REMARKS

Contractual Remedies: Beyond Enforcing Contractual Duties

*Mindy Chen-Wishart**

The question that I want to address is a pretty fundamental one in contract law. When I order a pizza, I want the pizza; I don't want damages for not getting the pizza. So why is it that contract law will only give me damages and not my pizza? Why is specific performance a secondary remedy that only kicks in if damages are thought to be "inadequate"? And even then, a lot of other considerations can block the award of specific performance.

Now, this is a puzzle because the dominant theoretical view is that the contractual right is the right to performance. Contracts are made to be performed. Civilian jurisdictions, as opposed to common law practice, treat specific performance as the primary remedy because, they say, performance is constitutive of, inherent in, and intrinsic to, the contractual right. In contrast, while common lawyers typically speak of the courts enforcing the right to performance, that right is remarkably fragile when it is translated into remedial form. Money, land, and some negative obligations aside, specific performance is very rarely given. And almost all of the bars to performance

* Professor of the Law of Contract and Associate Dean of Graduates, Oxford University. These remarks, delivered during a panel discussion for *The George Washington Law Review*'s 2016 Symposium, "Divergence and Reform in the Common Law of Contracts," are based on the Author's article, *Specific Performance and Change of Mind*, *in* COMMERCIAL REMEDIES: UNRAVELLING CONTROVERSIES (Graham Virgo & Sarah Worthington eds., 2017).

are impossible to square with the idea that contract law's response to breach is to enforce the duty to perform.

For example, we run up against the bars to specific performance of constant supervision and the uncertainty of the primary duties. Now, if performance is really *that* important, these problems can be overcome. There's also the concern about the heavy-handed nature of the enforcement mechanisms; namely, contempt of court, and going to jail. But, hey, if performance is *that* important, "heavy-handed" is good, right? And what about the mutuality bar? That's also a puzzle. There would be no problem of lack of mutuality at all if specific performance were freely available to *both* parties.

Then there's the big one, the adequacy of the damages bar, where adequate damages, contrary to the stated aim, will often *not* put me, as the aggrieved party, "so far as money can do[,] in the same position as if the contract had been performed,"[1] because of remoteness, mitigation, and so on. So again, why can't I just have my performance? Why am I confined to limited damages? Moreover, damages are inadequate *par excellence* where the contracts are for personal services. But here, we know that specific performance is most clearly barred. Why? Lord Hoffmann also warned that awarding specific performance may cause unjust enrichment if I, as the aggrieved party, end up negotiating more than court-ordered damages in order to waive the defendant's obligation to perform.[2] But if performance is my right, why can't I sell it for what I can get for it?

Next, there are the bars of procedural and substantive unfairness. Specific performance will be barred if I gave no consideration, nominal consideration, or inadequate consideration, if I lack clean hands, if the defendant was mistaken in entering into the contract, or even if facts, occurring *after* formation and even after *breach*, make it harsh or oppressive to order specific performance. Now, why should these outweigh my right to performance?

There is a lot of other evidence for contract law's lack of commitment to enforcing performance. Not only do courts rarely compel the contract-breaker to perform, sometimes they might even prevent the innocent party from performing. *White & Carter (Councils) Ltd. v. McGregor*[3] says that I (as the innocent party) can't affirm a contract, complete my performance, and earn the agreed sum if I don't have a

---

1 A-G v. Blake, [2001] 1 AC 268 (HL) 282 (citing Robinson v. Harman (1848) 1 Exch. 850, 855).

2 *See* Co-operative Ins. Soc'y Ltd. v. Argyll Stores (Holdings) Ltd. [1998] AC 1 (HL) 15.

3 [1962] AC 413 (HL).

"legitimate interest" in completing performance or would need the defendant's cooperation.[4] But how can I *both* have an obligation to perform and at the same time be *barred* from performing? This is bonkers, right? And why shouldn't the defendant have a duty to cooperate, even to the limited extent of letting me onto the property in order to perform as the defendant had agreed to do?

Further, we know that courts won't let parties protect their right to performance by an agreed specific performance clause, nor an agreed damages clause if it is, to quote Lord Hodge, "exorbitant or unconscionable," if it would "punish" a breach, and if it would indirectly coerce performance.[5] But why not, if the parties agreed that that's what the performance was worth?

The award of an account of profits for breach of contract in *Attorney General v. Blake*,[6] might seem a strong vindication of the contractual right to performance by tracing through to the profits. But that remedy turns out to be a mouse. It's confined to the most exceptional, never to be repeated, circumstances. The case is about an MI6 Secret Service agent who turned traitor, escaped to Russia, and wrote a book about it.[7] Now, to qualify for an account of profits, I (again as the innocent party) am told that I must have a legitimate interest in preventing the defendant's profit-making from breach.[8] But if I have a right to that performance, why should I ever *not* have an interest in preventing you from profit-making by breach? And what about the *Wrotham Park* or "negotiating damages"?[9] That is, the sum for which I could reasonably have sold my right to release the defendant from performance, even if I would never have agreed to sell that right.[10] Here, we can see that far from enforcing my right, the courts are compulsorily expropriating it for a fee.

A common answer to my puzzle is to say: "Calm down, the law *is* actually enforcing your right to performance." On this view, damages are a kind of specific performance, a kind of specific relief, akin to the award to repay debts. The first version of this treats damages as a complete substitute for performance. The innocent party is told: "Hey, it's just as good as performance, so you should be indifferent to

4 *Id.* at 430–31.

5 Hon. Lord Patrick Hodge, Keynote Address at *The George Washington Law Review*'s 2016 Symposium (Nov. 19, 2016).

6 [2001] 1 AC 268 (HL).

7 *See id.* at 275.

8 *See id.* at 282.

9 *See* Wrotham Park Estate Co. Ltd. v. Parkside Homes Ltd. [1974] 1 WLR 798 at 815.

10 *See id.*

whether you get damages or performance." Now, this is simply unrealistic. A reasonable person will often *not* be indifferent as between the two, mainly because of the many limits on the award of damages, such as remoteness and mitigation, the cost of cure is not automatically given.

The second version recasts the defendant's contractual duty as a disjunctive duty—analogous to the (in)famous account of Oliver Wendell Holmes—the contractual duty is actually to either perform or to pay damages.[11] But this is also unrealistic; I want my pizza. I didn't make a contract to get pizza *or damages*. Anyway, if the duty is disjunctive, then the defendant should be able to proffer the damages before adjudication; but if she tries that, she can't discharge her duty in law. Moreover, before adjudication, the defendant is unlikely to know how much damages will be, because she's unlikely to know the exact extent of my loss or how the remoteness or mitigation rules will play out.

For those sorts of reasons, I agree with Professor Stephen Smith, who argues that the award of damages does not enforce a duty, it creates one.[12] By *imposing liability*, the court is telling the defendant *not* what she was all along required to do, but what the law *now* requires her to do. What the courts are doing is publicly vindicating, rather than enforcing, the plaintiff's right to performance. From that vantage point I make three arguments.

First, contrary to the view of many people, including Professor Smith, I argue that an order of specific performance is just like the order for damages in that it also vindicates the plaintiff's right to performance, not by enforcing the original right, but by imposing a new liability. Three points support this argument. First, performance under a specific performance order just can't be performance of the *original* contract because *factually* it is, by definition, too late, it's not *that* performance. And *legally* you can't undo a breach just by proffering performance that's too late. Second, when courts order specific performance they're not just saying what the defendant should have done all along, otherwise the courts can just make a declaration to that effect. The discretionary nature of any ultimate order means that any order for specific performance is not so much the enforcement of

---

11 Oliver Wendell Holmes Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 462 (1897) ("The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it—and nothing else.").

12 Stephen A. Smith, *Duties, Liabilities, and Damages*, 125 HARV. L. REV. 1727, 1727, 1729–30 (2012).

the original right, as a backstop solution when absolutely nothing else will do—just consider all the bars that can stand in the way of the order. In addition, courts can tailor the order, they can award *partial* specific performance, and they can give directions to cure vagueness in the primary duties. And third, if a specific performance order is merely enforcing the duty to perform, it would imply that the defendant's performance duty persists after the breach and even before a court order. But, if the defendant performs without the court order, the plaintiff doesn't have to accept. There's no point in you delivering thirty pizzas after my party has ended; I don't want them. In that case, the defendant's performance won't discharge the duty and may even be impossible. Even if I accept the late performance, it doesn't retroactively undo the breach in law, although it might reduce my loss in fact. And again, at the time of breach, the defendant doesn't know whether she'll be liable for performance or for damages, not least because some of the bars, like hardship or adequacy of damages, take account of facts that may only arise *after* the breach.

My second argument then flows from the recognition that the courts are *imposing liability* rather than enforcing duties. It gives courts a broader remit untethered to merely coercing actual performance. The state is justified in facilitating, and therefore subsidizing, the autonomy-enhancing activity of contracts. Contract law empowers individuals to require the state to hold one's contract partner liable to one. But in deploying this coercion of Leviathan, courts, as emanations of the state, can and should take into account a range of factors that we see operating right across the law of remedies, and indeed across the law of contract. What are they? The courts rightly start with the seriousness of the breach in the sense of the loss caused. This yields the expectation interest as the starting point. But other factors also come into play; for example, the concern to avoid undue harshness to the defendant.[13] This considers the defendant's interest, in par-

13 The bar to specific performance of a personal service contract is more than simply a problem of administration of justice in the sense that it is difficult for courts to *make* someone perform. Instead, once the party breaches, there is judicial discretion to respect autonomy and change of mind (see below in the text discussing my third argument). Courts also take into account the context of the breach and factors such as hardship. *Patel v. Ali* [1985] Ch 283, is a famous English case concerning a contract for the sale of a house; this is *par excellence* a case where courts would usually give specific performance. But here, the court refuses to order specific performance because of the tremendous hardship it would cause the defendant due to changes in her circumstances. *See id.* at 283. Context must be taken into account, and the corollary is that you can't say there is a simple equation between the right and the remedy. Instead, it has to be mediated through judicial discretion. And that's why when courts do ultimately award specific performance they are imposing a new duty on somebody, not enforcing an old one.

ticular the impact of a particular remedy on her in comparison with other available remedies. And we see this concern operating in various other remedial rules and doctrines, for example: in the quantification of damages, in the penalty rule, and in the limits on affirmation and termination.

Courts also properly take into account the demands on the administration of justice. Hence, for example, we have the bars of constant supervision and vagueness, and it would also explain why our legal system is rather shy about giving damages for nonpecuniary loss, because quantification difficulties are so great. Another factor the courts might legitimately take into account is public policy. For example, specific performance has been ordered in the UK to allow a far right political party to hold a meeting in a rented hall in the name of free speech[14] and specific performance has been denied to protect a theater's right to artistic freedom.[15]

What about the adequacy of damages bar? I bargained for performance, why must I settle for damages? The defendant assumed an obligation to perform, why does she only have to pay damages? The answer I propose is counterintuitive. It lies in a concept of valuable autonomy that accommodates change of mind. This is my third and final argument. Let me explain. Contracts express the parties' autonomy at the time of formation, but breach happens because, come the time of performance, the defendant can no longer perform or no longer wants to perform. It's not obvious that we enhance people's freedom by forcing them to do what they no longer want to do, by saying to them: "We coerce you in the name of respecting your freedom." If contract law values freedom of choice in support of individual autonomy, it should not prioritize a person's past choice over her present change of mind when both are equally valid expressions of her autonomy. The original commitment can enjoy no moral advantage. The self is continuous, but it also evolves over time. Those of you who are under 30 in this room know how much you've changed, say in the last 10 years. Those of us over 30 may have to think a bit harder. An integral part of an autonomous life is the ability to learn, to mature, to recreate ourselves. Changes in our assumptions, our knowledge, our attitudes, values, priorities, and passions, might entail the rejection of previously held beliefs, commitments, projects or goals that are no longer authentically ours. Someone who sticks to her past commit-

14 *See* Verrall v. Great Yarmouth Borough Council [1981] QB 202; *see also* Imutran Ltd. v. Uncaged Campaigns Ltd. [2001] 2 All ER 385.

15 *See* Ashworth v. Royal Nat'l Theatre [2014] EWHC (QB) 1176, [2014] 4 All ER 238.

ments that no longer reflect her present vision of how she should live is not a model of autonomy in action. Being forced to keep a regretted undertaking may unduly compromise a person's integrity, authenticity, and self-respect.[16] Consider those who are now seeking to boycott or sever ties with Trump businesses.

To accommodate this dynamic aspect of autonomy, we must not only have the ability to make commitments, but also have some freedom to break from them, especially long-term and personal ones. Juxtapose the sincere undertakings made on the marriage alter with our society's acceptance of no-fault divorce. There should be what Joel Feinberg calls a general "presumption in favor of liberty."[17] Consistent with that, the adequacy of damages bar applies to *all* breaches of contract.

Law and economics have long recognized the importance of change of mind. The idea at the heart of the efficient breach theory is that what was efficient at formation is no longer so come the time for performance.[18] The problem is that, taken seriously, this would completely undermine the economic justification for the enforcement of contract. The common law solution does not lie in excusing the breach of contract, but in *not* insisting on performance, *unless* damages won't do *and* no other reason reflected in the bars to specific performance applies.

In essence, the adequacy of damages bar allows the defendant to change her mind while still vindicating the plaintiff's right to performance. The defendant's change of mind is *not cost free*; she is liable to pay damages in order to protect the plaintiff's legitimate interests, but the cost of her change of mind is reduced by the various rules limiting the amount payable. This makes the best sense of otherwise puzzling remedial rules. For example, it explains why the plaintiff has a "duty" to mitigate the cost of the defendant's change of mind. It also explains why courts won't specifically enforce personal services contracts, why courts won't force unwilling defendants to cooperate with an affirming plaintiff, why punitive damages are not awarded and account of prof-

16 An audience member commented that expectation damages are usually undercompensating and therefore courts should be more willing to make people do what they promised. The answer is that *not all rights are equal*. Contract rights are valued less highly than property rights. Consider bankruptcy. People can declare themselves bankrupt; the creditors, who usually become so via contract, can't insist on repayment of the whole debt. A large part of the rationale for bankruptcy is also based on protecting future autonomy.

17 Joel Feinberg, Harm to Others: The Moral Limits of the Criminal Law 9 (1984) ("Liberty should be the norm; coercion always needs some special justification.").

18 *See supra* note 11.

its are hardly ever awarded, why penalties are not enforced, and why *Wrotham Park* negotiating damages[19] compel the plaintiff to waive the defendant's performance.

In principle, civil law systems treat specific performance as the primary remedy but, in practice, they converge with the common law position of hardly ever compelling performance. The magic occurs via the good faith doctrine. Both systems give considerable scope for change of mind. So, far from the theme of the Symposium, "Divergence and Reform in the Common Law of Contracts," my theme has been that of convergence and the defense of a puzzling *status quo*.

19 *See* Wrotham Park Estate Co. Ltd. v. Parkside Homes Ltd. [1974] 1 WLR 798 at 815; *see also* Lunn Poly Ltd. v. Liverpool & Lancashire Props. Ltd. [2006] EWCA (Civ) 430, [2006] All ER 264.