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Explaining State Curbs on Contract Remedies

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I. Introduction

The puzzle for this chapter is to explain the impetus behind state curbs on contract remedies. Such curbs can only be delivered by state legislation or state courts. Here the focus is on the latter.[1] The puzzle arises because the courts routinely assert their adherence to a rule that the victim of a breach of contract is entitled to an award of money damages which places them 'in the same situation … as if the contract had been performed'.[2] Notwithstanding this, those same courts regularly confine the victim to some more limited remedy. This needs explanation.

This general rule is typically justified on the basis that contract promises are binding: they generate rights and obligations. This in turn generates an expectation that these obligations will be performed, and the remedy captured by the general rule seeks to fulfil or protect that expectation of performance by awarding damages (expectation damages) in that measure. This explanation has the benefit of expressing a clear underlying principle: contract promises are binding, and contracts should either be performed or else remedied by a payment of damages to match that goal. In short, the animating principle in contract law remedies is to *protect the parties' expectation of performance of their agreed obligations*.[3]

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[1] Court practices are likely to reveal far more about the broad foundations of contract law. Legislative intervention, by contrast, is frequently designed to provide policy-based protection of vulnerable classes, and so operates by exception to the general rule rather than in accordance with it. The cases cited here are chosen accordingly, illustrating core common law rules without protective legislative overlay.

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

[3] Note that this justification does not go so far as to suggest that specific performance is the only, or even the primary, appropriate remedy, merely that the guiding principle underpinning every determination of what remedies are appropriate will be the state's support of the parties' *interest* in having their contractual promises *performed*.

By contrast, when the courts decline to follow that approach – which they do remarkably often[4] – there is no similar clear articulation of a generic motivating principle, merely pleas of fairness or proportionality, or avoidance of waste or punishment or enslavement to another, or the victim's lack of an entitling legitimate interest in enforcement.[5] This will not do. Contracts are a crucial part of commercial and social life, and adherence to the rule of law demands that remedies for their breach are founded on principles capable of clear explanation and predictable application. What follows is an attempt to identify such an underlying principle.

I address the problem by, first, laying out the broad outlines of the well-known landscape of contract law remedies;[6] secondly, setting contract law within the broader landscape of private and public law; thirdly, formulating an alternative hypothesis to explain the judicial approach to contract law remedies; and, fourthly, testing that hypothesis against existing cases; before finally concluding that the hypothesis can be elevated to an applicable general principle.

Because I am skating rapidly over the relevant details, my route will be more intelligible if I make it plain at the outset that I am not endeavouring to set out some new normative approach to contract law remedies which the courts should follow in future. I am merely looking at what the courts *do*, and trying to fit that activity into a workable generalisation. Put another way, I am seeking a hypothesis which might then be tested against the data set of existing contract law cases in order to justify labelling it as a workable legal principle.

My suggestion, proposed first as a hypothesis, is that the overriding impetus for the courts' interventions in delivering contract remedies is *not* to mirror the expected performance of the parties' contract, nor to protect the various personal interests of the parties from unwarranted intrusions, but rather to *protect the institutional practice of contracting* because *that practice* is a public good generating both economic and social benefits. Put more prosaically, contract obligations are not like tort obligations: the state and its courts have no special interest in ensuring that A's apples are delivered or B's walls are painted yellow; these agreed contractual obligations are not of the same order as an obligation to take due care. But the state and its courts *are* interested in ensuring that the practice of contracting has state and court support, and they frame contract remedies with that end in mind. Further, with this as their animating focus, I suggest the courts then adopt the simplest and most direct means to that end: they focus on removing the *risks* of contracting,[7] not on delivering the *rewards* of contracting (as is suggested under the current general rule).

This hypothesis and its means of implementation present a remarkably consistent fit with the cases: the courts afford reasonable protection to the claimant from economic and amenity loss,[8] but they will sacrifice enforcement of the agreed deal

[4] See section II.

[5] Space prohibits citing the many relevant cases and commentaries, but any standard contract law textbook is replete with them. For a clear and succinct account, see E McKendrick, *Contract Law*, 15th edn (Oxford, Hart Publishing, 2023) chs 21 and 22.

[6] My focus is on English contract law, but I expect the broad points being made will easily translate to other common law jurisdictions provided appropriate tweaks are made to accommodate national differences.

[7] To anticipate, the risks of a failed contract are assessed against the counterfactual of proper performance, not non-entry into any contract. See n 50.

[8] ibid.

between the parties before them in order to demonstrate a broader commitment to the values of personal liberty and protection from punitive abstraction of wealth without which parties may hesitate to contract. This animating objective explains so many of the rules we take for granted in contract remedies, including the preference for money damages, the ramifications of privity, the notion of mitigation, and a good number of other rules considered later. This approach often delivers exactly what the parties would have chosen themselves, but what is crucial is its impact on the confidence and security of future parties intent on settling later contractual engagements.

In short, the key contribution of this chapter is this hypothesis, proposed in my conclusion as a broad principle given its support from the cases. It is that the overriding impetus for interventions by the state's courts in delivering contract remedies is *not* to support individual parties in their expected performance of their contract, as we commonly assume, but rather to protect *the institution and practice of contracting*, and to do that by focusing on *removing the risks of contracting, not delivering the rewards of contracting*. A number of additional observations are made, but they are subsidiary to this primary claim.[9]

II. Current Perceptions of the Contract Law Landscape

There is nothing more revealing of the underlying assumptions in contract law than the rules prescribing the remedies for breach.[10] Moreover, it is precisely at the margins, where cases are described as exceptional, that 'we can see the difference between crude categories and fundamental principles'.[11] These fundamental principles are the ones sought here.

The starting point is invariably the rule setting out the 'usual' award of expectation damages, stated by Parke B in *Robinson v Harman* more than 150 years ago:

> [T]he rule of the common law is, that where a party sustains 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.[12]

As already noted, the justification for this approach is commonly said to be that the binding nature of contractual promises creates an expectation in the parties that these promises will be performed, and the remedy granted by the courts seeks to fulfil or protect that expectation of performance. This then might be regarded as the accepted fundamental legal principle explaining contract law remedies in the orthodox contract law canon.

It is this underlying principle which is in the sightlines in this chapter, not the justifications for why it is the right principle. Nevertheless, especially in light of the

[9] Three are noted: first, a better approach to the confusing terminology of 'primary' and 'secondary' obligations as used when discussing party-agreed remedies; secondly, a particular insight into specific performance; and, thirdly, a problem in distinguishing between forfeiture and termination clauses with time-limited property interests: see n 92 for the relevant pages.

[10] EA Farnsworth, 'Damages and Specific Relief' (1979) 27 *American Journal of Comparative Law* 247.

[11] D Baird, 'The Holmesian Bad Man's First Critic' (2008) 44 *Tulsa Law Review* 739, 750.

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

hypothesis which is advanced in the next section, it is notable that none of the common justifications *requires* the courts to give *full* protection to the parties' expectations of obtaining actual performance. A remedy short of that would in most instances serve exactly the same ends, provided only that the claimant was not left suffering an unremedied *harm*[13] by their reliance on the defendant's broken promise. This is because the justifications are all simply reasons why the courts would want to ensure that parties who contract are encouraged, rather than harmed, by the endeavour. So it is commonly said that judicial protection of the expectation of performance is justified by the inherent nature of the parties' own binding agreement,[14] or natural justice and the morally binding nature of promises (thus harking back to the will theory of contract),[15] or ensuring that parties reap the benefits of their bargains and that goods and services find their way to those who most want them,[16] all of which furthers economic efficiency and hence overall social welfare.[17]

But the only problem with this is that almost immediately the familiar chorus is heard, noticing a great number of judicial decisions illustrating distortions from the expected generality of *Robinson v Harman* and its focus on protecting the parties' expectation of performance. Put in hypothesis-testing language, this suggests that the accepted principle does not match the observable data. That in turn suggests that the principle itself needs adjusting, either generally or at least for exceptional cases.[18]

The 'exceptional' cases are well known. These are the cases where courts deny the full operation of the parties' agreed terms where these are seen as illegitimate penalties clauses, forfeiture clauses, or restraint of trade clauses. But even outside these exceptional cases, it is clear that the general rule does not aptly encapsulate what the courts actually do in awarding remedies for breach of contract. Some of the more obvious aberrations can be listed.

First, why, if the courts are serious about protecting the parties' expectation that promises will be performed, is the 'normal' remedy not *specific performance* rather than a money equivalent? The argument for this is straightforward: promises should be enforced if the expectation interest is to be valued properly.[19] As Buckland

[13] That is, *harm* assessed against the counterfactual of proper performance: see n 7 and text to n 50. Note that this is *not* the remedy of 'reliance loss'; it is an assessment of 'expectation losses' measured by comparing the claimant's actual and expected economic positions if actual performance had been delivered. What this harm-based remedy does *not* guarantee, however, is cost of cure damages to enable the claimant to obtain the expected actual performance elsewhere.

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

[15] C Fried, *Contract as Promise: A Theory of Contractual Obligation*, 2nd edn (Oxford, Oxford University Press, 2015). See also SA Smith, *Contract Theory* (Oxford, Oxford University Press, 2004) esp 74–78, also favouring a rights-based approach, but with different justifications.

[16] LL Fuller and WR Perdue, 'The Reliance Interest in Contract Damages' (1936) 46 *Yale Law Journal* 52, 60–62.

[17] R Posner, *Economic Analysis of Law*, 9th edn (New York, Wolters Kluwer, 2014) ch 4; R Birmingham, 'Breach of Contract, Damage Measures, and Economic Efficiency' (1970) 24 *Rutgers Law Review* 273.

[18] This happens often in science. For example, Newtonian mechanics serves as a general explanation of motion in the macro world, but Einstein's theory of relativity is needed in the quantum world, still leaving a gap between the two which is not yet adequately theorised, but will be eventually (and perhaps by a grand theory covering everything).

[19] See especially L Smith, 'Understanding Specific Performance' in N Cohen and E McKendrick (eds), *Comparative Remedies for Breach of Contract* (Oxford, Hart Publishing, 2005); D Friedman, 'The Performance Interest in Contract Damages' (1995) 111 *LQR* 628; D Friedman, 'The Efficient Breach Fallacy' (1989) 18 *Journal of Legal Studies* 1.

put it, 'One does not buy a right to damages, one buys a horse'.[20] Pollock made similar observations.[21] To that same end, commentators have raised normative arguments,[22] doctrinal arguments[23] and arguments by analogy.[24] Despite this, the winner in this debate is Holmes's 'bad man' theory of contract,[25] with the courts effectively giving the promisor the choice to perform or pay damages. The suggested reasons are considered later.

Secondly, even if not specific performance, then why, with a 'protecting expected-performance' justification, is the 'normal' remedy not *cost of cure*, so that the victim of the breach can at least obtain substitute performance elsewhere? But the courts do not do this. Instead, they routinely confine C's expectation damages to the lost economic benefit that would otherwise have accrued if performance had been delivered.[26] In short, the courts award C the lost *economic surplus* that has been occasioned by the breach, not the lost *money value of obtaining performance*, unless, coincidentally, these two sums are roughly the same (or the cost of performance less).[27] The only variation on this approach is that, occasionally, this economic loss measure is supplemented with sums compensating for lost amenity value.[28]

The result of this approach is seen to dramatic effect in the now notorious case of *Ruxley Electronics and Construction Ltd v Forsyth*,[29] where a builder had constructed a pool to a lesser depth than agreed.[30] On appeal, the House of Lords declined to uphold cost of cure damages (being £21,500, a sum in excess of the original contract price for the pool), and confined the claimant to damages for lost economic surplus (£nil) and the uncontested value of lost amenity (£2,500). Similarly, in *Tito v Waddell (No 2)*,[31]

[20] FF Buckland, 'The Nature of Contractual Obligation' (1944) 8 *CLJ* 247, 249–51.

[21] F Pollock, *Principles of Contract*, 3rd edn (London, Stevens, 1881) 19: 'A man who bespeaks a coat of his tailor will scarcely be persuaded that he is only betting with the tailor that such a coat will not be made and delivered within a certain time. What he wants and means to have is a coat, not an insurance against not having a coat'.

[22] Farnsworth (n 10).

[23] RM Cunnington, 'The Inadequacy of Damages as a Remedy for Breach of Contract' in C Rickett (ed), *Justifying Private Law Remedies* (Oxford, Hart Publishing, 2008) ch 6.

[24] Suggesting that contract rights should be regarded as property, and protected as such: see, eg, D Friedmann, 'Restitution of Benefits Obtained Through the Appropriation of Property or the Commission of a Wrong' (1980) 80 *Columbia Law Review* 504.

[25] OW Holmes, Jr, 'The Path of the Law' (1897) 10 *Harvard Law Review* 457, 462; Farnsworth (n 10). See too J Nadler, 'Freedom from Things: a Defense of the Disjunctive Obligation in Contract Law' (2021) 27 *Legal Theory* 177, providing a moral defence for Holmes's 'bad man' theory.

[26] *White Arrow Express Ltd v Lamey's Distribution Ltd* (1996) Trading Law Reports 69 (CA) 73 (Lord Bingham MR): '[the *Robinson v Harman*] formulation assumes that the breach has injured [C's] financial position; if he cannot show that it has, he will recover nominal damages only'.

[27] See H Lücke, 'Two Types of Expectation Interest in Contract Damages' (1989) 12 *University of New South Wales Law Journal* 98; D Barnes, 'The Meaning of Value in Contract Damages and Contract Theory' (1996) 46 *American University Law Review* 1; 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; A Phang, 'Subjectivity, Objectivity and Policy – Contractual Damages in the House of Lords' [1996] *Journal of Business Law* 362; B Coote, 'Contract Damages, *Ruxley*, and the Performance Interest' (1997) 56 *CLJ* 537.

[28] Although only where the contract was specifically designed to supply such a benefit: *Jarvis v Swan Tours Ltd* [1973] QB 233 (CA); *Farley v Skinner* [2001] UKHL 49, [2002] 2 AC 732. Otherwise the normal position is that parties must meet the results of breach of contract with mental fortitude: *Johnson v Gore Wood & Co* [2002] 2 AC 1 (HL) 49.

[29] *Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344 (HL).

[30] ibid 362.

[31] *Tito v Waddell (No 2)* [1977] Ch 106.

an island environment damaged by mining operations was not reinstated, as promised, nor were cost of cure damages awarded, and the economic and amenity losses were nominal where the inhabitants had in any event moved elsewhere.[32]

Those choices suggest the courts are not intent on protecting the parties' expectation of performance by ordering actual performance or its cost of cure, but will order only what is required to compensate for the net economic and amenity loss actually suffered because full performance was not delivered. To that end, cost of cure is only awarded where that is shown to be the *reasonable* means of remedying no more than the '*actual* loss' sustained by C. But it is immediately plain that this formulation turns entirely on the view the courts take of C's 'actual loss', regarding it as the loss in economic and amenity benefits that performance would have delivered, not the loss which would be incurred in obtaining the promised performance elsewhere. Further, the courts regard an order for cost of cure as delivering an unwarranted gratuitous benefit to C (ie, an uncovenanted for profit[33]) and thereby unduly punishing D beyond the commitment made in their economic engagement unless cost of cure is the only means by which the claimant's 'actual loss' can be remedied.[34]

To see how this approach works, contrast *Ruxley* with the decision of the Australian High Court in *Tabcourt Holdings Ltd v Bowen Instruments Pty Ltd*,[35] where the Court held that the claimant lessor was entitled to cost of cure damages enabling reinstatement of the foyer of a leased building where the defendant lessee had, in 'contumelious' breach of contract, completely destroyed the original marble décor. The claimant's cost of cure was around $1.4 million (AUD) and its economic loss was around $34,000 (AUD). The case perhaps also illustrates the important point that the courts appear keen to preserve the *existing* assets of both claimant and defendant, fully protecting the former against harms caused by breach of contract, and protecting the latter by restricting contract remedies. Thus the promised delivery by D of a new asset to C will generally be remedied by the lost economic surplus, but D's promise to protect and preserve C's existing property, especially where the value of that property has been specifically brought to D's notice, will be remedied by cost of cure.[36]

Thirdly, and related to cost of cure, if the justification for the remedy is to meet the claimant's expectation of performance, then why is the usual money remedy for contracts entered into for the benefit of third parties merely nominal?[37] At least cost of cure would give the claimant the funds to deliver the benefit to the third party herself, or via some other third party.

[32] The analysis in this case was in any event exceptionally complex because of the uncertainties in all the arrangements between the parties.

[33] *Radford v De Froberville* [1977] 1 WLR 1262 (Ch) 1270.

[34] For the law in this paragraph, see generally *Ruxley* (n 29) esp 354, 356–58, 360–61, 363–65, 369–71; *Tito* (n 31) 332; and *Radford* (n 33).

[35] *Tabcorp Holdings Ltd v Bowen Instruments Pty Ltd* (2009) 236 CLR 272 (HCA).

[36] This urge to protect C's existing property is strong, and is seen in other areas of private law. The same instinct is seen in reverse in criminal law, where loss of personal liberty and loss of property are the primary means of *punishment* for crimes: see section III.

[37] Where *Beswick v Beswick* [1968] AC 58 (HL) is the exception that proves the rule, since the Court ordered specific performance. See also *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85 (HL); *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 AC 518 (HL). See too the limited operation of the Contracts (Rights of Third Parties) Act 1999.

Fourthly, even if the remedy awarded is not the money equivalent of obtaining alternative performance, but only protection of the victim's economic position, why is the victim's net economic loss not at the very least remedied in full? Instead, we find it is limited to what is reasonably *foreseeable* by the promisor, or, as Alderson B put it in *Hadley v Baxendale*, is 'such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it?'[38] Put another way, the claimant's protected economic and amenity interests are only those that the defendant has expressly or impliedly agreed to protect.

Fifthly, and more dramatically still, why, with this justification, and even with all the foregoing limits in place, is the victim of breach not entitled to an unfettered right to claim for the full measure of the actual economic loss, even if only the foreseeable loss, but must instead go out to the market and *mitigate* this loss, taking all reasonable steps to do so, and being debarred from claiming any losses which could have been mitigated, notwithstanding these are losses caused solely by the promisor's failure to perform as promised?[39]

Sixthly, and with ever-increasing clamours for proper explanation, why, with this justification, do the courts interfere so paternalistically with the parties' own properly agreed arrangements for default remedies, declining to regard these as promises which warrant enforcement, even when the parties fully understood the bargain they were making and had carefully and deliberately allocated the risks, thus, it would seem, deliberately and precisely framing their *Robinson v Harman* and *Hadley v Baxendale* expectations? Illustrations of court intervention in this category are usually drawn from restraint of trade clauses,[40] penalties clauses[41] and forfeiture clauses.[42] These are considered in detail later.[43]

Finally, even in those rare cases where the victim of the breach is in principle entitled to *specific performance* of the promised obligation because money damages are inadequate, why does the court nevertheless exercise a discretion to *decline* to deliver that outcome to the claimant if the consequences are too dire for the defendant, notwithstanding that the defendant is the party in breach?[44] So we find that that courts will not order specific performance of contracts of personal service because that smacks of slavery, even though the claimant cannot obtain the equivalent service on the market; nor specific performance of a contract requiring an anchor tenant in a shopping centre to 'keep open' its shops when to do so would put the tenant into penury;[45] nor specific performance of a contract for the sale of land where the vendor would suffer extraordinary personal (not economic) hardship.[46]

[38] *Hadley v Baxendale* (1854) 9 Exch 341, 357; 156 ER 145, 152.

[39] *British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd* [1912] AC 673 (HL) 689 (Viscount Haldane LC).

[40] *Egon Zehnder Ltd v Tillman* [2019] UKSC 32, [2020] AC 154.

[41] *Cavendish Square Holdings BV v Makdessi* [2015] UKSC 67, [2016] AC 1172.

[42] *Çukurova Finance International Ltd v Alfa Telecom Turkey Ltd* [2013] UKPC 2, [2016] AC 923 (on availability of relief) ('*Çukurova No 1*'); *Çukurova Finance International Ltd v Alfa Telecom Turkey Ltd* [2013] UKPC 20, [2016] AC 923 (on terms of relief) ('*Çukurova No 2*').

[43] See text accompanying nn 74–82.

[44] See, eg, *White and Carter (Councils) Ltd v McGregor* [1962] AC 413 (HL) 431 (Lord Reid).

[45] *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1998] AC 1 (HL).

[46] *Patel v Ali* [1984] Ch 283.

Of course, these listed 'aberrations' are exactly what might be expected in a mature and sophisticated contract law regime – and that is precisely the point being made in this chapter – but their significance in this section is that they sit uncomfortably with the broad general principle that the courts are seeking to protect the parties' expectation of performance. This suggests that a revision of the general principle is needed, and is needed generally, not just to deal with those exceptional cases of penalties, forfeiture and restraint of trade, where outcomes are especially harsh.

Further, and despite some suggestions to the contrary (made especially in the context of the exceptional cases), general court intervention on the grounds of fairness is not the rule. Unlike parliament, the court will only relieve parties from improvident or oppressive contracts in very limited circumstances,[47] and inevitably then the focus on whether the claimant has genuinely agreed to the deal. Otherwise, the general position holds: D has agreed, properly, to compromise both autonomy and wealth by agreeing to the contract, so should not expect the courts' own view of substantive fairness to weigh in aid against the enforcement of the contract as agreed, or the risk allocation as agreed, simply because the risks and benefits have not landed as D hoped.

For example, the penalties regime (where fairness and related arguments are often advanced) is not matched by equivalent court intervention in other areas: it is still possible to properly agree to sell a house for an extravagantly high or low price, even if it is not possible to agree to extravagant remedies for breach of the same contract. Nor do the courts prevent D validly terminating a contract because of a repudiatory breach or a breach of a condition. Recall *Union Eagle Ltd v Golden Achievement Ltd*[48] concerning a contract for the sale of land in Hong Kong, where time was of the essence and a substantial deposit was forfeited when that time limit was breached by 10 minutes. In short, party autonomy and buyer beware are still crucial in setting the framework of the deal.

What we see from these various well-known cases is that the courts are *not* intent on protecting the expectation of performance generally: there are too many exceptions and incursions into that general principle to make it useful. Nor are the courts minded to interfere on the basis of substantive fairness, even by way of exception, since the examples of intervention are matched by even greater numbers of cases going the other way. In short, the parties may have a deep personal interest in actual performance, but it is not a legally protected interest. The rule is not that promises must be kept, with remedies aligned to afford support to that right. The protection that follows a failure to keep a contractual promise is more restricted. The courts are clearly alive to some other wider interests or wider purposes beyond supporting the parties' autonomy in constructing and then enforcing their own deal.

III. Observable Truths across the Broader Legal Landscape

In considering what those wider interests or purposes might be, it is useful to compare contract law with other branches of law. There are commonalities, but also important differences. All modern societies need legal rules to operate effectively. Those rules are

[47] *White and Carter* (n 44).
[48] *Union Eagle Ltd v Golden Achievement Ltd* [1997] AC 514 (PC).

determined by the state (either by the legislature or the courts) and backed by state sanction. That differentiates these rules from moral and social rules, codes of practice and commercial norms, all of which make life more enjoyable, but do not come with the threat of judicial sanction for their breach.

What is important for current purposes is not the rules themselves, but the fundamental differences between the different categories of these rules. Criminal law, for example, demands compliance with its rules, and does so in order to protect the most fundamental aspects of the state's social order. Where there is failure to comply with these rules, the punishment meted out to the wrongdoer involves loss of liberty or subtraction of property, or both. These sanctions are against two especially valuable individual rights, usually highly protected by the courts, but both open to being removed when the seriousness of the public wrong demands it.

Compare that with remedies in tort. Tort law – like criminal law – sets state-mandated minimum standards of conduct, imposed so people can live together without threat of unsanctioned personal or property harm. With tort, the intent of the remedy is to require the defendant to repair the harm caused when the defendant acts outside these state-mandated minimum standards. Even here, however, and despite the importance of tort obligations, the courts adopt a number of pragmatic limits imposed in the interests of protecting defendants from unsustainable life-destroying liability. This is done by various means, including excluding liability for some harms even when they were caused by the defendant's wrong (eg refusing claims in negligence for pure economic loss, or holding certain losses to be too remote or unforeseeable), or by withholding an effective specific remedy where it would excessively limit the defendant's personal liberty (thus declining injunctions or specific performance, and awarding money damages instead).

In short, both criminal and tort law rules require minimum state-imposed standards of conduct to be met, with failure warranting legal sanction, be it punishment for criminal behaviour or imposing liability for harming the protected interests of others as in tort. Unjust enrichment law sets similar state-imposed minimum standards in requiring defendants to make restitution of enrichments unjustly obtained, again with pragmatic limits on liability to make restitution (eg the defence of change of position).

Contract law is quite different. This regime does not have the same normative force as criminal law, or tort and unjust enrichment law. The latter all set state-imposed obligations requiring minimum standards of behaviour for the good of society. Contract, by contrast, is clearly seen as an economic and social good, but the state – and so its courts – is not invested in the *actual performance* of the particular obligations agreed by the parties. It has no particular concern with whether Fred receives the promised apples or Magda has her walls painted orange. Those privately agreed obligations are not of the same order as whether Joe is harmed by someone's careless driving, or Jill has suffered an unjust enrichment at the hands of some third party. The difference is that these latter obligations are obligations which the state – via its courts or its legislature – has decided that citizens must obey. It *is* then important for the courts to enforce these obligations and lend the machinery of the courts to that endeavour. There is not the same imperative with the random individually selected obligations agreed bilaterally in a contracting framework. With those, neither the court nor the state is invested in performance of the specific obligation undertaken; it is simply invested in supporting parties in their contracting endeavours.

This is a crucial distinction. It means we should not expect the same easy and necessary alignment between obligation and remedy that we find in other areas of private law. Put more directly, we should pay careful attention to the *unimportance*, to the state, of the specific contractual promises between the two parties, and the great importance, to the state, of the institution of contracting as a practice.[49]

That particular distinction would seem critical in formulating the impetus, or animating principle, in the courts' responses to contract breaches. By contrast, the currently accepted animating principle risks treating contract obligations as in the same class as tort obligations, and so settles on the goal of *protecting the parties' expectation of performance of their agreed obligations*. But that offers a poor fit with reality: the previous section demonstrated the lack of alignment between this stated principle and what the courts actually do in ordering contract remedies. That suggests a new animating principle is needed which better describes the reality.

IV. Hypothesis Development

My proposed hypothesis emerges directly from the previous sections. It postulates that the overriding impetus for the courts' intervention in delivering contract remedies is to *protect the institutional practice of contracting*. This recognises the importance of the practice of contracting but the unimportance to the courts of the individual promises made by the parties. I go further and suggest that, in pursuing this impetus to protect the practice of contracting, *the best strategy is to focus on removing the risks of contracting, not on delivering the rewards bargained for*. This too affirms the distinction between the importance of the practice of contracting and the unimportance of the particular promises made by the parties. In addition, it has the further advantage of managing the risk of harm whilst also leaving maximum autonomy in the parties' hands: since their private obligations are not obligations imposed by the state, the state has little concern with whether the parties perform or not, so long as they remedy the harm caused by their change of mind.

To that end, under this hypothesis the counterfactual in any assessment of court-ordered remedies for breach of contract remains performance of the promised obligation, but the court-ordered remedy does not seek to put claimants in the same situation as if performance *had* been delivered; it merely seeks to remedy the harm caused by performance *not* being delivered.[50] That can be achieved in a more modest way than by enforcing performance or granting cost of cure; it can be done simply by ensuring that the anticipated but not-delivered economic and amenity surplus is compensated for

[49] See the instinct towards just this error, section II, text accompanying nn 19–25.

[50] The harm which needs to be remedied here is not the reliance loss discussed in standard works on contract remedies. That loss is merely the claimant's wasted expenditure. By contrast, the harm here is the claimant's lost economic surplus and amenity surplus with the counterfactual being the position the claimant would have been in with proper performance in compliance with the agreement, compared with the position they now find themself in. That in turn contrasts with what many suggest ought to be the objective of traditional *Robinson v Harman* expectation damages, which is to give the claimant enough in damages to obtain the expected performance even if from third-party sources. However, as demonstrated in section II, that is not what the courts do, regardless of their stated commitment to *Robinson v Harman*.

in money. Alternatively, but only rarely, the courts may order specific performance of the promised obligation, but only when that is the only reasonable means of remedying the harm arising when non-performance materialises.

V. Testing the Hypothesis against Existing Contract Cases

This section seeks to test the hypothesis that the impetus for the courts' intervention in delivering contract remedies is to protect the institutional practice of contracting, and, further, that it does this by focusing on removing the risks of contracting, not delivering the rewards of contracting. The courts have never claimed this specific endeavour as their role, so what is sought is fit with outcomes, not proof of judicial motivation. Nevertheless, this section demonstrates that, instinctively, judges appear to have delivered a regime perfectly shaped to meet the objectives of supporting the practice of contracting.

Moreover, the fit with this hypothesised objective is far better than the fit with the currently accepted objective of protecting the parties' interests in performance of their agreed obligations. Sometimes the two measures coincide, but that is a fortunate (and frequent) coincidence, rather than an intended correlation. There are just too many accepted rules in contract law's remedial canon – not only the rules on the practicalities of assessing damages, but also the associated rules on foreseeability and mitigation – for it to be sustainable to claim that the courts' objective is to protect the parties' interests in actual performance of their agreed obligations.

By contrast, what this hypothesis does is recognise that the courts' role in supporting contracts is not to deliver to claimants the value of the performances they have been denied, but simply to enable them to rely on promises, because the court will order a remedy which supports the parties' risk allocation, and will do that by removing from claimants the economic and amenity risk of non-performance, while at the same time not insisting on actual or substitutional cost of cure performance by the defendant.

This approach is beneficial for the institution of contracting. It enables parties to rely on remedies that repair, in money, the damage arising from misplaced reliance on the promised economic and amenity benefits. On the other hand, it also recognises that the defendant's failure to comply with a contractual obligation is not a legal wrong of the same order as breaches of criminal law or commissions of a tort. Accordingly, the remedy does not need to endeavour, so far as money can do it, to put the claimant in the same position as if the obligation had been complied with.

The proposed hypothesis thus supports both claimant and defendant in their contracting endeavours. The defendant is required to bear the loss caused to the claimant by the latter's reliance on the promised delivery of performance. However, because this loss is limited to the economic and amenity harm the claimant suffers, defendants know they will not be required to give up their liberty in an irrevocable commitment to deliver as promised, nor their property beyond what is necessary between reasonable contracting parties to make the claimant financially whole. This balanced strategy thus recognises the very different nature of contractual obligations: they are not like obligations in crime, tort or unjust enrichment. This in turn facilitates a remedial approach that is beneficial to the institution of contracting.

A. General Issues of Enforcement

All this fits remarkably well with the courts' approach to determining which arrangements merit court support and which do not. Since the impetus for court intervention in private arrangements is to protect the practice of contracting, the courts will lend their support to the parties to a contract, but not to parties promising gifts or other moral undertakings.[51] For the same reason, and absent legislative intervention,[52] courts should not allow third-party beneficiaries to enforce a contract made for their benefit: that would effectively permit the third party to enforce a gift being made to the third party by one of the contracting parties.[53] The proposed hypothesis thus justifies the judicial approach to contracts for the benefits of third parties, and may help resolve the controversies surrounding them.

In the same vein, non-contractual arrangements are not enforced,[54] nor are agreements lacking proper consent,[55] and because enforcement is only of the terms that are actually agreed, issues of contractual interpretation are vital. But within those limits, the courts accept that there is a deal between the claimant and the defendant, properly agreed, where the courts will order remedies for breach.

If the intent is then to protect the practice of contracting, we would expect the courts to resist interfering with terms properly agreed by the parties. The courts should have no special concern with *what* is agreed, provided it does not require the parties to act illegally. This judicial indifference is because party-agreed primary obligations are quite unlike state or court-mandated primary obligations in other areas of private law, so the courts have no special interest in their particular content, simply in the extent to which the courts will give support in ordering remedies. Moreover, this indifference should apply regardless of whether the court itself regards the arrangement as unwise or one-sided or unfair, provided only that the parties' consent is full and proper.[56]

And indeed this is what the courts do. Later discussion suggests that even party-agreed remedial terms follow this model,[57] but it is abundantly clear, at least outside those controversies, that the courts enforce the primary obligations agreed by the parties, providing default remedies that respond to these agreed terms. Accordingly,

[51] State and court support for contracting is pragmatic. Contracting based on trust is impossible to sustain in larger communities where parties do not know each other well; it requires the backing of legal sanctions for breach. By contrast, gifts or moral undertakings are typically confined to trusting parties, where adding legal sanctions is counterproductive, reducing the moral value of the activity by converting it into a legal obligation rather than an expression of personal moral choice.

[52] See, eg, Contracts (Rights of Third Parties) Act 1999 (UK), allowing such claims in limited circumstances unless the contracting parties exclude the third-party right, which well-advised parties frequently do.

[53] Although of course the contracting parties retain their rights against each other, and can specifically allocate the risks of non-performance. See the relevant cases listed at n 37.

[54] Although if the context permits, D's induced harm caused to C may be remedied by C's claims in tort (typically misrepresentation) or proprietary estoppel.

[55] Where the courts' response is to rescind *ab initio*, endeavouring to put the parties back in the position they were in before the agreement was entered into, see D O'Sullivan, S Elliott and R Zakrzewski, *The Law of Rescission*, 3rd edn (Oxford, Oxford University Press, 2023).

[56] And where consent is not proper, then the deal should be unwound: ibid.

[57] See section V.C. Here the discussion is confined to party-agreed primary obligations and the courts' imposition of default remedies.

courts enforce harsh agreements as to price, rent escalation clauses,[58] exclusion clauses,[59] termination clauses or clauses imposing conditions.[60] The courts' treatment of these and other similar clauses indicate the courts' exceptionally strong commitment to party autonomy in settling the terms of the parties' agreement.[61]

B. Court-ordered Default Remedies

Once the courts have established that the parties before them have properly agreed to be bound by certain contractual terms, the courts then have to deal with remedying breaches of these party-agreed terms. Under the hypothesis proposed here, the courts will order money damages only to the extent of lost economic surplus and lost amenity surplus, not cost of cure. This suggested approach to damages is one which inherently protects the defendant from excessive drains on their resources and ensures the claimant is not 'overcompensated', but it affords no protection from the consequences of bad deals or miscalculated risk-taking.[62] A number of outcomes follow as a matter of course if this is the approach adopted by the courts, and all are familiar sights in the contract landscape, thus suggesting the hypothesis affords a good match with the data.

First, the starting point in court-ordered remedies is not specific performance. This is plain from the impetus described in the hypothesis and from its justification. These party-agreed obligations are not obligations the court has any special interest in enforcing. It is therefore of little consequence if the parties decline to perform, as they are at liberty to do (there being no legal obligation mandating otherwise) provided others are not harmed by this choice to breach the contract. This concern with prevention of harm reflects the courts' support for the institution of contracting as distinct from any support for the particular promises made by the parties.

Secondly, the court-ordered remedy is to repair the harm caused by the defendant's failure to deliver on the promise. This is expectation damages, in that the counterfactual is the position the claimant would be in were the contract performed as promised, compared with their position now, ie, it is loss measured against expectation interest, not a loss measured against the need for performance itself. If this delivers a money remedy which fortuitously enables cure (as it often does), then that is by fortunate correlation rather than necessary or intended causation. Market rises and falls are also accommodated in the risk allocation between the parties.

[58] *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619.

[59] Subject to restrictions imposed by statute. Otherwise these terms can be seen as important means by which the parties indicate 'I am not promising X', and – it follows – therefore I cannot be made liable for the non-delivery of X.

[60] These too indicate the limits of the parties' willingness to remain bound together in the deal. *Union Eagle* (n 48) is the notorious example.

[61] *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827 (HL). The key cases are considered in detail in S Worthington, 'Common Law Values: The Role of Party Autonomy in Private Law' in A Robertson and M Tilbury (eds), *The Common Law of Obligations: Divergence and Unity* (Oxford, Hart Publishing, 2016) ch 14.

[62] That is left to the common law's careful consideration of whether terms have been properly agreed, or to the legislature's intervention in protecting especially vulnerable parties or parties in especially risky contexts.

Thirdly, with the goal of protecting the practice of contracting, not the specific deal, the defendant themself is protected by only having to pay out what is *reasonably* necessary to repair the claimant's harm, so contract damages are limited by *foreseeability*, in that the claimant's protected economic and amenity interests are only those that the defendant has expressly or impliedly agreed to protect; and the claimant too must behave reasonably and *mitigate* their losses, so that they do not make wasteful demands of resource from the defendant which they could reasonably have avoided by their own actions.[63] The only exception to this appears to be where the defendant's unperformed promise is to pay a debt; then, it seems, mitigation is not needed.[64]

Fourthly, there is the issue of specific performance and when, exceptionally, it is ordered. On the hypothesis advanced, it is ordered only when it provides the only reasonable means of repairing the loss of economic and amenity benefits that were promised to the claimant. Even then, there are limits when specific performance would drive the defendant into slavery or penury,[65] or cause unwarranted loss of the defendant's own assets.[66]

Notwithstanding those constraints, the courts typically regard the claimant as *entitled* to specific performance of a contract of sale where the defendant has failed to transfer special or unique assets such as land, a Picasso painting or a Ming vase.[67] The reason given is that, in these contexts, damages are inadequate. Since the sale objects are clearly special, that assertion is usually accepted without question. Yet it has one oddity. Amenity damages are a relatively new invention in contract law damages. And in measuring economic loss, what claimants are usually entitled to is not the cost of cure, but only the lost economic surplus. Even in these special contexts, that can probably be calculated, if only with some difficulty: it is why investors invest in these types of assets. Now, however, I suggest we can recognise that a better justification for these cases – and one more likely to fit the facts – is that for most people these purchases are motivated not by economic gains but by enormous and very particular and personal amenity value gains. In that context, where equivalents simply cannot be found, that lost amenity value can only be remedied by ordering specific performance of the sale. This, and only this, remedy will protect the institution of contracting in respect of these unique goods. If judicial support is sought for this proposed justification based on protecting amenity values, it might be found in the Canadian case of

[63] See text accompanying n 39.

[64] See *White and Carter* (n 44) (Lord Reid). However, this is an exceptionally controversial decision: for an indication of the debates this has raised both judicially and in academic commentary, see A Burrows, *Remedies for Tort, Breach of Contract, and Equitable Remedies,* 4th edn (Oxford, Oxford University Press, 2019) 383–87; McKendrick (n 5) 413–15. Also see text accompanying nn 74–79.

[65] *Argyll Stores* (n 45).

[66] However, in those circumstances the claimant can request Lord Cairns' Act damages – now s 50 of the Senior Courts Act 1981 (UK) – which enables the award of compensation for continuing future harm in the absence of an injunction or specific performance: see the analysis of this option in S Worthington, 'The Damage in Negotiating Damages' in E Peel and R Probert (eds), *Shaping the Law of Obligations: Essays in Honour of Professor Ewan McKendrick QC* (Oxford, Oxford University Press, 2023) 185–87.

[67] Most of the academic research in this area then focuses on the proprietary consequences of this assumption, a route I also took: see S Worthington, *Proprietary Interests in Commercial Transactions* (Oxford, Oxford University Press, 1996) 194–220.

Semelhago v Paramadevan,[68] where the Supreme Court of Canada indicated claimants would henceforth be required to prove the unique (presumably amenity) value of land being purchased. This could well put land development investors in a different class from typical domestic purchasers, with the former being awarded money remedies reflecting lost economic surplus, not lost amenity surplus, but the latter awarded specific performance, reflecting the inability to remedy the lost amenity surplus in money.

In summary, and at least so far as the courts' rules on default damages are concerned, the proposed hypothesis fits remarkably well with existing case law. Courts motivated by protection of the practice of contracting, rather than protection of the parties' expectation of performance of their own deal, can readily and fully recognise the parties' autonomy in constructing the deal, including deals which greatly favour one party over the other. More importantly, with this motivation, courts will remedy the claimant's exposure to the risk of non-performance, but are not motivated to provide them with the equivalent of actual performance, the court having no special interest in ensuring the parties keep to the particular private promises they have made. Remedies structured in this way facilitate economic exchange because the parties do not feel exposed to the risk of excessive damages or excessive restriction of their personal freedom, and this formulation in turn provides predictability and certainty so that parties can negotiate and settle in the shadow of a reasonably clear remedial framework.

C. Court Responses to Party-agreed Remedial Terms

The above analysis concerned the generalities of contract remedies and the detail of court-ordered default remedies. However, that leaves at large the often-controversial judicial reaction to party-agreed remedial clauses, here taking a broad view of what that encompasses.

The courts have shown a special predilection for resisting the enforcement of party-agreed remedies. This sits oddly alongside their willingness to enforce other harsh terms concerning price, conditions, termination clauses, exclusion clauses (even if construed against the interests of the protected party) and such like. But if the parties provide in their contract that 'if A is not done, then B must be done', then the courts are on alert.

The first question to ask is whether, in doing this, the courts are rewriting the parties' contract (by declining to enforce the terms agreed) or whether they are doing something else. The instinct is that they are rewriting the terms of the parties' contract.[69] I once subscribed to this view, at least in the context of penalties.[70] And indeed the courts encourage that error by labelling the parties' agreed terms as primary obligations and secondary obligations, with the latter being remedial, and – at least in the

[68] *Semelhago v Paramadevan* [1996] 2 SCR 415.

[69] As even the Court of Appeal has accepted: see *Makdessi* (n 41) [44].

[70] And still do if the courts persist with their current analysis: Worthington (n 61). But here I propose an alternative route to my preferred ends.

penalties context – the courts then having a licence to interfere if the parties' own agreed 'remedy' is greatly in excess of what the courts would have awarded by way of default remedy, although now expressly allowing the parties to include sums by way of deterring the defendant's breach of the primary obligation.[71]

This primary/secondary distinction, where both are party-agreed terms, then appears to map seamlessly onto the terminology used in court-ordered default remedies cases, where the contract sets out the primary obligations and the court determines the secondary obligations to be ordered on breach. It also seems to map equally seamlessly onto the terminology used in tort and unjust enrichment cases, where breach of a primary obligation (here settled by courts or the legislature) is again remedied by court-ordered secondary obligations.

Put like that, it is immediately obvious that party-agreed secondary obligations are obligations of quite a different character to the court-ordered obligations otherwise in the frame. This, it seems, introduces an unwelcome analytical error. In the usual case, the court considers the primary obligation, its breach, and the remedy that the court should then order in response, that remedy being a court-ordered secondary obligation imposed on the defendant. In those circumstances we do not say the court is rewriting the parties' primary obligation; instead, we say the party-agreed (or court or legislatively agreed) primary obligation is backed by the sanction of the state only to the extent of the secondary obligation the court is prepared to order in order to protect the promisee of the primary obligation.

Surely the better analysis is that *all* party-agreed terms are primary obligations, and the *only* secondary obligation in the frame is the court's response to breach of those terms, thus following the general model in private law. This would mean that *all* contractual terms impose *primary* obligations on the contracting parties, even if some of those obligations are alternatives or appear 'remedial'.[72] The language would then match reality. The parties cannot, by their own contract, impose secondary obligations backed by the machinery of the state, since parties have no power to impose such demands on the state without the state's agreement.[73]

What would then follow, analytically, is that when all the alternative primary obligations in the contract have been exhausted, and D *is* in breach of contract, then C will *need to come to court and see what the default remedy/secondary obligation imposed by the court* is for the alleged breach – with C deciding which breach(es) to pursue. This simple logic step – which must surely be correct – can then assist in dealing with some of the categories of cases which have proved most troubling in the context of contract remedies. Only two examples are considered here.

The first relates to *penalties*. The standard model in penalties cases is that D promises to fulfil an obligation (A), and, failing that, to pay a sum of money (B).[74] When D does

[71] *Makdessi* (n 42).

[72] As argued in S Worthington, 'Penalty Clauses' in G Virgo and S Worthington (eds), *Commercial Remedies: Resolving Controversies* (Cambridge, Cambridge University Press, 2017) 374–79.

[73] It is for this reason that parties to a contract cannot agree, eg, that the remedy for breach will be imprisonment of the contract-breacher, or specific enforcement of the term (as to the latter, see *Quadrant Visual Communications v Hutchison Telephone (UK)* [1993] BCLC 442 (CA)).

[74] Although note the *Makdessi* discussion of non-money alternatives in the penalties jurisdiction, and query whether this expansion is apt: *Makdessi* (n 42) [16] (Lords Sumption and Neuberger), 1257–58 [183]

neither, C typically complains that D has failed to do B,[75] and C now wants the court *to specifically enforce D's obligation to do B*. Of course, the general rule – a rule justified earlier – is that the court has a discretion over such orders and may instead merely order a money remedy. But the obvious problem in these circumstances is that B is (usually) an obligation to pay money; it is a debt, and the court routinely simply enforces the debt provided it is due.

On this analysis, which seems more principled and doctrinally satisfactory than having the court simply declare void one term of the parties' agreement by way of dramatic exception to its usual practices,[76] is there any way to reach the conclusion the courts would like to reach, albeit only exceptionally? Where obligations A and B appear to be reasonable alternatives, and noting that the inclusion of a deterrent is reasonable, then I suggest not: the debt should simply be enforced. But where the courts are put on alert by an exceptional disproportion, then the obvious enquiries are, first, was the term properly agreed;[77] secondly, do all debt obligations *need* to be specifically enforced;[78] or, thirdly, was obligation B posted by way of a *guarantee* of performance,[79] opening up analyses analogous to those operating with forfeiture clauses, considered next.

With *forfeiture clauses*, D typically promises to fulfil a service or debt obligation (A), and, failing that, to forfeit some interest they have in property (B). Although the starting point looks similar to penalty clauses, the outcome is not. This is because the 'remedial clause' (B) is not a debt obligation.[80] If D fails to do either A or B, C will clearly *go to court asking for specific performance of B, the forfeiture clause*. The usual rule applies: the court will not order specific performance unless money damages are inadequate. This rule was examined earlier, and found to be in full accord with the proposed hypothesis and its impetus to protect the practice of contracting. In forfeiture cases, *if* the clause is inserted by way of security (and only if), and *if* the defendant can perform obligation A, albeit late, but with damages which compensate for that lateness and any consequential losses, then the court will afford D relief from forfeiture. In short, *if* C can be fully protected without resort to the promised security, then that is the route the courts will take; they will *not* specifically enforce forfeiture

(Lord Mance), 1271 [230] (Lord Hodge). Space prevents discussion here, but see F Halbhuber, 'The Scope of the Penalty Jurisdiction: A Critical Analysis of the Application of the Rule Against Penalties to Contentious Clauses' (2022) 11 *The Oxford University Undergraduate Law Journal* 90; A Summers, 'Unresolved issues in the Law on Penalties' [2017] *Lloyd's Maritime and Commercial Law Quarterly* 95; C Conte, 'The Penalty Rule Revisited' (2016) 132 *LQR* 382. More generally, see Worthington (n 72); and S Worthington, 'The Death of Penalties in Two Legal Cultures?' (2016) 7 *UK Supreme Court Yearbook* 129.

[75] And also failed to do A, since otherwise the failure to do B would not be a breach at all.

[76] This is especially so when the courts will enforce obligation B provided the parties word their contract so that it does not fall foul of the penalties jurisdiction by posing A and B as *alternatives*, not as the primary requirement being A and the remedial consequences of failing to do A being B.

[77] But it would often be difficult to argue it was not, especially in a detailed written contract negotiated with legal advice.

[78] See the controversial issues noted in text accompanying nn 44–45.

[79] See Worthington (n 61) 316. However, it would, I suggest, require very special facts and appropriate contract wording to reach this conclusion.

[80] Hence the query about the suggested expansion of penalty clauses to include obligations to hand over property. The assumed similarities seem to ignore a key difference in what is being promised by contract: see n 74.

of D's property unnecessarily. But if the clause is by way of security and D cannot deliver on obligation A, with damages added for delay, then the courts *will* specifically enforce the security, since money damages that cannot be paid are not adequate damages when C and D have expressly agreed to a security arrangement intended to remove that risk from C.[81] Explained that way, the jurisdiction is a limited one. The cases support that limited vision.[82]

Notice further, however, that any security arrangement requires D to offer up their *own* property as hostage or security for the obligation they promise to C. It is easily possible for D to make that arrangement in relation to assets D owns, such as patents or shares.[83] And at first glance it seems equally easy to say that this option is not open when D's rights are only contractual. This is the approach the courts take.[84] However, the reality may not be quite so straightforward. The line between property and contract is a difficult one,[85] and if a security by way of *charge* can be granted over receivables (ie, debts, being the ultimate example of a contract right), then it is difficult to see why relief from forfeiture could not be granted where the forfeiture of receivables is agreed by way of security.[86] If that were true – and it is difficult to see why it is not – then this area may need far more careful analysis, one that runs head-on into the issue discussed next.

The exceptionally difficult cases are those where D's proprietary or possessory interests are inherently time-limited, and moreover are interests in C's property, granted by C to D. This might be C's grant to D of a possessory interest in land[87] or in machinery, for example. In those circumstances, is a provision which terminates D's possessory interests before the end of the agreed term, and does so on D's breach of another obligation, to be construed as a termination of the hire contract for breach of *condition*,[88] or as a clause agreed by way of *security* for the enforcement of the breached obligation?[89] And, pursuing my earlier comment on the possibility of security over contractual rights, precisely the same problem can be seen there too. The choice between these different constructions is likely to be fraught: the outcomes for D are vastly different, and yet the parties are unlikely to have appreciated the subtleties of the distinctions in their negotiations. Although this issue must remain

[81] Contrast that with the analysis which would apply if B were not an obligation agreed by way of security, but merely an obligation to transfer an asset. See text accompanying nn 19–25.

[82] See *Çukurova No 1* (n 42) (on availability of relief); *Çukurova No 2* (n 42) (on terms of relief).

[83] *BICC plc v Burndy Corp* [1985] Ch 232 (CA); *Cukurova 2* (n 42) (on availability of relief).

[84] *Sport International Bussum BV v Inter-Footwear Ltd* [1984] 1 WLR 776 (CA, HL) (relief from forfeiture not available in respect of termination of an exclusive licence to use C's trade names and trademarks); *Scandinavian Trading Tanker Co AB v Flota Petrolera Ecuatoriana* [1983] 2 AC 694 (HL) (relief not available in respect of termination of a time charter of a ship – a time charter not being a 'hire' giving D possession of the ship, but rather the provision by C of a fully manned and serviced ship to meet D's needs).

[85] S Worthington, 'Property | Contract' in W Day and J Grower (eds), *Borderlines in Private Law* (Oxford, Oxford University Press, 2024) ch 13.

[86] The short answer to that is probably that security by way of charge is such a simple possibility, the parties would be expected to adopt that option. But then the same could be said of all these relief from forfeiture cases.

[87] I exclude discussion of leases which give D an estate in land, protected by the Law of Property Act 1925 (UK).

[88] As in *Sport International* (n 84).

[89] As in *Manchester Ship Canal Co Ltd v Vauxhall Motors Ltd* [2019] UKSC 46, [2020] AC 1161.

a problem for another day,[90] it does not dent the efficacy of the hypothesis proposed here. Indeed, it perhaps shows its usefulness, with cases then needing to be resolved on their own particular facts, but with tight and robust doctrinal analysis, not the mere application of conclusionary labels.

By way of closing comment, the purpose of this section has been to show that the hypothesis proposed in section IV – that *courts are motivated by a desire to protect the institution of contracting, not the particular deal agreed by the parties* – provides a good fit with the outcomes in decided cases. That has been done. Indeed, the hypothesis appears to provide a better fit with decided cases than the currently accepted principle – that courts seek to enforce the parties' expectation of performance of their contract by providing remedies which put parties in same situation as if their contract had been performed.

If it is true that the hypothesis provides a better fit with decided cases, then it would seem to be a preferable guiding principle for the future.

VI. Conclusion and Ramifications

All law is delivered by means of state sanctioned rules, so the issue for this chapter is not state control, but the *impetus* for that state control in the context of contract law, and in particular contract remedies.

The key claim made in this chapter is that the overarching purpose being pursued by the courts in delivering contract remedies is to *protect the institution of contracting because it is a social good*. It is not to enforce the particular obligations agreed by the parties, which may have no compelling normative social benefit in themselves. Moreover, the courts achieve that end by removing the *risk* of contracting, not by delivering the anticipated *reward* of contracting.[91] Both are measured against the counterfactual of expected performance, but all the cases, whether concerning the courts' default rules on remedies or the courts' treatment of party-agreed remedies, are consistent with the 'removal of risk' analysis, not the 'delivery of reward' analysis.[92]

Since this new hypothesis provides a better fit with decided cases, it would seem to provide a preferable guiding principle for the future. If this appears to be a 'novel' or

[90] A perfect starting point is the perceptive treatment of these issues by Mr Justice Timothy Fancourt in 'Forfeiture, Penalties and Damages in Property Law' (8th Annual Property Law Lecture, School of Law and Social Justice, University of Liverpool, 21 February 2023), www.judiciary.uk/the-8th-annual-property-law-lecture-at-the-school-of-law-and-social-justice-in-the-university-of-liverpool.

[91] For the 'reward' approach, see the discussion of the orthodox *Robinson v Harman* (1848) 1 Ex 850, 855; 154 ER 363, 365 principle in text accompanying nn 10–12.

[92] This chapter also advances three subsidiary findings: first, that contractual analysis would be far simpler if we confined the terminology of secondary (remedial) obligations to court ordered obligations, and recognised *all* party-agreed obligations as primary obligations regardless of their form or function (see text accompanying nn 72–73); secondly, that orders for specific performance of contracts for the sale of unique goods are probably better justified as protecting *amenity* surplus, not economic surplus (see text accompanying n 68); and, finally, that we have a difficult problem distinguishing between termination clauses and forfeiture clauses in cases where the proprietary interests in issue are themselves inherently time-limited (see text accompanying nn 87–90).

'courageous' proposal – in the '*Yes, Minister*' sense – then it is worth noting that it is far from being a new idea. It is the basis of the ancient *lex mercatoria*: as Montesque put it, 'the law constrains merchants in the interests of commerce'. So if this *is* an old idea, it seems to be an old idea that is well worth reviving in the interests of explaining why the courts do not – and properly do not – deliver *Robinson v Harman* damages in every single case. What the courts are doing instead, and properly doing, is protecting the institutional practice of contracting, not the precise deal between the parties. And all credit to them for that.