Trustee Corporation* [2005] NSWCA 462 at 44.

²⁴⁵ Webb, above n 214, at 47.

claimed and awarded.²⁴⁶ These damages, as suggested above, are not loss-based or gain-based but *performance* based.²⁴⁷ They are the logical next-best alternative to vindicate a contracting party's performance right when actual performance is impossible.²⁴⁸ Therefore claims under this head could be expected to increase if the performance interest thesis gained prominence.

But, again, the present law, operating within a compensatory paradigm, is already pointing towards the same conclusion: increased prominence of *Wrotham Park* damages awards. Recent case law has confirmed that *Wrotham Park* damages are available even when not claimed in lieu of an injunction or in lieu of specific performance²⁴⁹, when the obligation which founds the claim is positive,²⁵⁰ and when there is no invasion of property rights associated with the breach.²⁵¹ This has led judges²⁵² and academics²⁵³ to query why more use is not being made of *Wrotham Park* damages at present - which suggests that it may only be a matter of time until awards of such damages become commonplace.

What emerges from this analysis is that when the arguments which underlie performance damages are pushed to their logical conclusion several limitations on this award emerge which are not emphasised in the secondary literature. Thus the practical effects of acknowledging a new head of non-compensatory 'performance damages' may not be radical, unlike some authors suggest. But, it will be argued below, this conclusion does not consign 'performance damages' to the 'interesting theoretically but meaningless practically' category of private law theory.

(iii) What is the pay-off of acknowledging performance damages?

The first step in appreciating the real value in the 'performance damages thesis', in my opinion, lies in recognising that some characteristics of *Altmarloch* and the recent Australian case-law *do* bear strong affinity with equitable principles. For instance, what emerges from these cases is that the limitation that money awards equivalent to the cost of performance will not be awarded when it is 'unreasonable to do so' has become very narrow: on the view these courts take very

²⁴⁶ Stevens, above n 218, at 192-194.

²⁴⁷ Webb, above n 214, at 51.

²⁴⁸ Stevens, above n 218, at 194.

²⁴⁹ *Johnson v Agnew* [1980] 1 AC 367 (HL)

²⁵⁰ *Giedo Van de Garde*, above n 37, at [505]

²⁵¹ *Attorney General v Blake*, above n x, at 283 per Lord Nicholls.

²⁵² *Giedo Van de Garde*, at [505].

²⁵³ William Fotherby in "How to use *Wrotham Park* Damages" (2013) 19 NZBLQ 214 said that the potential of this measure of damages "remains not fully realised" and that "litigators should now consider using it much more than they presently do" at 214.

rarely will a claim for the money equivalent of performance be refused on the basis of it being unreasonable.

The “obvious analogue” this narrow reasonableness limitation has is with the situations in equity when specific performance will be denied, which are also very difficult for a defendant to engage.²⁵⁴ For instance, as Spry notes, specific performance will not be denied on the grounds of ‘unfairness’ because of the mere fact that one of the parties made a particularly advantageous bargain.²⁵⁵ And the ground of ‘hardship’, which perhaps seems like the most likely equitable principle to be applicable as a limiting factor to awards of the money equivalent of performance, is also very difficult to engage. This is mainly due to the fact that hardship to the defendant of awarding the specific remedy is always balanced against the hardship to the plaintiff of being denied that remedy. And given the value which the recent New Zealand and Australian case law places on the importance of keeping one’s promises, the courts are very likely to come down on the side of the innocent contractual party in this analysis.

The practical pay-off from this insight may be in the way that it helps to bring into relief the sorts of arguments which a court operating with a performance-oriented conception of the contractual obligation will and will not be amenable to. Given the narrow view of the ‘reasonableness’ criterion which such courts hold, a view which is informed by the equitable principles mentioned above, raising arguments attempting to engage this criterion by making much of the differences between what different measures of damages would yield is very unlikely to be successful. Yet these are the sorts of arguments which the parties challenging awards of the money equivalent of performance made in *Altimarloch*, *Tabcorp*, and *Clarke*.

A much more successful avenue to attack a performance interest damages claim would be one which does not squarely grate with these equitable principles and which is not inconsistent with the moral principles which underpin the performance damages thesis. This line of attack could be made by questioning whether a claimed cure is too remote, albeit that this argument will only be available when the claimed cure is not for exactly what was stipulated in the contract. Yet such arguments have not been raised in the case law, even when were available, like in *Altimarloch* and *Clark*.

²⁵⁴ Smith, above n 218, at 15.

²⁵⁵ ICF Spry, *The Principles of Equitable Remedies* (9th ed, Sweet & Maxwell, London, 2014) at 196.

(c) Conclusion

There are aspects of *Altmarloch* which suggest that Tipping and Blanchard JJ may have been tacitly affirming ideas raised in academic literature and that this case may be the first step in the development of a new head of non-compensatory damages in contract, ‘performance damages’. Proponents argue that performance damages have greater explanatory value than current compensatory accounts of the law of contract damages, and will help in achieving consistency in damages awards in private law generally, which, perhaps controversially, they see as a virtue. After engaging with the academic literature and taking the arguments underlying ‘performance damages’ seriously it has been argued that, contrary to the views expressed by some authors, the practical implications of acknowledging this new head of damages will not be drastic.

But it was contended that to conclude from this that the idea of performance damages is of no utility would be misguided. The real value of recognising performance damages is that it would remove the “conceptual fog”²⁵⁶ which results from construing all cost of cure awards as compensatory in nature, a construal which is invalid because it trades on an artificially broad notion of ‘loss’. The pay-off from this greater conceptual clarity is that it would hone litigants’ focus on the sorts of arguments which may persuade a court that has endorsed the performance-oriented view of the contractual obligation not to award the money equivalent of performance, and ensure that litigants are not distracted by arguments which have no chance of doing so.

²⁵⁶ A phrase used by Robert Flannigan in “The Boundaries of Fiduciary Accountability” [2004] NZLRev 215 at 215.

Chapter VI: Conclusion

This dissertation has focused on a recent contribution to the ongoing debate about the true nature of the contractual obligation: whether, fundamentally, the essence of contract is in receiving performance from the other contracting party/ies.

Chapter II surveyed the usage of Professor Friedmann's 'performance interest' terminology in primary and secondary sources and concluded that this usage is increasing markedly. This was all necessary work to set up this dissertation's main premise: to consider whether the increasing prominence of the performance interest terminology is reflective of a wide-spread commitment to a performance-oriented view of contract law as a whole, and if so to address what the implications of accepting this view may be.

In chapter III the focus of this inquiry was distilled into an analysis of *Altimarloch* and other Commonwealth case-law where there has been argument about which measure of damages is appropriate. The conclusion was reached was that there are clearly discernible indications that the Supreme Court in *Altimarloch* endorsed a performance-oriented view of contract. A subsidiary conclusion was that this brings contract law in this jurisdiction into line with Australian law and signifies a departure from English law on this point. Furthermore, it was that concluded that the reasoning in *Altimarloch* is likely to lead to a law of contract which gives effect more faithfully to the bargains that people have struck and which is more predictable.

Finally, in chapter III 'C' a key theoretical implication of *Altimarloch* was examined: that this case may represent the embryonic stages of a new head of non-compensatory 'performance damages', under which substantial damages can be awarded even though there has been 'loss'. The conclusion was reached that there are highly persuasive arguments which underlie calls that this new head of damages should be acknowledged. The real pay-off for acknowledging performance damages, it was argued, would be in attaining greater conceptual clarity, which may in turn sharpen litigants' focus on the sorts of arguments which can defeat a claim for the money equivalent of performance and make the advice that practitioners give to their clients more accurate.

Bibliography

A: Cases

1. New Zealand

Altimarloch Joint Venture Ltd v Moorhouse HC Blenheim CIV-2005-406-91, 3 July 2008.

Cedenco Foods v Akiaki Ltd HC Napier CIV 2007-441-439, 22 November 2007.

In Stevens v Premium Real Estate Ltd [2009] NZSC 15.

Landco Albany Ltd v Fu Hao Construction Ltd [2006] 2 NZLR 174.

Marlborough District Council v Altimarloch Joint Venture Ltd [2012] NZSC 11; [2012] 2 NZLR 726.

McKinlay Hendry Ltd v Tonkin & Taylor Ltd HC Wellington CIV-1999-485-78, 22 March 2004.

Morrison v Vero Insurance New Zealand Ltd [2014] NZHC 2344.

Newmans Tours Ltd v Ranier Investments Ltd [1992] 2 NZLR 68.

Rowlands v Callow [1992] 1 NZLR 178 (HC).

Steffensen v BGW Investments Ltd (formerly Broadbase Otago Ltd) [2014] NZHC 1828.

Stevenson Precast Systems Ltd v Kelland HC Auckland CP303-SD01, 9 August 2001; [2001] BCL 807.

Vining Realty Group Ltd v Moorhouse [2010] NZCA 104.

2. England

Alfred McAlpine Construction Ltd v Panatown Ltd (No.1) [2001] A.C. 518 (HL).

And So to Bed Ltd v Dixon [2001] F.S.R. 47 (HC).

Attorney General v Blake [2001] 1 AC 268 (HL) at 280.

Bovis Lend Lease Ltd (formerly Bovis Construction Ltd) v RD Fire Protection Ltd [2003] EWHC 939 (TCC); 89 Con. L.R. 169.

Cebave NV v Bremer Handelsgesellschaft mbH (The Hansa Nord) [1976] QB 44.

Channel Island Ferries Ltd v Cenargo Navigation Ltd (The Rozel) [1994] 2 Lloyd's Rep. 161; [1994].

Davis Contractors Ltd v Fareham Urban District Council [1956] AC 696.

Earl's Terrace Properties Limited v Nilsson Design Limited, Charter Construction Plc [2004] EWHC 136.

Giedo Van Der Garde BV, Giedo Gisbertus Gerrit Van Der Garde v Force India Formula One Team Limited (Formerly Spyker F1 Team Limited (England)) [2010] EWHC 2373 (QB).

G.W. Atkins Ltd. v Scott (1991) 7 Const. L.J. 215.

Hadley v Baxendale (1854) 9 Exch 341.

John Grimes Partnership Ltd v Gubbins [2013] EWCA Civ 37 at [30].

Johnson v Agnew [1980] 1 AC 367 (HL).

Radford v De Froberville [1977] 1 WLR 1262 (Ch); [1978] 1 All ER 33.

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

Ruxley Electronics & Construction Ltd v Forsyth [1996] 1 AC 344 (HL).

Smithkline Beecham Plc v Apotex Europe Ltd [2006] EWCA Civ 658., [2006] 3 W.L.R. 1146 (CA).

Target Holdings Ltd v Redferns [1996] 1 AC 421.

Tito v Waddell (No 2) [1977] Ch 106; [1977] 3 All ER 129.

Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas) [2009] AC 61 (HL).

Wertheim v Chicoutimi Pulp Company [1911] AC 301, 307.

Wrotham Park Estate Co Ltd v Parkside Homes Ltd [1974] 1 WLR 978.

3. *Australia*

Bellgrove v Eldridge (1954) 90 CLR 613.

Body Corporate for Sun City Resort CTS 24674 v Sunland Constructions Pty Ltd & Ors (No 2) [2011] QSC 42.

Bovis Lend Lease Ltd (formerly Bovis Construction Ltd) v RD Fire Protection Ltd 2003 WL 21917429.

Clark v Macourt (2013) 304 ALR 220; [2013] HCA 56.

Macourt v Clark [2012] NSWCA 367.

Scott Carver Pty Ltd v SAS Trustee Corporation [2005] NSWCA.

Tabcorp Holdings Ltd v Bowen Investments Pty Ltd [2008] HCATrans 395 (2 December 2008).

UI International Pty Ltd v Interworks Architects Pty Ltd [2007] QCA 402.

Willsbee v Westcourt Ltd [2009] WASCA 87.

4. *Singapore*

Chia Kok Leong and Another v Prosperland Pte Ltd [2005] SGCA 12 (16 March 2005).

Family Food Court (a firm) v Seah Boon Lock and Another (trading as Boon Lock Duck and Noodle House) [2008] SGCA 31.

Indulge Food Pte Ltd v Torabi Marashi Babram [2010] SGHC 22.

Seah Boon Lock and Another v Family Food Court [2007] SGHC 80.

5. Hong Kong

Linfield Ltd v Taobo Design Architects Ltd & Others & Brooke Hillier Parker (third party) [2004] HKEC 1135, (2004) HCCT 68/2001.

6. United States

Hooks Smelting Co v Planters' Compress Co 79 SW 1052 (1904) [Supreme Court of Kansas].

Chamberlain v. Parker 45 N.Y. 569 (1871).

B: BOOKS

Beatson, J 'Anson's Law of Contract' (27th ed. Oxford University Press, 1998).

Burrows, Andrew, *English Private Law* (3rd ed. Oxford University Press, Oxford, 2013).

Chen-Wishart, Mindy *Contract Law* (4th ed, Oxford University Press, 2012).

Beale, Hugh (ed) *Chitty on Contracts* (29th ed, Sweet & Maxwell, 2004).

Decock, Wim *Theologians and Contract Law: The Moral Transformation of the Ius Commune* Wim Decock (Martinus Nijhoff Publishers, Leiden, 2013).

Edelman, James *Gain-Based Damages – Contract, Tort, Equity and Intellectual Property* (Oxford, Hart Publishing, 2002).

Fried, Charles *Contract as Promise: a Theory of the Contractual Obligation* (Harvard University Press, Cambridge, 1981).

Kramer, Adam *The Law of Contract Damages* (Hart Publishing, Oxford, 2014).

Lewis, George *Faith and philosophy: discourses and essays* (Scribner, New York, 1877).

McKendrick, Ewen *Contract Law: Text, Cases, and Materials* (5th ed, Oxford University Press, Oxford, 2012).

Morgan, Johnathan *Contract Law Minimalism: A Formalist Restatement of Commercial Contract Law* (Cambridge University Press, Cambridge, 2013).

Sigrah, R and King, S *Te Rii Ni Banaba – The Backbone of Banaba* (University of the South Pacific, Institute of Pacific Studies, Suva, 2001).

Spry, ICF *The Principles of Equitable Remedies* (9th ed, Sweet & Maxwell, London, 2014).

Taylor, Richard and Taylor, Damien *Contract Law Directions* (Oxford University Press, Oxford, 2013).

C: Chapters

Kreitner, Roy “Multiplicity in Contract Remedies” in N Cohen and E McKendrick (eds.) *Comparative Remedies for Breach of Contract* (Hart Publishing, Oxford, 2005) 19.

O’Sullivan, Janet “Loss and Gain at Greater Depth: The Implications of the Ruxley Decision” in F Rose (ed) *Failure of Contracts: Contract, Restitutionary and Proprietary Consequences* (Hart Publishing, Oxford, 1997) 1.

Smith, Stephen A “Substitutionary Remedies” in Charles Rickett (ed) *Justifying Private Law Remedies* (Hart Publishing, Oxford, 2008) 93.

Stevens, Robert “Damages and the Right to Performance: a *Golden Victory* or not” in JW Neyers, R Brounagh and SGA Pitel (eds) *Exploring Contract Law* (Hart Publishing, Oxford, 2009) 171.

D: Journal Articles

Al-Tawil, Tareq “*Damages for breach of contract compensation: cost of cure and vindication*” (2013) 34(2) *Adel L Rev* 351.

Buckland F “The Nature of *Contractual Obligation*” (1944) 8 *CLJ* 247.

Campbell, D and Harris, D “In defence of breach: a critique of restitution and the performance interest” (2002) 22 *Legal Studies* 208.

Carter, John; Courtney, Wayne and Tolhurst, Greg “Issues of Principle in Assessing Contract Damages” (2014) 31 *JCL* 171.

Chandler, Adrian “Defective Performance of Building Contracts: Expectations in a Straitjacket” [1996] *ICLR* 255.

Chetwin, Maree “Beyond Fuller and Purdue’s classification: Welcome Steps or Troublesome Taxonomy” (2010) 40 *JCL* 271.

Chetwin, Maree “Comparative analysis of some aspects of assessment of damages for contractual breaches in England and Wales, Australia and New Zealand” (2011) 3.2 *International Journal of Law in the Built Environment* 113.

Chetwin, Maree “Protecting the Performance Interest the Differing views of the New Zealand Supreme Court” 2012 40 *ABLR* 307.

“Common Sense on Cost of Cure” 1995 72 *LMCLQ* 456.

Coote, Brian “Contract Damages, Ruxley, and the Performance Interest” (1997) 56 CLJ 537.

Coote, Brian “The Performance Interest, Panatown, and the Problem of Loss” (2001) 117 LQR 81.

Edelman, James “*Money Awards of the Cost of Performance*”(2010) 4 Journal of Equity 122.

Farnsworth, Allan E “Damages and Specific Relief” (1979) 27 Am. J. Comp. L. 247.

Flannigan, Robert “The Boundaries of Fiduciary Accountability” [2004] NZLRev 215.

Fotherby, William “How to use Wrotham Park Damages” (2013) 19 NZBLQ 214.

Fried, Barbara “The Holmesian Bad Man Flubs His Entrance” (2011) 45 Suffolk Law Rev. 627.

Fried, Charles “The Convergence of Contract and Promise” (2007) 120 Harv. L Rev. F. 1.

Friedman, Daniel “The Performance Interest in Contract Damages” 111 Law Quarterly Review 628.

Friedmann, Daniel “A comment on fuller and perdue, the reliance interest in contract damages” (2001) 1 Issues in Legal Scholarship 23.

Friedmann, Daniel “The Efficient Breach Fallacy”, (1989) 18 J. Legal Stud. 1.

Fuller, LL and Perdue, WR, “The Reliance Interest in Contract Damages” (1936) 46 Yale Law Journal 52.

Harris, *Ogus* and Phillips, “Contract Remedies and the *Consumer Surplus*”(1979) 95 LQR 581.

Holmes, Oliver Wendell “The Path of the Law” (1897) 10 Harv. L. Rev. 457.

Holstein, Herbert A "Vices of Consent in the Law of Contracts" (1938) 13 Tul.L.Rev. 560.

Hunter, Howard “Has the Achilleas Sunk?” (2014) 31 JCL 120.

Loke, A “Cost of Cure or *Difference in Market Value: Towards a Sound Choice in the Basis for Quantifying Expectation Damages*” (1996) 10 Journal of Contract Law 189.

McInnes, R “*The Yellow Brick Road: Ruxley Revisited*" 1998 14 Const. L.J 33.

McLauchlan, David "Reliance damages for breach of contract." [2007] NZLRev 417.

Menetrez, Frank “Consequentialism, promissory obligation and the theory of efficient breach” (2000) 47 UCLA LR 859.

Mills, Stephen “Specific Performance: Sale of Land” [2006] NZLJ 196 at 197.

Muris, Timothy “Cost of Completion or Diminution in Market Value: the Relevance of Subjective Value” (1983) 12 J. Legal Stud. 379.

O'Sullivan, J "Mitigation and Specific Performance in the Canadian Supreme Court" 2013 72 CLJ 253.

Orsborn, Justin "Expectation Damages for Breach of Contract and the Principle of *Restitutio In Integrum*" (1993) 7 Auckland U L Rev 305.

Phang, Andrew "Subjectivity, objectivity and policy: Contractual damages in the House of Lords" [1996] JBL 362.

Rickett, Charles "Equitable Compensation: Towards a Blueprint?"(2003) 25(1) Sydney Law Review 31.

Roberts, Marcus "Contractual Damages and the Supreme Court – *Altamarloch* and the Shifting Sands of 'Reasonableness'" (2013) 19 NZBLQ 11.

Rowan, Solene "For the recognition of remedial terms agreed inter partes" (2010) 126 LQR 448.

Sangha, B and Moles, B "Can Contract Law Protect Individual Rights and Preferences?" (1998) 10 Bond Law Review 3.

Shapiro, Fred R "The Most-Cited Law Review Articles Revisited" (1996) 71 Chi.-Kent. L. Rev. 751.

Sidhu, Dawinder S "The Immorality and Inefficiency of an Efficient Breach" (2006) 8 Tenn. J. Bus. L. 61.

Smith, SA "'The Reliance Interest in Contract Damages' and the Morality of Contract law" (2001) 1 Issues in Legal Scholarship 6.

Webb, Charlie "Performance and compensation: an analysis of contract damages and contractual obligation." (2006) 26 OJLS 41.

Webb, Charlie "Performance and compensation: an analysis of contract damages and contractual obligation" (2006) 26 OJLS 41.

Wheen, N "The Resource Management Act 1991: A 'Greener' Law for Water?"(1997) 1 N.Z. J. Env'tl. L. 165.

Winterton, David "Money Awards Substituting for Performance" [2012] LMCLQ 446.

Zaid, Frank "Conflict in the Measure of Contract Damages: Cost of Performance (Replacement) Versus Difference in Value (Indemnity)." (1971) 9 Osgoode Hall L.J. 9.1: 179.

E: Theses and Dissertations

Steven Elliott, "Compensation Claims Against Trustees" (DPhil thesis, University of Oxford, 2002).

F: Internet Materials

Ferguson, A and McGuigan, J “Supreme Court Examines Interplay of Tortious and Contractual Liability” (18 December 2012) International Law Office Newsletter <
<http://www.wilsonharle.com/nz-supreme-court-examines-interplay-of-contractual-and-tortious-liability/>>.

Ficetola, Luca (2011) “Comparing Remedies for Breach of Contract in Italian and English Law” Social Science Research Network <<http://ssrn.com/abstract=1990791>>.

Murphy, L “The Practice of Promise and Contract” (2014). *New York University Public Law and Legal Theory Working Papers*. Paper 458. <http://lsr.nellco.org/nyu_plltwp/458>.

