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DAMAGES FOR BREACH OF CONTRACT: COMPENSATION, RESTITUTION, AND VINDICATION*

David Pearce and Roger Halson**

Introduction

'The function of the law is to enable rights to be vindicated and to provide remedies when duties have been breached.'¹ The purpose of this article is to explore the extent to which the English courts pursue a vindicatory function when awarding a remedy for breach of contract and, in particular, to examine the function of contractual damages. Vindication describes the making good of the claimant's legal right by the grant of an adequate remedy. Unless an infringed right is met with an adequate remedy, the right is 'a hollow one, stripped of all practical force and devoid of all content'.² As society becomes more rights-focused and English law more rights-based,³ the vindicatory function is likely to become increasingly evident. In this piece two related claims concerning vindication are put forward. The first is that the English courts already recognise that their primary objective in awarding a remedy for breach of contract is the vindication of the claimant's rights under that contract. While the limited availability of specific relief and the preference for compensation as a substitute for performance suggest that contractual rights are vindicated only in a weak sense, closer examination of conventional compensatory principles reveals that compensation is very much a means to an end rather than an end in itself. That end is the making good of the claimant's right to performance of the contract. The second claim is that a discrete remedy, vindicatory damages, may be identified in contract cases. Up until the 'new start'⁴ heralded by the decision in *Attorney-General v. Blake*,⁵ it was commonly accepted that damages for breach of contract were exclusively loss-based.⁶ The fundamental basis of contractual damages was to compensate 'for pecuniary loss naturally flowing from the breach'.⁷ But in *Blake*, the House of Lords acknowledged that English 'law does not adhere slavishly to the concept of compensation for financially measurable loss': damages may be measured

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¹ *Chester v. Afshar* [2004] UKHL 41; [2005] 1 A.C. 134 at para. 87 *per* Lord Hope of Craighead.

² *Ibid.*

³ As far as statutory developments are concerned, examples include the Human Rights Act 1998, the Contracts (Rights of Third Parties) Act 1999, and the Data Protection Act 1998.

⁴ *Experience Hendrix LLC v. PPX Enterprises Inc.* [2003] EWCA Civ 323; [2003] E.M.L.R. 25 at para. 16 *per* Mance L.J.

⁵ [2001] 1 A.C. 268.

⁶ Nominal damages aside.

⁷ *British Westinghouse Electric and Manufacturing Co. Ltd. v. Underground Electric Railways Co. of London Ltd.* [1912] A.C. 673 at 689 *per* Viscount Haldane L.C. Similarly, see *Farley v. Skinner* [2001] UKHL 49; [2002] 2 A.C. 732 at para. 16 *per* Lord Steyn: the 'general principle is that compensation is only awarded for financial loss resulting from the breach of contract'. For recovery of non-pecuniary loss see *Watts v. Morrow* [1991] 1 W.L.R. 1421 and *Farley v. Skinner* (*ibid.*)

by the gain made by the defendant.⁸ The precise nature of such damages has proved controversial. Some judges and commentators maintain that gain-based damages are restitutionary, others, that the damages remain compensatory. The better view, it is suggested, is that these damages are vindicatory in nature. Vindicatory damages, which to date have only been explicitly recognised in the context of constitutional rights,⁹ are neither loss-based nor gain-based: they are a rights-based remedy. As well as providing a just remedy in suitable cases, vindicatory damages offer a further benefit. For at present, the concept of loss in English contract law is in danger of being over-stretched. Extending the availability of vindicatory damages to contractual actions would provide a more accurate explanation of the remedy awarded in certain cases and would help to preserve the coherence of the conventional remedies of compensation and restitution.

The right to performance

It is important at the outset to clarify the extent of the rights which a party acquires under a contract. When entering into a bilateral, or synallagmatic, contract, each party acquires 'a legal right to the performance of the contract'¹⁰ and at the same time 'assumes a legally recognised and enforceable obligation to perform' it.¹¹ For 'the purpose of contract is performance'.¹² *Pacta sunt servanda*. Liability in contract may be contrasted with that imposed in the tort of negligence. The obligation in negligence is 'an obligation to compensate the claimant against loss which was a reasonably foreseeable consequence of his carelessness'.¹³ Liability in negligence is founded 'not on the act but on the consequences' of the act.¹⁴ 'There is no free standing obligation or duty of care.'¹⁵ Liability in contract, by contrast, is founded on the act of agreement.¹⁶ The most obvious means of vindicating the claimant's right to performance of the contract is to order the defendant to perform. Where the relevant obligation is to convey an interest in land, or refrain from doing something, or pay a sum of money, the English courts will generally vindicate the claimant's corresponding right by an order of specific performance, by an injunction, or by judgment for the fixed sum. But specific relief, particularly in the form of an order for specific performance or an injunction, nevertheless remains the exception rather than the rule in contract. While the vindicatory function may be becoming increasingly evident, recent cases reveal a disinclination to expand the availability of

⁸ *A.-G. v. Blake* [2001] 1 A.C. 268 at 285 *per* Lord Nicholls of Birkenhead. The actual remedy awarded in *Blake* was not damages but an account of profits. As to whether this is a distinction without a difference, see *World Wide Fund for Nature v. World Wrestling Federation Entertainment Inc.* [2007] EWCA Civ 286; [2007] All E.R. (D.) 13 (Apr.) at para. 58 *et seq.* *per* Chadwick L.J.

⁹ See *The Attorney General of Trinidad and Tobago v. Ramanoop* [2005] UKPC 15; [2006] 1 A.C. 328 and *Merson v. Cartwright* [2005] UKPC 38; [2006] 3 L.R.C. 264.

¹⁰ *Alley v. Deschamps* (1806) 13 Ves. Jun. 25 at 27-28 *per* Lord Erskine.

¹¹ *In Re T & N Ltd.* [2006] 1 W.L.R. 1728 at para. 26 *per* David Richards J.

¹² *George Mitchell (Chesterhall) Ltd. v. Finney Lock Seeds Ltd.* [1983] Q.B. 284 at 304 *per* Oliver L.J.

¹³ *In Re T & N Ltd.* [2006] 1 W.L.R. 1728 at para. 25 *per* David Richards J.

¹⁴ *Overseas Tankship (UK) Ltd. v. Morts Dock and Engineering Co. Ltd. (The Wagon Mound)* [1961] A.C. 388 at 425 *per* Viscount Simonds.

¹⁵ *In Re T & N Ltd.* [2006] 1 W.L.R. 1728 at para. 25 *per* David Richards J.

¹⁶ This distinction has been acted upon by the House of Lords in the context of an award of interest on damages (*Nykredit Mortgage Bank plc v. Edward Erdman Group Ltd. (No. 2)* [1997] 1 W.L.R. 1627) and more recently with regard to the date of accrual of a cause of action for limitation purposes (*Law Society v. Sephton & Co.* [2006] UKHL 22; [2006] 2 A.C. 543).

specific relief in contract generally.¹⁷ In *Co-op v. Argyll*¹⁸ the House of Lords, by reversing the majority decision of the Court of Appeal,¹⁹ declined an opportunity to bring English law into line with other systems as regards the specific enforceability of contractual duties.²⁰ In English law the ‘presumption’ remains that any breach of contract will result in an obligation on the defaulting party to pay damages.²¹

The demise of nominal damages

Turning to damages, it may be thought that the remedy of nominal damages fulfils a vindicatory function. For nominal damages are ‘not intended to compensate for anything at all’ but are awarded simply ‘to mark the fact that there has been a breach of contract’.²² But it soon becomes apparent that nominal damages offer little hope of making good the claimant’s performance right. First, nominal damages have limited relevance in contractual claims in practice.²³ While nominal damages may be used as a way of establishing a legal right, they will generally be so used in the context of property, and not contractual, rights.²⁴ In any event, the availability of the declaration has rendered this aspect of nominal damages increasingly redundant.²⁵ Further, there are signs that the ‘main purpose’²⁶ of nominal damages, that of acting as a peg on which to hang costs,²⁷ has been undermined by the courts’ reluctance to adopt in mechanical fashion the principle that costs follow the event where that event is no more than the award of nominal damages. In *Anglo-Cyprian v. Paphos* the claimant failed in its principal claim for breach of contract damages of around £2,000, succeeding only on an alternative claim for £52.²⁸ Devlin J., having noted the general rule that a successful claimant will recover his costs from the defendant, nevertheless ordered this claimant to pay the defendant’s costs: ‘I do not think that a plaintiff who recovers nominal damages ought necessarily to be regarded in the ordinary sense of the word as a “successful” plaintiff.’²⁹ This approach was followed in *Mappouras v.*

¹⁷ Thereby departing from earlier authorities, such as *C H Giles & Co v. Morris* [1972] 1 W.L.R. 307, *Tito v. Waddell (No 2)* [1977] Ch 321 and *Sky Petroleum Ltd. v. VIP Petroleum Ltd.* [1974] 1 W.L.R. 576, hinting at a wider availability for specific relief.

¹⁸ *Co-operative Insurance Society Ltd. v. Argyll Stores (Holdings) Ltd.* [1998] A.C. 1. The case concerned a ‘keep trading’ covenant in a lease. However, cf. *Thames Valley Power Ltd v. Total Gas & Power Ltd* [2005] EWHC 2208 (Comm); [2006] 1 Lloyd’s Rep 441 where the court, *obiter*, appeared to endorse a wider concept of uniqueness and consequent availability of specific relief.

¹⁹ [1996] Ch. 286.

²⁰ See, e.g., *Highland and Universal Properties Ltd. v. Safeway Properties Ltd.* 2000 S.L.T. 414.

²¹ *George Mitchell (Chesterhall) Ltd. v. Finney Lock Seeds Ltd.* [1983] Q.B. 284 at 304 *per* Oliver L.J.

²² *Mappouras v. Waldrons* [2002] EWCA Civ 842; [2002] All E.R. (D.) 299 (Apr.) at para. 15 *per* Kay L.J. In *Farley v. Skinner* [2001] UKHL 49; [2002] 2 AC 732 at para. 40 Lord Clyde said ‘...damages should not be awarded, unless perhaps nominally, for the fact of a breach of contract as distinct from the consequences of that breach’.

²³ See for example, Treitel’s *The Law of Contract*: nominal damages are not mentioned in the index and merit treatment of less than a half-a-dozen lines in the main text (11th edn., (London: Sweet & Maxwell, 2003) at 926-7). *Chitty on Contracts* discusses nominal damages in a single paragraph: Beale, H., (gen. ed.), *Chitty on Contracts* 29th edn., (London: Sweet & Maxwell, 2004) at para. 26-008; (hereafter, *Chitty on Contracts*).

²⁴ McGregor, H., *McGregor on Damages*, 17th edn., (London: Sweet & Maxwell, 2003) at para. 10-009; (hereafter, *McGregor on Damages*).

²⁵ Thus, Burrows who, having noted the function of the declaration, concludes that nominal damages ‘are superfluous and could happily be abolished’: Burrows, A., *Remedies for Torts and Breach of Contract*, 3rd edn, (Oxford: OUP, 2004) at 589.

²⁶ *McGregor on Damages* at para. 10-009.

²⁷ *Beaumont v. Greathead* (1846) 2 C.B. 494 at 499 *per* Maule J.

²⁸ *Anglo-Cyprian Trade Agencies Ltd v. Paphos Wine Industries Ltd* [1951] 1 All E.R. 873.

²⁹ *Ibid.*, at 874 *per* Devlin J.

Waldrons, where the claimant, who had been awarded £15 in nominal damages, was ordered to pay the defendant's trial and appeal costs, the latter alone being assessed at £3,000.³⁰ Such Pyrrhic victories undermine rather than vindicate the claimant's right to performance of the contract. Further in *Clarke v. Buckle Mellows* the Court of Appeal declined to award nominal damages where the claimant was unable to prove that the defendant's breach of contract had caused the claimant any loss and upheld the trial judge's order of costs against the claimant.³¹

Nominal damages may be seen to lack a vindicatory element in another way. An award of a pound or two³² is unlikely in itself to provide adequate satisfaction for the wrong.³³ An award of nominal damages differs little, if at all, from an award of derisory, or contemptuous, damages. Derisory damages serve to indicate 'that while a right has technically been infringed, the court has formed a very low opinion of the claimant's bare legal claim, or that his conduct was such that he deserved, at any rate morally, what the defendant did to him.'³⁴ In theory, then, nominal and derisory damages serve different purposes. In practice, it can be hard to distinguish between the two. For example, in *Grobelaar v. News Group Newspapers Ltd.*, the House of Lords unanimously substituted an award of £1 damages in place of the jury's award of £85,000.³⁵ Lord Bingham of Cornhill, with whose speech Lord Millett agreed, Lord Hobhouse of Woodborough and Lord Scott of Foscote each expressly identified the award as one of nominal damages.³⁶ Yet there can be little doubt as to their Lordships' views as to the merits of the case. 'It would be an affront to justice,' Lord Bingham said, 'if a court of law were to award substantial damages to a man shown to have acted in such flagrant breach of his legal and moral obligations'.³⁷ Both Lord Steyn and Lord Millett described the award as 'derisory'.³⁸

Rather than marking the infringement of a legal right where there is no 'moral obliquity on the claimant's part',³⁹ nominal damages today may indicate a lack of any

³⁰ [2002] EWCA Civ 842. In *Excelsior Commercial & Industrial Holdings Ltd v. Salisbury Hamer Aspden and Johnson* [2002] EWCA Civ 879, *The Independent* 18 June 2002, the Court of Appeal upheld the decision of the trial judge, who, having awarded the claimant nominal damages of £2, ordered the claimant to pay the defendant's costs on the indemnity basis.

³¹ [2005] EWCA Civ 1611, especially at paras. 55, 59 and 73.

³² There seems to be little consistency in the amount of an award of nominal damages: awards of £1, £2, £5, £10, and £15 can all be found in the cases. In *Liverpool C.C. v. Irwin* [1977] A.C. 239 at 264 and 270, the House of Lords reduced the nominal damages awarded by the County Court judge from £10 to £5. In the Court of Appeal, Roskill L.J. had also questioned the award of £10. However he thought that the proper figure for such an award was £2 ([1976] Q.B. 319 at 333). In *Radford v. De Froberville* [1977] 1 W.L.R. 1262 at 1268 Oliver J. assumed nominal damages to be the decimal equivalent of 40 shillings. This figure may have its origins in the practice of the royal courts in the thirteenth century to exclude claims for less than 40 shillings: see Baker, J.H., *An Introduction to English Legal History* 4th edn., (London: Butterworths, 2002) at 22.

³³ In *Blake*, Lord Nicholls commented ([2001] 1 A.C. 268 at 283) that if the claimants in *Wrotham Park* had only been awarded nominal damages, justice would manifestly not have been done. Contrast *Constantine v. Imperial Hotels Ltd.* [1944] K.B. 693 where the claimant was awarded nominal damages of five guineas. Rogers notes that 'this sum would now be at least £100': Rogers, W.V.H., *Winfield & Jolowicz on Tort*, 17th edn., (London: Sweet & Maxwell, 2006) para. 22-7. (Hereafter, *Winfield & Jolowicz on Tort*).

³⁴ *Winfield & Jolowicz on Tort* at para. 22-6.

³⁵ [2002] UKHL 40; [2002] 1 W.L.R. 3024.

³⁶ *Ibid.*, at para. 27 (Lord Bingham), para. 61 (Lord Hobhouse), and para. 87 (Lord Scott).

³⁷ *Ibid.* at para. 24.

³⁸ *Ibid.* at paras. 36 and 69 respectively.

³⁹ *Winfield & Jolowicz on Tort* at para. 22-7.

substantive merit in the claimant's case. In *Hyde Park Residence Ltd. v. Yelland*⁴⁰ Jacob J. rejected the claimant's argument that an award of nominal damages for infringement of copyright lay even where the claimant's actions led to the denial of equitable relief: 'A plaintiff who recovers only nominal damages has in reality lost and in reality the defendant has established a complete defence.'⁴¹ Such an approach calls into question the continuing presence of nominal damages in the courts' remedial armoury, a fact explicitly envisaged in *Ibekwe v. T.G.W.U.*⁴² In that case, the claims against the defendant for breach of contract had been struck out at trial on the ground that the claimants had failed to show that the breaches had caused any loss. The Court of Appeal allowed the claimants' appeals on the ground that the judge had misapplied the burden of proof. But Peter Gibson L.J., with whom Latham L.J. agreed, was 'much more doubtful'⁴³ about the claimants' alternative ground of appeal, that the fact of breach entitled them to nominal damages. Peter Gibson L.J. thought it might be 'well within' the court's discretion under the Civil Procedure Rules to stop a case where it became clear that the claimant would only recover nominal damages.⁴⁴ The court had to 'avoid incurring unnecessary costs and taking up a disproportionate amount of' its own time.⁴⁵ In summary, nominal damages may be seen to provide an inadequate means in practice of vindicating contractual rights.

Vindication and compensation

In practice, in the vast majority of cases, the claimant's performance right is vindicated by an award of compensatory damages. While compensation has as its immediate object the making good of a loss,⁴⁶ the scope of the duty to compensate which the law imposes on a defendant who breaks his contract, reveals a underlying vindicatory object. It is important to bear in mind first the different measures of loss adopted in contract and tort. Contractual damages are generally awarded so as to protect the claimant's expectation interest, to give him the benefit of the bargain: the claimant '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.'⁴⁷ The primacy of this measure of damages for breach of contract is reflected by its description as the contract measure.⁴⁸ This may be contrasted with the objective in tort, where the court awards damages so as to put the claimant 'in the same position as he would have been in if he had not sustained the wrong'.⁴⁹ Suppose the defendant dishonestly induces the claimant to enter a contract to buy the defendant's car by making a false statement of fact. The statement is found to have been incorporated as a term of the contract. The claimant pays £5,000 for a car which has a market value of £4,000. Had the statement been true, the car would have been worth £7,000. As every law student ought to

⁴⁰ [1999] R.P.C. 655. Jacob J.'s actual decision, that the defendants had not infringed the claimant's copyright, was reversed by the Court of Appeal: see [2001] Ch. 143.

⁴¹ [1999] R.P.C. 655 at paras. 36-37.

⁴² [2001] EWCA Civ 432; [2001] All E.R. (D.) 178 (Mar.).

⁴³ *Ibid.*, at para. 26.

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

⁴⁶ *Alfred McAlpine Construction Ltd. v. Panatown Ltd.* [2001] 1 A.C. 518 at 580 *per* Lord Millett. See generally Mckendrick, E. "Breach of Contract and the Meaning of Loss" (1999) *Current Legal Problems* 37.

⁴⁷ *Robinson v. Harman* (1848) 1 Exch. 850 at 855 *per* Parke B.

⁴⁸ *Nykredit Mortgage Bank plc v. Edward Erdman Group Ltd. (No. 2)* [1997] 1 W.L.R. 1627 at 1634 *per* Lord Nicholls. In *Wertheim v. Chicoutimi Pulp Co.* [1911] A.C. 301 at 307 this measure was described as the 'ruling principle' of contract damages.

⁴⁹ *Livingstone v. Rawyards Coal Co.* (1880) 5 App. Cas. 25 at 39 *per* Lord Blackburn.

know,⁵⁰ the claimant could recover damages of £1,000 in the tort of deceit⁵¹ or £2,000 for breach of contract.⁵² Thus the duty to compensate imposed in contract is more onerous than that imposed in tort, because the respective duties seek to vindicate different rights.⁵³ Contractual damages vindicate the performance right: they put the claimant in the same position as if the defendant had performed his promise. The difference between damages in contract and tort,⁵⁴ is further brought out by the ‘important’ distinction in breach of contract claims between *normal* and *consequential* loss.⁵⁵ McGregor describes normal loss as ‘that loss which every claimant in a like situation will suffer’.⁵⁶ Consequential losses are those which are ‘special to the circumstances of the claimant’.⁵⁷ Normal loss is generally measured by the difference in market value between what the claimant should have received under the contract and what he actually received. Consequential losses, says McGregor, are ‘anything beyond this normal measure, such as profits lost or expenses incurred through the breach, and are recoverable if not too remote’.⁵⁸ In torts not concerning property,⁵⁹ the defendant is generally only liable for consequential losses, not normal, or expectation, losses. Fuller and Perdue famously described damages based on the expectation interest as a ‘queer kind’ of compensation.⁶⁰ For, they argued, ‘the loss which the plaintiff suffers (deprivation of the expectancy) is not a datum of nature but the reflection of a normative order. It appears as a “loss” only by reference to an unstated *ought*. Consequently, when the law gauges damages by the value of the promised performance it is not merely measuring a quantum, but is seeking an end, however vaguely conceived this end may be.’⁶¹

The end that the law seeks is the fulfilment of promises:⁶² it seeks to vindicate the claimant’s performance right.

This vindicatory function underlying the duty to compensate is evident not just in the law’s recognition and enforcement of the expectation interest itself, but also in the way the expectation interest is measured. The starting position is that the claimant can recover damages for the difference in value between what he received and what he should have received together with any consequential losses, such as loss of profit,

⁵⁰ ‘The way in which the Court of Appeal dealt with the case suggests it misunderstood the effect of the rules that were identified in *Hadley v. Baxendale* ... They are very familiar to every student of contract law. Most would claim to be able to recite them by heart.’ *Per* Lord Hope in *Jackson v. Royal Bank of Scotland plc* [2005] UKHL 3; [2005] 1 W.L.R. 377 at para. 25.

⁵¹ Or, more likely, under s.2(1) of the Misrepresentation Act 1967.

⁵² ‘[T]he correct measure of damages in the tort of deceit is an award which serves to put the claimant into the position he would have been in if the representation had not been made to him, and not, as with breach of condition or warranty in contract, into the position he would have been in if the representation had been true’: *McGregor on Damages* at para. 41-002 (footnotes omitted).

⁵³ In deceit, as in negligence, damage is the gist of the action: *Smith v. Chadwick* (1884) 9 App. Cas. 187 at 196 *per* Lord Blackburn. See *Winfield & Jolowicz* at para. 11-3.

⁵⁴ Other than torts concerning property ‘which in this respect are similar to contract’ (*McGregor on Damages* at para. 1-036).

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

⁵⁹ See *ibid.*

⁶⁰ Fuller, L. and Perdue, W., *The Reliance Interest in Contract Damages* [1936] 46 Yale L.J. 52 at 53.

⁶¹ *Ibid.*

⁶² In *Farley v. Skinner* [2001] UKHL 49; [2002] 2 A.C. 732 at para. 25, Lord Steyn described contract law’s central purpose as ‘promoting the observance of contractual promises’.

which are not too remote. Where there is no difference in value, and no consequential loss, an award of nominal damages, if available, may be an adequate means of making good the performance right. Suppose that the defendant agrees to sell 1,000 rubbish bins to the claimant. The contract specifies that the bins are to be black in colour but the bins delivered by the defendant are grey and not black. The defendant made no saving by supplying grey and not black bins. Nor does it make any difference to the claimant: the bins are perfectly fit for their intended purpose and are worth the same amount of money. The claimant's compensation will be nil.⁶³ An award of substantial damages would represent an unjustified windfall in the claimant's hands.

But compare this situation with that in *Radford v. De Froberville* where the claimant sold part of his land to the defendant.⁶⁴ The defendant covenanted to build at her expense a wall on her side of the boundary line dividing her property from the land retained by the claimant. The defendant failed to build the wall and sold her land to a third party. The claimant sued the defendant for breach of covenant. As the land was now owned by a third party, specific relief was not available and so the claimant sought damages.⁶⁵ The defendant argued that the claimant's damages should be measured by the diminution in value of his land, the difference between the value of the claimant's land with a boundary wall and without. The evidence suggested that there was no difference. Oliver J. however held that the claimant was entitled to damages measured by the cost of cure, the amount of money it would cost to have the wall built. This was despite the fact that the claimant let out the property to tenants and was 'realistically, merely a landlord with an investment property' who wanted the work done for the benefit of his tenants.⁶⁶ Oliver J. invoked the general principle that *pacta sunt servanda*.⁶⁷ The claimant 'had a contractual right to have the work done' and wanted the wall built.⁶⁸ Where a claimant contracts for something and the defendant fails in breach of contract to supply that thing, 'I do not see why, in principle, [the claimant] should not be compensated by being provided with the cost of supplying it through someone else or in a different way'.⁶⁹ *Radford* demonstrates that compensatory damages involve more than the mere making good of a loss. Their purpose is to put the claimant, as far as money can, in the same position as if the contract had been performed: their purpose is to vindicate the performance right. Where awarding the difference in value will make good the performance right, that measure will be adopted. But where the claimant's expectation will only be satisfied by getting the very thing contracted for, the court will award cost of cure damages.⁷⁰

That compensation is a means to an end and not an end in itself, is further suggested by a variety of limitations which, in practice, mean that damages may not provide a precise indemnity for loss arising from a breach of contract. A claimant

⁶³ S.53(3), Sale of Goods Act 1979 provides that the damages are the difference between the value of the goods at the time of delivery and the value they would have had had they conformed to the contract. Note however that, subject to s.15A of the Act, the buyer may be able to reject the goods under s.13.

⁶⁴ [1977] 1 W.L.R. 1262.

⁶⁵ And the claimant would have to build the wall on his own land: see, *ibid.*, at 1267.

⁶⁶ *Ibid.*, at 1285. The garden was not included in the leases, although the tenants had the right to use it: see *ibid.*, at 1264.

⁶⁷ *Ibid.*, at 1270.

⁶⁸ *Ibid.*, at 1285.

⁶⁹ *Ibid.*, at 1270. This was however, 'subject to the proviso, of course, that he is seeking compensation for a genuine loss and not merely using a technical breach to secure an uncovenanted profit.' (*Ibid.*)

⁷⁰ Unless cost of cure damages would be unreasonable or oppressive: see *Ruxley v. Forsyth*, below.

cannot recover for loss which is too remote; so the mill-owner in *Hadley v. Baxendale* was not awarded the profits he lost by reason of the carrier's failure to return the crankshaft in good time.⁷¹ Further, no liability attaches as regards a loss which the claimant could reasonably have avoided. So the buyer of the vessel, *The Solholt*, was unable to recover the difference between the contract and market prices when the defendant was late in tendering delivery, as the court concluded that he should have offered to purchase the vessel at the original contract price.⁷² Another bar to full recovery is the decision of the House of Lords in *London, Chatham & Dover Railway Co. v. South Eastern Railway Co.* which prevents a claimant from recovering interest by way of general damages for the late payment of a debt.⁷³ Historically rules applicable to particular types of contract might mean that a claimant did not recover the entirety of his loss. Thus according to the rule in *Bain v. Fothergill* a vendor's failure to deduce good title to the land being sold would result only in liability for reliance, and not expectation, losses.⁷⁴

A further limit upon the recovery of full compensation may be seen to arise from the decision in the *SAAMCO* case.⁷⁵ There, surveyors employed by mortgagees had negligently overvalued commercial property to the extent that when, following the mortgagor's default, the security was realised, the proceeds of sale were insufficient to discharge the outstanding debt. The House of Lords held that the negligent surveyors were not automatically liable for the entire shortfall. Rather they were only liable in respect of the extent to which they had overvalued the premises; in so far as the mortgagees' losses exceeded this 'initial security shortfall' the losses were irrecoverable. The *SAAMCO* principle, that 'a defendant is not liable in damages in respect of losses of a kind that fall outside the scope of his duty of care',⁷⁶ has subsequently been applied widely⁷⁷ to contractual and tortious duties of care owed by valuers and surveyors towards vendors,⁷⁸ purchasers⁷⁹ and others.⁸⁰ Recent

⁷¹ (1854) 9 Exch. 341.

⁷² [1983] 1 Lloyd's Rep. 605.

⁷³ [1893] A.C. 429. The rule is subject to any contrary provision in the contract: see *Chitty on Contracts* at para. 38-249. Further, interest may be recoverable by way of special damages: see *Wadsworth v. Lydall* [1981] 1 W.L.R. 598. See also the Late Payment of Commercial Debts (Interest) Act 1998.

⁷⁴ (1874) L.R. 7 H.L. 158. The rule was abolished by s.3 of the Law of Property (Miscellaneous Provisions) Act 1989.

⁷⁵ *South Australia Asset Management Corp. v. York Montague Ltd.* (on appeal from *Banque Bruxelles Lambert S.A. v. Eagle Star Insurance Co. Ltd.*) [1997] A.C. 191. See *Platform Home Loans Ltd. v. Oyston Shipways Ltd.* [2000] 2 A.C. 190 at 207 per Lord Hobhouse, and Burrows, A., *Remedies for Torts and Breach of Contract*, 3rd edn, (Oxford: OUP, 2004) at pp. 109-122.

⁷⁶ *Aneco Reinsurance Underwriting Ltd. (in liquidation) v. Johnson and Higgins Ltd.* [2001] UKHL 51; [2001] 2 All E.R. (Comm) 929 per Lord Lloyd at para. 10.

⁷⁷ The principle does not apply where the defendant's duty extends beyond one to provide information upon which the claimant will base his decision, to one to advise the claimant as to what decision to make: see, e.g., *Aneco Reinsurance Underwriting Ltd. (in liquidation) v. Johnson & Higgins Ltd.* [2001] UKHL 51; [2001] 2 All E.R. (Comm) 929 (insurance brokers who had assumed duty to advise on availability of reinsurance were liable for client's full loss) and *Keydon Estates Ltd. v. Eversheds LLP* [2005] EWHC 972 (Ch); [2005] All E.R. (D.) 312 (May) (negligent solicitors who knew client was purchasing property as investment were liable for all lost rental).

⁷⁸ *Trustees of WASPS Football Club v. Lambert Smith Hampton Group* [2004] EWHC 938 (Comm); [2004] 3 E.G.L.R. 149.

⁷⁹ *Woolfson v. Gibbons* [2002] All E.R. (D.) 69 (Jan.).

⁸⁰ *HOK Sport Ltd. v. Aintree Racecourse Co. Ltd.* [2002] EWHC 3094 (TCC); [2003] Lloyd's Rep. P.N. 148 (action by client against architect), *Singh v. Sardar Investments Ltd.* [2002] EWCA Civ 1706; [2002] All E.R. (D.) 476 (Oct.) (action by purchaser of property against agent who did not have principal's authority to sell) and *Weston v. Gribben* [2005] EWHC 2953 (Ch); [2005] All E.R. (D.) 304

cases also support a wider scope of application to include a duty to avoid physical, as well as economic, harm.⁸¹

On the other hand, the claimant's damages may exceed the amount of loss caused by the breach of contract. So the factory owner in *Harbutt's "Plasticine" Ltd. v. Wayne Tank and Pump Co. Ltd.* was awarded damages sufficient to enable him to build a new factory superior to that destroyed by the defendant's breach of contract.⁸² Similarly, application of the *res inter alios acta* principle may leave a claimant with a windfall gain. Thus a buyer of defective goods who manages to sell the goods on to a sub-buyer at full price may recover damages from the seller measured by the notional difference in value between the goods as delivered and as they should have been under the contract.⁸³ In yet other cases the damages awarded may bear no relation to the actual loss suffered. In *Cory v. Thames Ironworks and Shipbuilding Co. Ltd.* the claimant recovered damages for profits lost by not being able to use the subject matter of the contract, a boom derrick, as a coal store.⁸⁴ However the claimant had never intended to use the derrick in that way: he wanted to use it to tranship coal to barges and his inability so to do gave rise to much higher losses, but losses which were too remote to be recoverable.⁸⁵ In some situations, the parties to a contract may prefer to agree in advance what damages are to be paid in the event of breach of a particular term: they may choose to include in their agreement a liquidated damages clause. To be enforceable, the agreed sum must be a genuine pre-estimate of the likely loss,⁸⁶ the genuineness of the pre-estimate being judged at the time of contracting.⁸⁷ This requirement satisfied, the defendant will be liable for the agreed sum irrespective of the loss actually caused by the breach.⁸⁸ Given the limited ability of contractors to anticipate the future, it is, in a sense, inevitable that the stipulated damages clause will either under-compensate⁸⁹ or over-compensate⁹⁰ the victim of the breach. Thus the

(Dec.) (action by property owner against notary who validated documents and government department which certified authenticity of signature).

⁸¹ *Thames Water Utilities Ltd v. London Regional Transport* [2004] EWHC 2021 (TCC); [2004] All E.R. (D.) 96 (Aug.) at para. 11 *per* Judge David Wilcox: 'There is sufficient authority for the proposition that there should be a single test of causation applicable to the same set of facts, irrespective of whether the case is pleaded in negligence, nuisance or for a statutory breach.' See also *Mattis v. Pollock (trading as Flamingos Nightclub)* [2002] EWHC 2177 (QB); [2002] All E.R. (D.) 373 (Oct.) at paras. 91-93 (nightclub owner not vicariously liable for attack by doorman outside club); decision on liability reversed at [2003] EWCA Civ 887; [2003] 1 W.L.R. 2158.

⁸² [1970] 1 Q.B. 447. The decision as to liability was overruled by the House of Lords in *Photo Production Ltd. v. Securicor Transport Ltd.* [1980] A.C. 827, but the reasoning as to quantum would appear to remain unaffected. See also *Voaden v. Champion, the Baltic Surveyor and Timbuku* [2002] EWCA Civ 89; [2002] 1 Lloyd's Rep. 623.

⁸³ See *Rodocanachi v. Milburn* (1886) 18 Q.B.D. 67 and *Slater v. Hoyle & Smith Ltd.* [1920] 2 K.B. 11. Cf. *Bence Graphics International Ltd. v. Fasson UK Ltd.* [1988] Q.B. 87 at 102 where Auld L.J. thought that the time had come for *Slater's* case to be reconsidered. See now *Transfield Shipping Inc. v. Mercator Shipping Inc., the Achilleas* [2006] EWHC 3030 (Comm); [2007] 1 Lloyd's Rep 19.

⁸⁴ (1868) L.R. 3 Q.B. 181.

⁸⁵ *Ibid.*, at 189-192.

⁸⁶ *Dunlop Pneumatic Tyre Co. Ltd. v. New Garage and Motor Co. Ltd.* [1915] A.C. 79.

⁸⁷ *Public Works Commissioner v. Hills* [1906] A.C. 368 at 376 *per* Lord Dunedin; repeated in *Dunlop Pneumatic Tyre Co. Ltd. v. New Garage and Motor Co. Ltd.* [1915] A.C. 79 at 86-87. See now *Murray v. Leisureplay plc* [2005] EWCA Civ 963; [2005] I.R.L.R. 946 *per* Arden L.J. at para. 69 and *Alfred McAlpine Capital Projects Ltd. v. Tilebox Ltd.* [2005] EWHC 281 (TCC); [2005] Con. L.R. 39 *per* Colman J. at para. 61.

⁸⁸ See *Chitty on Contracts* at para. 26-109.

⁸⁹ *Diestal v. Stevenson* [1906] 2 K.B. 345 (£90 recovered under liquidated damages clause when defendant's agreed losses were £320)

court may, in effect, sanction liability for a substantial sum as damages where no loss has been suffered.⁹¹ The same dissociation between recovery and loss occurs where a deposit is forfeit as a result of the payor's breach of contract.⁹² While there are a number of torts where a claimant may recover substantial damages without showing actual damage,⁹³ the only contractual equivalent appears to lie in claims for damage to reputation, such as an action against a bank for wrongful failure to honour a client's cheques,⁹⁴ or an action for loss of publicity.⁹⁵ Nonetheless, such claims provide another example of the court condoning the recovery of substantial damages where no loss may have been suffered.

The scope of the vindicatory function

Thus far the aim has been to show that the principal motive in the award of compensatory damages is the vindication of the claimant's performance right: that the making good of the performance right rather than the mere making good of a loss lies at the heart of the liability for damages for breach of contract. To support this, reference has been made to various shortcomings of damages as a loss-filling device. Thus far then, the analysis has focused on the application of orthodox compensatory principles. Yet the vindicatory impulse may be seen to be more pervasive in its extent and more radical in its means. The need to award damages which vindicate the claimant's performance interest may require a departure from conventional compensatory principles. Take the extension of the *Dunlop v. Lambert* principle to building contracts.⁹⁶ *Dunlop* has been described as probably the only true exception to the general rule of English law that in an action for breach of contract a claimant may only recover substantial damages for loss which he himself has suffered.⁹⁷ The rule in *Dunlop*, as interpreted by Lord Diplock in *The Albazero*,⁹⁸ 'allows a consignee of goods to recover from the carrier in full in respect of loss or damage to the goods in transit even though he has parted with all property in the goods before they are lost or

⁹⁰ In *Clydebank Engineering and Shipbuilding Co. Ltd. v. Don Jose Ramos Yzquierdo Y Castaneda* [1905] A.C. 6 at 10, the House of Lords rejected the somewhat disingenuous argument of a seller that he was not liable for liquidated damages in respect of his failure to deliver a number of torpedo boats because, if they had been tendered on time, they would have been lost in a disastrous naval engagement which subsequently took place.

⁹¹ Clearly, the reason for so doing is not simply to vindicate the claimant's performance right: enforcement of a liquidated damages clause which contains a genuine pre-estimate of likely loss has the advantages of greater certainty for the parties and of avoiding the cost, inconvenience, and delay of proving actual loss. These traditional justifications for the enforcement of liquidated damages clauses may be overstated: see further, Furmston, M., (ed.), *The Law of Contract* 3rd edn., (London: Butterworths, 2007) at para. 8.106.

⁹² Only a reasonable deposit may be forfeit unless, as with sales of land, there is some other conventional level of deposit taking: *Workers Trust & Merchant Bank Ltd. v. Dojap Investments Ltd.* [1993] A.C. 573.

⁹³ Such as libel (*Tripp v. Thomas* (1824) 3 B. & C. 427), inducing breach of contract (*Goldsoll v. Goldman* [1914] 2 Ch. 603), and trespass to goods (*GWK Ltd v. Dunlop Rubber Co. Ltd.* (1926) 42 T.L.R. 376; see below).

⁹⁴ *Wilson v. United Counties Bank Ltd.* [1920] A.C. 102, *Kpohraror v. Woolwich Building Society* [1996] 4 All E.R. 119. See also *Aerial Advertising Co. v. Batchelors Peas Ltd. (Manchester)* [1938] 2 All E.R. 788, where, in the context of an advertising contract, Atkinson J. awarded general damages for pecuniary loss.

⁹⁵ See, e.g., *Herbert Clayton and Jack Waller, Ltd. v. Oliver* [1930] A.C. 209. See also damages in the former action for breach of promise of marriage: *Smith v. Woodfine* (1857) 1 C.B. (N.S.) 660 (the cause of action was abolished by s.1, Law Reform (Miscellaneous Provisions) Act 1970).

⁹⁶ *Dunlop v. Lambert* (1839) 6 Cl. & F. 600.

⁹⁷ *Alfred McAlpine Construction Ltd. v. Panatown Ltd.* [2001] 1 A.C. 518 at 582 per Lord Millett.

⁹⁸ [1977] A.C. 774 at 847.

damaged and thus suffers no loss'.⁹⁹ In *St. Martins v. McAlpine* this principle was applied so as to allow a developer to recover from a builder substantial damages, representing repair costs, for breach of a building contract, in circumstances where the developer had, before the breaches of contract occurred, transferred its interest in the land being developed to a third party.¹⁰⁰

The approach in *St Martin's*, and in the subsequent case of *Darlington v. Wiltshier*,¹⁰¹ represents a significant extension of the *Dunlop* principle, an extension which demonstrates the increasing willingness of the courts to fulfil a vindicatory function. In the carriage of goods scenario, from which the *Dunlop* principle arises, 'it is the loss to the proprietary or possessory interest that is compensated, not some other or different economic loss'.¹⁰² The essence of the *Dunlop* principle is compensation for the diminution in value of an asset. It involves the enforcement of the claimant's contractual rights so as to compensate a third party for a diminution in the value of the third party's assets brought about by the defendant's wrong. The object, therefore, of the *Dunlop* principle is the vindication of the third party's property rights.¹⁰³ By contrast, in *St Martin's*, the damages did not relate to loss to the proprietary or possessory interest, but to the expectation interest created by the contract. The damages represented compensation for a failure to enhance the value of certain assets in the manner bargained for by the claimant. The builder's wrong had not caused any diminution in the value of the third party's assets. He had failed to enhance the value of those assets but he was under no duty to the third party to do so. The damages in *St Martin's* cannot be said to represent the vindication of the third party's property rights. The essence of the *St Martin's* principle is the non-enhancement of the value of an asset: that is an economic interest protected by the law of contract, not a proprietary interest protected by the law of tort. *St Martin's* involves the enforcement by the claimant of his contractual rights against the defendant so as to compensate a third party for the non-enhancement of the value of the third party's assets brought about by the defendant's breach of contract.¹⁰⁴ In *St Martin's* the court is vindicating *contractual* rights.¹⁰⁵

⁹⁹ *Alfred McAlpine Construction Ltd. v. Panatown Ltd.* [2001] 1 A.C. 518 at 582 *per* Lord Millett. The consignor must account to the consignee for the damages recovered (*ibid.*).

¹⁰⁰ *St Martins Property Corporation Ltd. v. Sir Robert McAlpine Ltd.* (heard with *Linden Gardens Trust Ltd. v. Lenesta Sludge Disposals Ltd.*) [1994] 1 A.C. 85.

¹⁰¹ *Darlington Borough Council v. Wiltshier Northern Ltd.* [1995] 1 W.L.R. 68.

¹⁰² *Obestain Inc. v. National Mineral Development Corporation Ltd., the Sanix Ace* [1987] 1 Lloyd's Rep. 465 at 469 *per* Hobhouse J.

¹⁰³ That the complaint in a contract of carriage case where goods are delivered in a damaged condition or are delivered late, relates to the underlying property interest in the cargo is demonstrated by the fact that freight remains payable: no right to an abatement arises. See *Colonial Bank v. European Grain and Shipping Ltd., the Dominique* [1989] A.C. 1056 and *Linden Gardens Trust Ltd v. Lenesta Sludge Disposals Ltd.* [1994] 1 A.C. 85 at 111-112 *per* Lord Browne-Wilkinson.

¹⁰⁴ Thus in a building contract, a right to an abatement of the price will arise whether or not the claimant has retained ownership of the development: see *Modern Engineering (Bristol) Ltd. v. Gilbert-Ash (Northern) Ltd.* [1974] A.C. 689. The breach 'involves a failure to provide the very goods or services which the defendant had contracted to supply': *Linden Gardens Trust Ltd v. Lenesta Sludge Disposals Ltd.* [1994] 1 A.C. 85 at 111-112 *per* Lord Browne-Wilkinson.

¹⁰⁵ The broad ground adopted by Lord Griffiths in *St Martin's* [1994] 1 A.C. 85 at 96-98 and the approach of the minority in *Panatown* ([2001] 1 A.C. 518) involve, on the face of it, a more obvious vindicatory element: the claimant is recovering for his own loss, not that of a third party. But in practice the approach may not differ greatly. In *St Martin's*, Lord Griffiths clearly envisaged a situation where the claimant himself had already incurred the cost of repairs to the third party's property ([1994] 1 A.C. 85 at 96). In *Panatown*, Lord Goff of Chieveley thought that 'any damages recovered by Panatown from McAlpine by reason of the defective state of the building will be

The most striking example of the development of the vindicatory function is the decision of the majority of the House of Lords in *Attorney-General v. Blake*.¹⁰⁶ In 1966, Blake, a notorious double agent escaped from Wandsworth prison, where he was serving a 42 year sentence for breaches of the Official Secrets Act 1911, and fled to Russia. In 1989, Blake entered into a contract with Jonathan Cape for Cape to publish his autobiography. Cape agreed to pay advance royalties to Blake, and by the time of the proceedings about £90,000 of these remained payable. Disclosure of material contained in the book constituted a breach of by Blake of the confidentiality undertaking given immediately before his employment by the Crown. It was clear that the Crown suffered no loss from the breach of contract. Nevertheless, the Crown was held to be entitled to claim the sums due from Cape to Blake by means of an account of profits.

‘In the same way as a plaintiff’s interest in performance of a contract may render it just and equitable for the court to make an order of specific performance or grant an injunction, so the plaintiff’s interest in performance may make it just and equitable that the defendant should retain no benefit from his breach of contract.’¹⁰⁷

Here the Crown could demonstrate a ‘legitimate interest in preventing [Blake’s] profit-making activity and, hence, in depriving him of his profit’.¹⁰⁸ The majority, in effect, awarded an equitable remedy for breach of fiduciary duty where no such duty existed.¹⁰⁹

Vindicatory damages

The second argument put forward in this article builds on the first. In fulfilling their vindicatory function, the courts may be seen to have developed a distinct measure of damages. Such damages, vindicatory damages, are not compensatory, or loss-based, in the orthodox sense; nor are they restitutionary, or gain-based. They are better conceived as rights-based damages.¹¹⁰ Rights-based damages have to date only been explicitly recognised in the field of constitutional rights.¹¹¹ The Privy Council has

available for making good the defects in the structure, and will no doubt be used, directly or indirectly, for that purpose’ ([2001] 1 A.C. 518 at 560). Lord Millett thought that Panatown would hold the damages on trust to be applied at the direction of the group company which had provided the finance for the construction work (*ibid.*, at 592-593).

¹⁰⁶ [2001] 1 A.C. 268. In *Esso Petroleum Co. Ltd. v. Niad Ltd.* [2001] EWHC 6 (Ch); [2001] All E.R. (D.) 324 (Nov.) Morritt V.-C. applied *Blake* and held that the claimant was entitled to an account of profits. The remedy was refused in *Experience Hendrix L.L.C. v. PPX Enterprises Inc.* [2002] EWCA Civ 323; [2003] 1 All E.R. (Comm.) 830, *World Wide Fund for Nature v. World Wrestling Federation* [2001] All E.R. (D.) 50 (Aug.), and, *The Sine Nomine* [2001] 1 Lloyd’s Rep. 805.

¹⁰⁷ [2001] 1 A.C. 268 at 285 *per* Lord Nicholls.

¹⁰⁸ *Ibid.*

¹⁰⁹ At trial the Attorney General had unsuccessfully argued that Blake was in breach of fiduciary duties he owed to the Crown by virtue of his service. Scott V.-C. dismissed the claim; while a member of the secret and intelligence service owed a lifelong duty of non-disclosure in respect of secret and confidential information, the law did not impose a duty which went beyond this. In the present case, none of the material disclosed by Blake remained confidential. See [1997] Ch. 84.

¹¹⁰ See *Dunlea v. Attorney General* [2000] 3 N.Z.L.R. 136 at para. 68 where Thomas J. speaks of damages under the New Zealand Bill of Rights Act necessitating a ‘rights-centred approach’.

¹¹¹ See *The Attorney General of Trinidad and Tobago v. Ramanoop* [2005] UKPC 15; [2006] 1 A.C. 328 and *Merson v. Cartwright* [2005] UKPC 38; [2006] 3 L.R.C. 264. To date, the availability in English law of vindicatory damages for infringement of constitutional rights is uncertain. However their recognition would raise an interesting issue as to their compatibility with damages under the Human Rights Act 1998. The refusal by the House of Lords in *R. (on the application of Greenfield) v.*

acknowledged that where a constitutional right has been violated, an award of compensatory damages may not suffice as the fact that the infringed right is a constitutional right adds an extra dimension.¹¹² In such a case, damages ‘may be compensatory but should always be vindicatory’.¹¹³ For, as Thomas J. observed in *Daniels v. Thompson*:

‘Compensation recognises the value attaching to the plaintiff’s interest or right which is infringed, but it does not place a value on the fact the interest or right ought not to have been infringed at all.’¹¹⁴

In *Merson v. Cartwright* the trial judge, Sawyer J., had awarded the claimant \$100,000 as damages for infringement of her constitutional rights on top of general damages of \$180,000 for assault, battery, false imprisonment, and malicious prosecution. The Privy Council upheld the award of the constitutional damages. The purpose of these damages ‘is to vindicate the right of the complainant, whether a citizen or a visitor, to carry on his or her life in the Bahamas free from unjustified executive interference, mistreatment or oppression.’¹¹⁵ In the earlier case of *Ramanoop*, the Privy Council likewise upheld an award of vindicatory damages made by the Court of Appeal of Trinidad and Tobago in respect of appalling misbehaviour by a police officer towards the claimant.¹¹⁶ In reaching its conclusion in *Ramanoop*, the Privy Council derived ‘particular assistance’¹¹⁷ from the dissenting judgment of Thomas J. in *Dunlea v. Attorney General*.¹¹⁸ In *Dunlea*, Thomas J. concluded that damages under the New Zealand Bill of Rights Act 1990 should not be calculated on the same basis as ordinary tortious damages. In reaching that view, Thomas J. drew a distinction between loss-centred damages and damages which are rights-centred. Generally damages awarded in tort are loss-centred: the court, Thomas J. said, awards a figure to compensate the claimant for physical damage and mental distress. But damages under the Bill of Rights Act necessitate ‘a rights-centred approach based on an understanding of the importance of vindicating the right now vested in the plaintiff as a citizen’.¹¹⁹ As such, damages under the Act should include an amount representing ‘the value of the right (or the non-violation of that right) to the plaintiff’.¹²⁰ Vindicatory damages reflect the ‘intrinsic value’ of the infringed right to the claimant.¹²¹

Secretary of State for the Home Department [2005] UKHL 14; [2005] 1 W.L.R. 673 to award damages for violation of article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms suggests, perhaps, that awards of damages under the Human Rights Act might be less common and less generous than awards of vindicatory damages. See also *A v. Head Teacher and Governors of Lord Grey School* [2006] UKHL 14; [2006] 2 A.C. 363 at para. 83 per Baroness Hale of Richmond.

¹¹² *The Attorney General of Trinidad and Tobago v. Ramanoop* [2005] UKPC 15; [2006] 1 A.C. 328 at para. 19.

¹¹³ *Merson v. Cartwright* [2005] UKPC 38; [2006] 3 L.R.C. 264 at para. 18.

¹¹⁴ [1998] 3 N.Z.L.R. 22 at 70.

¹¹⁵ *Ibid.*

¹¹⁶ *The Attorney General of Trinidad and Tobago v. Ramanoop* [2005] UKPC 15; [2006] 1 A.C. 328.

¹¹⁷ *Ibid.*, at para. 16.

¹¹⁸ [2000] 3 N.Z.L.R. 136.

¹¹⁹ *Ibid.*, at para. 68.

¹²⁰ *Ibid.*, at para. 70. Thomas J. saw vindicatory damages as compensatory (see, *ibid.*, at paras. 66 and 67). The better view, it is respectfully suggested, is that vindicatory damages should be treated as distinct from an award of compensation: see below.

¹²¹ *Ibid.*, at para. 60.

In *Ramanoop*, Lord Nicholls stated that two aims, among others, of vindicatory damages are ‘to reflect the sense of public outrage ... and deter further breaches’.¹²² As such, Lord Nicholls conceded that an award of vindicatory damages ‘is likely in most cases to cover much the same ground in financial terms as would an award by way of punishment in the strict sense of retribution’. But punishment in this sense, he continued, is not the object of vindicatory damages and the expressions punitive and exemplary are ‘better avoided’ in this context.¹²³ This view was echoed by Lord Scott in *Merson*.¹²⁴ The overlap between vindicatory and punitive damages is evident in the context of tort law where infringement of what may be termed constitutional rights is one of the two common law categories where exemplary damages are available.¹²⁵ Vindicatory damages may thus offer a more palatable means of achieving at least some of the aims of exemplary damages and the recognition of vindicatory damages may raise the prospect of the elimination from English civil law of the ‘anomalous’ remedy of exemplary damages.¹²⁶

Vindicatory damages outside constitutional law

As *Ramanoop* and *Merson* represent the only instances of a court awarding vindicatory damages, it must be asked whether such damages may be awarded for the infringement of rights other than constitutional rights. The obvious argument against their wider availability would appear to be that constitutional rights are uniquely important rights. It is the constitutional nature of the right which adds an ‘extra dimension’ to the claim.¹²⁷ But to so confine vindicatory damages would be a mistake. First, all legal rights are important: that is why they are *legal* rights and not mere social norms or conventions. The important characteristic of *Ramanoop* and *Merson* ought not to be that the claims involved the violation of constitutional rights but that the claims involved the violation of legal rights. Clearly, the fact that the right which has been violated is a constitutional right may, depending on the circumstances, call for a larger award of vindicatory damages than that justified in an action between two private parties. But the fact the infringed right was not explicitly constitutional ought not of itself to preclude an award of vindicatory damages. Second, distinguishing constitutional from other legal rights is not straightforward. Thus Lord Rodger of Earlsferry, speaking in the context of identifying those torts which are actionable *per se*, said:

‘The term “constitutional right” works well enough, alongside equivalent terms, in the field of statutory interpretation. But, even if it were otherwise suitable, it is not sufficiently precise to define a class of rights whose abuse should give rise to a right of action in tort without proof of damage.’¹²⁸

¹²² [2005] UKPC 15; [2006] 1 A.C. 328 at para. 19.

¹²³ *Ibid.*

¹²⁴ ‘The purpose of a vindicatory award is not a punitive purpose. It is not to teach the executive not to misbehave.’ *Merson v. Cartwright* [2005] UKPC 38; [2006] 3 L.R.C. 264 at para. 18.

¹²⁵ See *Rookes v. Barnard* [1964] A.C. 1129 at 1220-1231. Note that Lord Devlin thought that in the two categories he outlined, exemplary damages could ‘serve a useful purpose in vindicating the strength of the law’: *ibid.*, at 1226. The *Shorter Oxford English Dictionary* 5th edn. (Oxford: OUP, 2003) gives ‘punitive’ as one meaning of vindicatory.

¹²⁶ See *Cassell & Co. Ltd. v. Broome* [1972] A.C. 1027 at 1091 *per* Lord Reid. See also Lord Scott’s speech in *Kuddus v. Chief Constable of Leicestershire* [2001] UKHL 29; [2002] 2 A.C. 122.

¹²⁷ See *The Attorney General of Trinidad and Tobago v. Ramanoop* [2005] UKPC 15; [2006] 1 A.C. 328 at para. 19 *per* Lord Nicholls.

¹²⁸

Third, English law has in any event historically relied on the law of torts, part of English private law, to vindicate constitutional rights.¹²⁹ The ‘flagship of the fleet’ in this context has been the tort of trespass.¹³⁰ *Entick v. Carrington*, where a jury’s award of £300 against messengers of the King who broke into his house and carried away his private papers was upheld by Lord Camden C.J., provides a well-known example.¹³¹ Indeed, the courts continue today to use private law as the primary means of vindicating some fundamental rights.¹³²

Nevertheless, there is an important respect in which vindicatory damages will have a greater role in claims involving the infringement of constitutional rights than contractual rights. This is not because contractual rights are inherently less valuable than constitutional rights. It is because, as has been shown, damages for breach of contract are generally measured by reference to the claimant’s expectation interest. Damages in tort generally extend only to consequential loss.¹³³ In *Dunlea*, Thomas J. stated that damages under the New Zealand Bill of Rights Act should include an amount representing ‘the value of the right (or the non-violation of that right) to the plaintiff’.¹³⁴ Vindicatory damages thus recognise the ‘intrinsic value’ of the right.¹³⁵ Because of the expectation measure, contractual damages already largely achieve this. As well as compensating for consequential loss, damages for breach of contract generally compensate the claimant for the loss of value which proper performance would have brought. Further, vindicatory damages will be less prevalent in the contractual context because breach of contract, unlike infringement of constitutional rights, is an ‘incident of commercial life’.¹³⁶ As such, the performance right will generally be vindicated by compensatory damages based on the expectation measure. Vindicatory damages will be an exceptional remedy for breach of contract claims. As will be shown below, vindicatory damages are likely to be relevant in contract where the breach causes no loss within the conventional meaning of loss,¹³⁷ where an award of compensatory damages will not be an adequate remedy because all or part of the loss caused by the breach is not loss for which the defendant is liable to the claimant,¹³⁸ where an award of compensatory damages would be oppressive as regards the defendant,¹³⁹ and where the claim is for damages for loss of a chance.¹⁴⁰

¹²⁹ See, for example, in the context of claims against the Crown, *Davidson v. Scottish Ministers* [2005] UKHL 74; 2006 S.C.L.R. 249 at para. 73 *per* Lord Rodger:

‘By concentrating on judicial review, lawyers and judges today may tend to forget the historical importance of the law of tort or delict as a way of vindicating the subject’s rights and freedoms.’

¹³⁰ Weir, T., *A Casebook on Contract* 10th edn., (London: Sweet & Maxwell, 2004) at 18.

¹³¹ (1765) 2 Wils. K.B. 275. Based on a House of Commons Library Research Paper (06/09), ‘Inflation: The Value of the Pound 1750-2005’ the award would have equated to around £35,500 in 2005. *Ashby v. White* (1703) 2 Ld. Raym. 938 provides another example.

¹³² See, for example, the way the courts have developed the equitable wrong of breach of confidence as a means of protecting privacy following the enactment of the Human Rights Act 1998.

¹³³ Damages for torts relating to property and for libel (which may be thought of as rights-based torts) are exceptions to this principle.

¹³⁴ [2000] 3 N.Z.L.R. 136 at para. 70 *per* Thomas J.

¹³⁵ *Ibid.*, at para. 66.

¹³⁶ ‘Contract-breaking is treated as an incident of commercial life which players in the game are expected to meet with mental fortitude.’ *Johnson v. Gore Wood & Co.* [2002] 2 A.C. 1 at 49 *per* Lord Cooke of Thorndon.

¹³⁷ See, for example, *Wrotham Park Estate Co. Ltd. v. Parkside Homes Ltd.* [1974] 1 W.L.R. 798, below.

¹³⁸ See, for example, *Jackson v. Horizon Holidays Ltd.* [1975] 1 W.L.R. 1468, below.

¹³⁹ See, for example, *Ruxley Electronics and Construction Ltd. v. Forsyth* [1996] 1 A.C. 344, below.

¹⁴⁰ See, for example, *Chaplin v. Hicks* [1911] 2 K.B. 786, below.

*Entick v. Carrington*¹⁴¹ and *Ashby v. White*¹⁴² may be seen as early examples of vindictory damages being awarded in tort. A more recent instance, and one unrelated to constitutional rights, is provided by the decision of the majority of the House of Lords in *Rees v. Darlington*.¹⁴³ The claimant, who was severely visually impaired, wished to be sterilised as she felt that she would not be able to cope with bringing up a child. Her sterilisation was performed negligently by the hospital operated by the defendants. The claimant subsequently gave birth to a healthy son. A bare majority of a seven member panel of the House of Lords held that the defendant was not liable to pay for the additional cost of bringing up the child brought about by the claimant's disability. However the majority also held that compensation in respect of the stress, trauma and cost associated with the pregnancy and birth, which was recoverable, would, on its own, not give 'adequate recognition' to the reality that the claimant had lost 'the opportunity to live her life in the way that she wished and planned'.¹⁴⁴ Accordingly, the claimant was awarded an additional, conventional, sum of £15,000. The damages awarded in *Rees* are, it is suggested, rights-based, or vindictory, in nature. Such an analysis is consistent at least with the approach of Lord Bingham. Giving the leading speech, Lord Bingham said that the award was not intended to be compensatory, and was neither nominal nor derisory; rather, it 'would afford some measure of recognition of the wrong done.'¹⁴⁵

Damages for personal injury are more usually, but not exclusively, sought in the tort of negligence. In such actions several heads of damage are not easily explicable by reference to a compensatory justification. There is equivocal support for the award of damages for non-pecuniary loss which extends beyond the recognised heads of pain and suffering allied with loss of amenity.¹⁴⁶ *Forster v. Pugh* may be such an example.¹⁴⁷ In this case treatment of an abdominal injury necessitated the removal of the claimant's spleen and damages were awarded for pain and suffering *and the injury itself*. Formerly, damages were awarded on a conventional basis for loss of expectation of life when the injury reduced the victim's life expectancy.¹⁴⁸ Where a person has died as a consequence of a tort a limited class of persons is entitled to claim damages for bereavement. The damages consist of a conventional sum which has been progressively raised to £7,500.¹⁴⁹ Damages for bereavement were introduced as compensation for the loss of the deceased's 'guidance' and 'counsel'.¹⁵⁰ However the damages were also regarded as a symbolic recognition by the State of the fact, as well as the effect, of bereavement and the manner in which it was caused.¹⁵¹

What, in substance, amount to vindictory damages may be found elsewhere in private law. One example is an award of damages based on the so-called 'user-

¹⁴¹ (1765) 2 Wils. K.B. 275.

¹⁴² (1703) 2 Ld. Raym. 938.

¹⁴³ *Rees v. Darlington Memorial Hospital NHS Trust* [2003] UKHL 52; [2004] 1 A.C. 309.

¹⁴⁴ *Ibid.*, at para. 8 *per* Lord Bingham.

¹⁴⁵ *Ibid.*

¹⁴⁶ So-called 'PSLA' damages.

¹⁴⁷ [1955] C.L.Y. 741.

¹⁴⁸ The claim, amounting to £1,750 at the time of abolition, was abolished by s 1(1)b, Administration of Justice Act 1982.

¹⁴⁹ Damages for Bereavement (Variation of Sum) (England and Wales) Order 1990 (S.I. 1990/2575).

¹⁵⁰ Law Commission *Report on Personal Injury Litigation: Assessment of Administration of Damages* Law Com. No. 56 (1973) para. 172 and see now their *Claims for Wrongful Death* report no. 263 (1999) at para. 6.3.

¹⁵¹ See *Hansard* (HL) vol. 428, cols. 41-42 and (HC) vol. 148, col. 544.

principle'.¹⁵² The exact nature of these user damages has provoked disagreement: on the one hand, they are viewed as loss-based or compensatory; on the other, gain-based or restitutionary. A review of the case law reveals support for both views. In *Whitwham v. Westminster Brymbo Coal and Coke Co.* the defendants had for many years trespassed on the claimant's property by tipping spoil from their colliery on the land.¹⁵³ Each of the three members of the Court of Appeal described the damages awarded as compensatory.¹⁵⁴ In *Strand v Brisford*¹⁵⁵ where the defendant was held liable in damages for the wrongful detention of the claimants' goods, Somervell and Romer L.JJ. both viewed the damages as loss-based.¹⁵⁶ On the other hand, Denning L.J. characterised the damages in *Strand* as restitutionary.¹⁵⁷ Lord Denning M.R., as he had by then become, adopted the same approach in *Penarth v. Pounds* where the defendant failed to remove his floating pontoon from the claimant's dock.¹⁵⁸ In *Ministry of Defence v. Ashman* Hoffmann L.J. characterised a claim for mesne profits as a restitutionary claim, preferring to 'call a spade a spade'.¹⁵⁹ Kennedy L.J., in the same case, thought that the proper measure of damages was the benefit to the defendant of the use of the property. However, in *Attorney-General v. Blake*, Lord Nicholls of Birkenhead appears to have adopted a middle course: the damages in these cases, he concluded, are gain-based *and* compensatory.¹⁶⁰ The claimant's rights have been invaded, Lord Nicholls said, but no *financial* loss has been suffered.¹⁶¹ An award of a 'sensibly calculated sum of money' therefore represents 'compensation ... measured by a different yardstick'.¹⁶² Lord Nicholls concedes that to describe these awards as loss-based would involve giving a 'strained and artificial meaning' to the term loss.¹⁶³ So instead he prefers to acknowledge that the damages are gain-based.¹⁶⁴

The clearer, and better, approach, it is suggested, is to view the damages in these cases as rights-based. To begin, it is worth noting that these claims arise from the defendant's infringement of the claimant's property rights: by wrongfully occupying or using the claimant's land or chattels, the defendant has interfered with the claimant's right to possession. The wrong is the violation itself. The defendant owes a duty not to interfere, not merely to compensate for loss caused. That user damages are not loss-based is supported by the *Strand Electric* case. There, the Court of Appeal, in holding that the claimants were entitled to the full market rate of hire for

¹⁵² The source of the description was attributed to Nicholls L.J. in *Stoke-on-Trent City Council v. W. & J. Wass Ltd.* [1988] 1 W.L.R. 1406 at 1416 by Lord Lloyd in *Inverugie Investments Ltd. v. Hackett* [1995] 1 W.L.R. 713 at 718. In the context of trespass to land, the claims are for 'mesne profits': see, e.g., *McGregor on Damages* at para. 34-039.

¹⁵³ [1896] 2 Ch. 538.

¹⁵⁴ See, *ibid.*, at 541 (Lindley L.J.), 542 (Lopes L.J.), and 543 (Rigby L.J.).

¹⁵⁵ *Strand Electric and Engineering Co. Ltd. v. Brisford Entertainments Ltd.* [1952] 2 Q.B. 246.

¹⁵⁶ See, *ibid.*, at 252 and 256 respectively.

¹⁵⁷ 'The claim ... is therefore not based on the loss to the plaintiff, but on the fact that the defendant has used the goods for his own purposes ... It resembles, therefore, an action for restitution rather than an action of tort.' *Ibid.*, at 255-6.

¹⁵⁸ *Penarth Dock Engineering Co. Ltd. v. Pounds* [1963] 1 Lloyd's Rep. 359 at 362: 'the test of the measure of damages is not what the plaintiffs have lost, but what benefit the defendant obtained'. In *Ministry of Defence v. Ashman* (1993) 66 P. & C. R. 195 at 203, Lloyd L.J. described *Penarth*, with some degree of understatement, as a case with a 'whiff of restitution'.

¹⁵⁹ (1993) 66 P. & C.R. 195 at 201.

¹⁶⁰ [2001] 1 A.C. 268 at 278.

¹⁶¹ *Ibid.*

¹⁶² *Ibid.*

¹⁶³ *Ibid.*, at 279.

¹⁶⁴ *Ibid.*, at 281.

the detention of their goods, overturned the decision of Pilcher J. The learned judge had applied the approach adopted by the House of Lords in the *Valeria*,¹⁶⁵ on the basis that in both cases the relevant subject-matter was a profit-earning chattel. In the *Valeria* the claimant's vessel had been damaged in a collision. Lord Buckmaster said:

‘What has to be considered is what would this vessel have earned for the period of the seven days that she was incapacitated owing to the accident; and that amount is the true measure of the damage which the vessel who was to blame is called upon to pay, and it can only be ascertained by considering what she had earned under similar conditions.’¹⁶⁶

In *Strand* Pilcher J. accordingly awarded an amount equivalent to the actual loss suffered by the claimants. In doing so, he deducted from the total weekly hire for the period of wrongful detention sums to reflect the likelihood that the claimants would have been unable to hire out the switchboards for the whole of the relevant period and the likelihood that, had the defendants returned the switchboards in a timely fashion, some may have been damaged and so have been incapable of being hired out. The Court of Appeal rejected this award, based as it was on the estimated actual loss. But as Lord Nicholls appreciated, damages not based on actual loss cannot sensibly be described as loss-based unless loss is given a ‘strained and artificial meaning’.¹⁶⁷ Pilcher J.’s award was loss-based. The Court of Appeal substituted a rights-based remedy. Similarly in *Swordheath Properties Ltd. v. Tabet*,¹⁶⁸ where the defendant remained in the claimant’s residential property as a trespasser, Megaw L.J. thought it clear ‘as a matter of principle and of authority’ that the claimant was entitled to damages representing the value of the property without adducing evidence that he would have let the property to a third party.¹⁶⁹ Once the court dispenses with the requirement that the claimant prove his actual loss, it becomes hard to classify the award as loss-based. Some other principle would seem to be at work. Indeed, McGregor describes the awards in these cases as ‘moving away from damages’.¹⁷⁰ However he immediately adds that the awards are moving towards restitution.¹⁷¹ But, with respect, such a conclusion is better avoided. To explain, it is helpful to identify two uses of the word ‘restitutionary’.

The first use of restitution describes a remedy which requires the defendant to restore to the claimant what belongs to the claimant. Restitution, in this sense, effects the reversal of a subtraction by the defendant from the claimant’s property.¹⁷² Lord Hobhouse adopted this meaning in his dissenting speech in *Blake*, saying that restitution ‘is analogous to property: it concerns wealth or advantage which ought to be returned or transferred by the defendant to the plaintiff’.¹⁷³ The essence of

¹⁶⁵ *The S.S. Valeria* [1922] 2 A.C. 242.

¹⁶⁶ *Ibid.*, at 247-8.

¹⁶⁷ See *Attorney-General v. Blake* [2001] 1 A.C. 268 at 279 *per* Lord Nicholls.

¹⁶⁸ [1979] 1 W.L.R. 285.

¹⁶⁹ *Ibid.*, at 288. Lloyd L.J. adopted the same approach in the *Ashman* case: ‘It is true that the plaintiffs did not prove that they had an alternative tenant who was waiting to move in. But that does not mean they cannot claim and recover damages.’ (1993) 66 P. & C.R. 195 at 203. Lloyd L.J. doubted whether a restitutionary claim was even available in an action for the wrongful occupation of land (*ibid.*, at 202).

¹⁷⁰ *McGregor on Damages* at para. 34-045.

¹⁷¹ *Ibid.*

¹⁷² Thus the *Shorter Oxford English Dictionary* 5th edn. (Oxford: OUP, 2003) gives as the primary meaning of restitution: ‘The action or an act of restoring or giving back something to its proper owner’.

¹⁷³ [2001] 1 A.C. 268 at 296.

restitutionary relief, according to Lord Hobhouse, is ‘the *performance* by the defendant of his obligations’: the claimant ‘recovers what he is actually entitled to not some monetary substitute for it’.¹⁷⁴ Damages, on the other hand, are a ‘*substitute* for performance’.¹⁷⁵ Lord Hobhouse thought that the remedy in *Blake* could not properly be described as restitutionary. In this respect *Blake* can usefully be contrasted with *Reading v. Attorney-General*.¹⁷⁶ Sergeant Reading, a Crown servant, assisted a smuggling operation in Egypt by abusing his army position. The House of Lords held that the Crown was entitled to recover the money Reading received as payment from the smugglers. Like *Blake*, Reading made financial gains from his breach of contract. But the remedy in *Reading* may properly be characterised as restitutionary since, due to Reading’s position as a fiduciary, the monetary gains could be treated as belonging to the Crown. The House of Lords made an order requiring Reading to restore to the Crown what belonged to it. *Blake* was not a fiduciary and the Crown had no interest in the money due from Jonathan Cape. In none of the user principle cases can the damages be properly described as restitutionary in this sense: in none of them did the sum awarded to the claimant belong to the claimant. In each case the remedy was substitutionary and the claimants had no pre-existing entitlement to the sums awarded.

The second meaning of restitution is broader and refers simply to a gain-based remedy or to the disgorgement of a gain.¹⁷⁷ But damages based on the user principle are not restitutionary in this sense either: for they are not measured by the gain made by the defendant. This is evident from the decision of the Privy Council in *Inverugie Investments Ltd. v. Hackett*.¹⁷⁸ Here the claimant was wrongfully deprived by the defendant of possession of 30 apartments in a hotel complex in the Bahamas. The Privy Council held that the claimant was entitled to recover a reasonable rent for the period for which he was deprived of possession of the apartments. Applying the user principle, Lord Lloyd, delivering the judgment of the Board, concluded that the claimant was entitled to recover a reasonable rent whether or not he had ‘suffered any *actual* loss’.¹⁷⁹ Likewise, the defendant was liable to pay a reasonable rent even though he ‘may not have derived any *actual* benefit’.¹⁸⁰ In the same way that it is difficult to regard as loss-based those awards not based on actual loss, so too with supposedly gain-based damages which are awarded irrespective of any gain. Lord Lloyd thought that an award based on the user principle ‘need not be characterised as exclusively compensatory, or exclusively restitutionary; it combines elements of both’.¹⁸¹ In other words, it may be said, the awards seek neither to compensate the claimant for the consequences of the wrong nor deprive the defendant of the fruits of his conduct. Their aim is to vindicate the claimant’s right to possession: the damages represent the intrinsic value of this right, rather than the amount of any loss or gain consequential on its infringement. The defendant has violated the claimant’s right to

¹⁷⁴ *Ibid.*, 297 (emphasis in the original).

¹⁷⁵ *Ibid.* (emphasis in the original).

¹⁷⁶ [1951] A.C. 507.

¹⁷⁷ See e.g., Virgo, G., *The Principles of the Law of Restitution* 2nd edn., (Oxford: OUP, 2006) at 3: ‘The law of restitution is concerned with the award of a generic group of remedies which arise by operation of law and which have one common function, namely to deprive the defendant of a gain rather than to compensate the plaintiff for loss suffered.’

¹⁷⁸ [1995] 1 W.L.R. 713.

¹⁷⁹ *Ibid.*, at 718.

¹⁸⁰ *Ibid.*

¹⁸¹ *Ibid.* Lord Lloyd seems to have viewed the damages as compensatory: see, *ibid.*, at 717.

exclusive possession and he must pay for the privilege.¹⁸² *Inverugie* was applied in *Roberts v. Rodney D.C.* when a local authority constructed a sewer on the claimant's land without permission.¹⁸³ The damages payable in respect of the trespass were assessed as half of the difference between the cost to the Council of routing the sewer through the claimant's land and the cost of the alternative available route.

Vindictory damages for breach of contract: compulsory acquisition of a right

User damages seek to make good the claimant's right to possession of his property. More recently the same principle has been applied to personal rights¹⁸⁴ and, in particular, contractual rights.

'Property rights are superior to contractual rights in that, unlike contractual rights, property rights may survive against an indefinite class of persons. However, it is not easy to see why, as between the parties to a contract, a violation of a party's contractual rights should attract a lesser degree of remedy than a violation of his property rights ... it is not clear why it should be any more permissible to expropriate personal rights than it is permissible to expropriate property rights.'¹⁸⁵

The leading case remains *Wrotham Park v. Parkside*.¹⁸⁶ In 1971, the defendant acquired an undeveloped part of the Wrotham Park Estate, the land being subject to a covenant against development without the written approval of the owner of the Estate. The following year, the defendant began building on the plot. The claimant, the Estate owner, issued a writ seeking an injunction preventing further development and a mandatory injunction requiring demolition of any buildings built in breach of the covenant. It did not apply for interlocutory relief. The defendant ignored the writ and continued with development. By the time the matter came to trial the defendant had completed and sold all the houses on the plot but remained owner of the road serving each of the houses on the plot. Brightman J. held that the covenant was enforceable but declined to grant a mandatory injunction since to order the demolition of the newly-constructed houses would constitute an 'unpardonable waste of much needed houses'. The judge then went on to consider what damages, if any, ought to be awarded to the claimant.¹⁸⁷ The claimant had conceded that the value of the

¹⁸² A statutory example of an award of vindictory damages, it is suggested, is provided by s.117(3)(b), Employment Rights Act 1996. This provides for the award of an additional sum on top of compensation for unfair dismissal in the event that the employer declines to give effect to an order for reinstatement or re-engagement.

¹⁸³ [2001] 2 N.Z.L.R. 402.

¹⁸⁴ See, e.g., *Rees v. Darlington Memorial Hospital NHS Trust* [2003] UKHL 52; [2004] 1 A.C. 309, above.

¹⁸⁵ *Attorney General v. Blake* [2001] 1 A.C. 268 at 283 per Lord Nicholls. See also the comments of Laws L.J. in *Manchester Airport plc v. Dutton* [2000] 1 Q.B. 133 at 149.

¹⁸⁶ *Wrotham Park Estate Co. Ltd. v. Parkside Homes Ltd.* [1974] 1 W.L.R. 798. For more recent examples, see: *World Wide Fund for Nature v. World Wrestling Federation Entertainment Inc.* [2006] EWHC 184 (Ch); [2006] All E.R. (D.) 212 (Feb.) (reversed on other grounds at [2007] EWCA Civ 286; [2007] All E.R. (D.) 13 (Apr.)); *Horsford v. Bird* [2006] UKPC 3; [2006] 1 E.G.L.R. 75; *Severn Trent Water Ltd. v. Barnes* [2004] EWCA Civ 570; [2004] 2 E.G.L.R. 95; *Lane v. O'Brien Homes* [2004] EWHC 303 (QB); [2004] All E.R. (D.) 61 (Feb.); *Amec Developments Ltd. v. Jury's Hotel Management (U.K.) Ltd.* (2000) 82 P. & C.R. 286.

¹⁸⁷ Brightman J. noted that under the jurisdiction which originated with s.2 of the Chancery Amendment Act 1858 (Lord Cairns' Act) he was able to award damages in lieu of an injunction. Accordingly, he could award damages against the developer, as owner of the roadway, and the other defendants, as owners of the houses.

Wrotham Park Estate had not been reduced at all by the development and the defendant argued that accordingly the claimant was only entitled to nominal damages. But such an outcome struck the learned judge as being of questionable fairness.¹⁸⁸ So instead, Brightman J. concluded that a ‘just substitute’ for an injunction would be such sum as the claimants might reasonably have demanded ‘as a quid pro quo for relaxing the covenant’.¹⁸⁹

As with damages based on the user principle, disagreement dogs the proper characterisation of the award in *Wrotham*. Dillon L.J., giving judgment in *Surrey v. Bredero*, thought that Brightman J. had interpreted Lord Cairns’ Act as granting the courts power ‘to award such damages as would achieve a fair result between the parties’.¹⁹⁰ In the same case, Steyn L.J. said that the damages in *Wrotham Park* could only be based on the restitutionary principle. It was a fiction, he said, to justify them on the basis of a loss of bargaining opportunity: their object ‘was not to compensate the plaintiff for financial injury, but to deprive the defendants of an unjustly acquired gain.’¹⁹¹ This view is shared by many academic writers.¹⁹² Other judges have viewed the award in *Wrotham Park* as compensatory. In *Jaggard v. Sawyer*, Bingham M.R. was unable to accept that the award in *Wrotham Park* ‘was based on other than compensatory principles’.¹⁹³ Millett L.J. in the same case thought it ‘plain’ that Brightman J. was adopting a ‘compensatory, not restitutionary’ approach.¹⁹⁴ Megarry V.-C. saw the award as quite clearly one of compensatory damages.¹⁹⁵ In the more recent *WWF* case Peter Smith J. concluded that the *Wrotham Park* remedy is ‘compensation based and not restitutionary based’.¹⁹⁶ In his judgment in the appeal of that case, Chadwick L.J. thought it ‘reasonably clear’ that Brightman J. ‘took the view that he was making an award of compensatory damages’.¹⁹⁷ In *Blake*, Lord

¹⁸⁸ ‘Is it just that the plaintiffs should receive no compensation and that the defendants should be left in undisturbed possession of the fruits of their wrongdoing? Common sense would seem to demand a negative answer to this question.’ [1974] 1 W.L.R. 798 at 812.

¹⁸⁹ *Ibid.*, at 815. As to amount Brightman J. thought that the damages had to be calculated on a ‘fair’ basis, and he assessed this as a sum equal to 5% of the developer’s anticipated profits (*ibid.*, at 816).

¹⁹⁰ *Surrey County Council v. Bredero Homes Ltd.* [1993] 1 W.L.R. 1361 at 1367. Such a conclusion, Dillon L.J. thought, involved the Act introducing a substantive change in the law, a possibility dismissed in *Johnson v. Agnew* [1980] A.C. 367.

¹⁹¹ [1993] 1 W.L.R. 1361 at 1369.

¹⁹² See, e.g., Burrows, A., *The Law of Restitution*, 2nd edn., (London: Butterworths, 2002) at 483; Virgo, G., *The Principles of the Law of Restitution* 2nd edn., (Oxford: OUP, 2006) at 482; *McGregor on Damages* at para. 12-023; Birks, P., “Restitutionary Damages for Breach of Contract: *Snepp* and the Fusion of Law and Equity” [1987] L.M.C.L.Q. 421 at 428; and, Edelman, J., *Gain-Based Damages* (Oxford: Hart Publishing, 2002) at 179. Other writers are more equivocal: Tettenborn describes *Wrotham Park* as adopting ‘partly restitutionary reasoning’ (Tettenborn, A., *The Law of Restitution in England and Ireland* (London: Cavendish, 2002) at 249 (emphasis added)). Similarly, Smith concludes that *Wrotham Park* ‘seems to mix compensatory and restitutionary aims’ (Smith, S.A., *Atiyah’s Introduction to the Law of Contract* 6th edn., (Oxford: Clarendon Press, 2005) at 413).

¹⁹³ [1995] 1 W.L.R. 269 at 281.

¹⁹⁴ *Ibid.*, at 291.

¹⁹⁵ *Tito v. Waddell (No.2)* [1977] Ch. 106 at 335.

¹⁹⁶ *World Wide Fund for Nature v. World Wrestling Federation Entertainment Inc.* [2006] EWHC 184 (Ch); [2006] All E.R. (D.) 212 (Feb.) at para. 137. Peter Smith J. did however recognise that following *Attorney General v. Blake* [2001] 1 A.C. 268 there was greater support for Steyn L.J.’s analysis. At para. 111 Peter Smith J. noted: ‘Thus far [i.e. prior to *Blake*] Lord Steyn is a voice crying in the wilderness on this interesting jurisprudential debate’. However, at para. 135 his lordship conceded that after *Blake* ‘...Lord Steyn is to some extent still in the wilderness but he might not now be necessarily crying loudly’.

¹⁹⁷ *World Wide Fund for Nature v. World Wrestling Federation Entertainment Inc.* [2007] EWCA Civ 286; [2007] All E.R. (D.) 13 (Apr.) at para. 29.

Nicholls said that Brightman J. had been right in *Wrotham Park* to apply by analogy the user principle cases. According to Lord Nicholls, *Wrotham Park* shows that contractual damages ‘are not always confined to recoupment of financial loss’.¹⁹⁸ The award may be measured by the defendant’s gain. But such damages remain compensatory for it is ‘axiomatic’ that damages for breach of contract are compensatory.¹⁹⁹

It is respectfully suggested that Lord Nicholls is correct to concede that the damages in *Wrotham Park* are not loss-based. For it is preferable to retain the coherence of loss as traditionally understood. But, with equal respect, it is suggested that it is misconceived to persist with a compensatory characterisation of the award. The difficulty in *Wrotham Park* arises not because the loss cannot be expressed in financial terms. As will be shown below, the courts have no difficulty in measuring non-pecuniary loss when awarding compensatory damages. The difficulty arises because there was no loss at all. As such, it is unhelpful to persist with a compensatory analysis. Punitive and nominal damages are not based on loss and no-one describes these as compensatory. As Lord Nicholls appears to accept, it is simply not possible to explain *Wrotham Park* on orthodox compensatory grounds. To begin, the breach of covenant caused no loss: the ‘existence of the new houses did not diminish the value of the benefited land by one farthing’.²⁰⁰ Lord Nicholls thought it correct to view the award as ‘damages for the loss of a bargaining opportunity’.²⁰¹ The claimant ‘lost’ the release fee it could have secured from the defendant for relaxing the covenant. Indeed, Brightman J. described his award as representing ‘a sum of money as might reasonably have been demanded by the plaintiffs from the [developer] as a quid pro quo for relaxing the covenant’.²⁰² However, it was accepted by Brightman J. that the claimant would never have agreed to relax the covenant.²⁰³ The position of the claimant in *Wrotham Park* is thus analogous to that of the claimant in *Ford v. White & Co.*²⁰⁴ Here the claimant bought a house and an adjacent piece of land for £6,350. The claimant intended to develop the plot, but his solicitor had negligently failed to bring to his attention a covenant against building on the land. The evidence showed that the value of the house and adjacent plot was £6,350, although it would have been worth an additional £1,250 were it not for the restrictive covenant. The court held that the claimant could not recover the £1,250 as damages as this did not represent his loss of bargain. Had the solicitor performed his duties with due care and skill and told the claimant of the covenant, the claimant would not have proceeded with the purchase. Thus an award of £1,250 would not have the effect of putting the claimant into the position he would have been in had the contract been performed. Had the contract in *Wrotham Park* been performed, that is, had the defendant not commenced development without seeking a release, the release would not have been forthcoming from the claimant. Breach or no breach, the claimant

¹⁹⁸ [2001] 1 A.C. 268 at 283.

¹⁹⁹ *Ibid.*, at 282.

²⁰⁰ *Ibid.*

²⁰¹ *Ibid.*

²⁰² Such damages need to be assessed by reference to a particular date. As with contract damages generally, the date of breach is used: *Lunn Poly Ltd v. Liverpool and Lancashire Properties Ltd* [2006] EWCA Civ 430; [2006] 2 E.G.L.R. 29 and *Wynn-Jones v. Bickley* [2006] EWHC 1991 (Ch); [2006] All E.R. (D.) 31 (Jul.). However a later date might be used if more appropriate *Horsford v. Bird* [2006] UKPC 3; [2006] 1 E.G.L.R. 75.

²⁰³ ‘On the facts of this particular case the plaintiffs, rightly conscious of their obligations towards existing residents, would clearly not have granted any relaxation.’ [1974] 1 W.L.R. 798 at 815.

²⁰⁴ [1964] 1 W.L.R. 885.

would never have received a release fee. As such, it was not open to the court to award damages on the loss of bargain basis, in the same way that the claimant could not recover the £1,250 in *Ford v. White*.²⁰⁵

Vindictory damages for breach of contract: loss of amenity

Lord Nicholls thought that damages for the loss of a bargaining opportunity and the price payable for the compulsory acquisition of a right came to the same thing.²⁰⁶ In *Wrotham Park* then, Brightman J.'s award of damages represented the reasonable value of the claimant's right to prevent development on the defendant's land, the benefit of which the defendant had in effect compulsorily acquired. The same principle may be identified in what, at first sight, appears to be a different kind of case. In *Ruxley v. Forsyth* Ruxley undertook to build a swimming pool for Mr. Forsyth but failed to construct the pool to the depth specified in the contract.²⁰⁷ The trial judge found that the pool as constructed was perfectly safe and that the shortfall in depth did not adversely affect its value. Further, the judge found that the only way of remedying the defect was to re-construct the pool from scratch at a cost of £21,560 and that such cost would be wholly disproportionate to any benefit attained by having the additional depth. Accordingly, Mr. Forsyth's damages were limited to £2,500, being the loss of amenity value. The Court of Appeal held that Mr. Forsyth was entitled to recoup the re-instatement cost, but the House of Lords restored the trial judge's award.

Lord Mustill²⁰⁸ rejected the argument that diminution in value and cost of cure were the only measures of normal loss, 'for the law must cater for those occasions where the value of the promise to the promisee exceeds the financial enhancement of his position which full performance will secure'.²⁰⁹ This excess, the so-called

²⁰⁵ Nor should the damages in *Wrotham Park* be viewed as restitutionary. First, they did not restore to the claimant something to which the claimant had a pre-existing entitlement. Second, while notionally based on an actual gain, reference to the defendant's profit is better interpreted as an attempt to value the right, of the benefit of which, the claimant was deprived. That the damages in *Wrotham Park* are neither loss-based nor gain-based gains further support from their analysis by Nourse L.J. in *Stoke-on-Trent City Council v. W. & J. Wass Ltd.* [1988] 1 W.L.R. 1406. While describing the result in *Wrotham Park* as 'entirely appropriate', Nourse L.J. viewed the decision as being 'something akin to an award of exemplary damages for breach of contract' (ibid., at 1414). While, as the Privy Council has noted (see *The Attorney General of Trinidad and Tobago v. Ramanoop* [2005] UKPC 15; [2006] 1 A.C. 328 at para. 19), it is important to distinguish vindictory damages from punitive, or exemplary, damages, Nourse L.J.'s approach is more consistent with a vindictory analysis than a compensatory one. Cf. *Gafford v. Graham* [1998] EWCA Civ 666; (1998) 77 P & C.R. 73 at 86 where Nourse L.J. states that a compensatory analysis of *Wrotham Park* is 'perfectly acceptable' as long as it is recognised 'that it was not a diminution in value of the dominant tenement that was compensated'.

²⁰⁶ [2001] 1 A.C. 268 at 282. It is respectfully suggested that this may not be the case. Damages for loss of bargaining opportunity depend on there being a bargaining opportunity in the first place. As Megarry V.-C. pointed out in *Tito v. Waddell (No. 2)* [1977] Ch. 106 at 335, the bargaining opportunity arises from the defendant being faced with either an injunction restraining breach or liability for substantial damages for breach. On this basis the claimant in *Surrey v. Bredero* [1993] 1 W.L.R. 1361 had no bargaining opportunity to lose: Dillon L.J. said that there had never been any possibility of an injunction being granted to restrain the breach of covenant; nor did the breach cause any diminution in value of any adjoining property owned or occupied by the claimant (ibid., at 1364). Yet Lord Nicholls appears to have thought that there ought to have been an award of substantial damages in the *Surrey* case (see [2001] 1 A.C. 268 at 283).

²⁰⁷ *Ruxley Electronics and Construction Ltd. v. Forsyth* [1996] 1 A.C. 344.

²⁰⁸ With whose reasons Lord Keith of Kinkell and Lord Bridge of Harwich agreed.

²⁰⁹ [1996] A.C. 344 at 360. Lord Mustill did not explicitly refer to normal loss but was clearly speaking in the context of such loss.

consumer surplus, represents ‘a personal, subjective and non-monetary gain’.²¹⁰ The law, Lord Mustill says, should recognise this gain and ‘compensate the promisee if the misperformance takes it away’.²¹¹ The better view, it is suggested, is to view the damages in *Ruxley* as rights-based damages. It is important to bear in mind that in a building contract the presumptive measure of compensation is the cost of cure.²¹² The House of Lords held in effect that the presumption was rebutted: the relatively high cost to the builder, and the relatively small benefit to Mr Forsyth, of re-building the pool meant that damages based on the re-instatement cost would have been oppressive. An award of cost of cure damages would have been oppressive as far as the builder was concerned, but a failure to award substantial damages would have left Mr Forsyth’s performance right unsatisfied. The damages awarded are best treated as a ‘sensibly-calculated’ sum of money designed to vindicate the right to performance of the contract. In *Ruxley*, there is no question of treating the damages as gain-based: there was no evidence that the builder derived any benefit from the skimmed performance. Yet the absence of any gain does not take away the requirement for a substantive remedy. The builder must pay for the privilege of acquiring the right to derogate from the level of performance specified in the contract.

This analysis of the award in *Ruxley* avoids the difficulties inherent in the measure outlined by Lord Mustill. Lord Mustill’s account is problematic in its reference to a *subjective* gain by the claimant. Diminution in value and cost of cure, the general measures of normal loss, incorporate an important safeguard so far as the defendant is concerned. His liability under the contract as regards normal loss is limited by the *objective* standard provided by market value. Diminution in value and cost of cure provide an equitable balance between the competing interests of claimant and defendant. On the one hand they provide a reliable means of placing the claimant in the same position as if the contract had been performed. On the other hand, they ensure that the defendant’s duty to compensate is not rendered unduly onerous by the claimant’s subjective expectations. Now subjective loss is recoverable in contract as well as tort. But it is recoverable as consequential loss and the defendant is protected from too onerous a liability by the remoteness rules applicable to both contractual and tortious claims. Given that normal loss is ‘that loss which every claimant in a like situation will suffer’, it is logical to use an objective means of measurement, namely, the market.

In any event, the concepts of normal and consequential loss as conventionally measured are capable of recognising the intangible, non-pecuniary benefit which the consumer surplus represents. This is shown by *Jarvis v. Swans Tours Ltd.*²¹³ Mr Jarvis booked a skiing holiday with the defendants which turned out to be a grave disappointment. Lord Denning M.R. thought that as Mr Jarvis went to enjoy all the facilities which the defendants had promised, he was ‘entitled to damages for the lack of those facilities, *and* for his loss of enjoyment.’²¹⁴ Now the failure by the defendants to provide the promised facilities corresponds to normal loss: it was the loss which every claimant in Mr Jarvis’ situation would have suffered. The trial judge indeed based his award of damages on this measure: ‘The judge seems to have taken the difference in value between what [Mr Jarvis] paid for and what he got.’ But, the

²¹⁰ *Ibid.*, at 360-361. For the idea of consumer surplus, see Harris D., Ogus A., and Philips J., “Contract Remedies and the Consumer Surplus” (1979) 95 L.Q.R. 581.

²¹¹ [1996] A.C. 344 at 361.

²¹² *East Ham Corp. v. Bernard Sunley & Sons Ltd.* [1966] A.C. 406.

²¹³ [1973] 1 Q.B. 233.

²¹⁴ *Ibid.*, at 238 (emphasis added).

Court of Appeal, in increasing the damages from £31.72 to £125, in effect awarded damages for consequential loss, ‘his loss of enjoyment’, in addition to damages for normal loss. Loss of enjoyment in the context of a contract for a holiday corresponds to loss of profit in the context of an ordinary commercial contract, and loss of profit will generally comprise consequential loss.²¹⁵

It seems clear that Mr Forsyth suffered no loss of amenity as conventionally measured. The evidence indicated that the reasonable man would have attached equal value to, and derived equal enjoyment from, a pool of the contractual depth and the pool as built. As Lord Millett noted in the *Panatown* case, ‘viewed objectively, there was no loss of amenity’ in *Ruxley*.²¹⁶ And as Lord Scott observed of the *Ruxley* case in *Farley v. Skinner*:²¹⁷

‘the breach of contract by the builders had not caused any consequential loss to the pool owner ... it was not a case where the recovery of damages for consequential loss consisting of vexation, anxiety or other species of mental distress had to be considered’.²¹⁸

Loss of amenity is not the sole ground of the decision in *Ruxley*. Having expressed agreement with the trial judge’s award of damages for loss of amenity, Lord Lloyd observed that ‘in most cases such an approach would not be available.’²¹⁹ He gave as an example a contract for the construction of a house, where the breach caused no diminution in value and where the cost of cure would have been prohibitive. ‘Is there any reason’, he asked,

‘why the court should not award by way of damages for breach of contract some modest sum, not based on difference in value, but solely to compensate the buyer for his disappointed expectations? Is the law of damages so inflexible ... that it cannot find some middle ground in such a case?’²²⁰

Lord Lloyd’s approach was followed by Lord Scott in *Farley v. Skinner*.²²¹ According to Lord Scott, *Ruxley* establishes that ‘if a party’s contractual performance has failed to provide to the other contracting party something to which that other, was under the contract, entitled, and which, if provided, would have been of value to that party, then if there is no other way of compensating the injured party, the injured party should be compensated in damages to the extent of that value.’²²² Lord Scott concluded that the *Ruxley* principle ‘should be used to provide damages for deprivation of a contractual benefit where it is apparent that the injured party has been deprived of something of value but the ordinary means of measuring the recoverable damages are inapplicable.’²²³ In *Farley* itself, Lord Scott thought it ‘open to the court

²¹⁵ In *Jackson v. Horizon Holidays Ltd.* [1975] 1 W.L.R. 1468, another ruined holiday case, the trial judge, directing himself in accordance with *Jarvis v. Swans Tours*, awarded damages of £1,100. The award was upheld by the Court of Appeal. While the trial judge did not divide up the £1,100, Lord Denning M.R. thought that the suggestion by Mr Jackson’s counsel that the judge gave £600 for diminution in value and £500 for disappointment ‘may well be right’ (*ibid.*, at 1472). As discussed below, while the Court of Appeal upheld the amount of the trial judge’s award, they would not necessarily have arrived at the final figure in the same way.

²¹⁶ *Alfred McAlpine Construction Ltd v. Panatown Ltd* [2001] 1 A.C. 518 at 588.

²¹⁷ *Farley v. Skinner* [2001] UKHL 49; [2002] 2 A.C. 732 at para. 80.

²¹⁸ *Ibid.*

²¹⁹ [1996] 1 A.C. 344 at 374.

²²⁰ *Ibid.*

²²¹ [2001] UKHL 49; [2002] 2 A.C. 732.

²²² *Ibid.*, at para. 79.

²²³ *Ibid.*, at para. 86.

to adopt a [*Ruxley*] approach and place a value on the contractual benefit of which Mr. Farley has been deprived'.²²⁴ The deprivation of a benefit approach differs from the account of vindicatory damages put forward in this article in that Lord Lloyd and Lord Scott view the damages as compensatory. But a compensatory approach, if it is respectfully suggested, creates difficulties. If a loss-based approach is adopted, the concept of loss becomes over-stretched because in a case like *Wrotham Park* it is not possible on conventional grounds to identify a loss. On the other hand, if a gain-based approach is adopted, as proposed by Lord Nicholls, the concept of compensation becomes over-stretched, for compensation is synonymous with loss. A vindicatory analysis avoids the need to depart from conventional meanings of compensation and loss. While compensation for loss represents the principal means by which the courts vindicate the claimant's performance right, it is not the sole means. Where the conventional meanings of compensation and loss preclude an award of compensatory damages, it is better to award rights-based damages than over-stretch well-established concepts.

Vindicatory damages for breach of contract: third party loss

A third situation where an entitlement to compensatory damages may not be sufficient to vindicate the claimant's performance right occurs where all or part of the benefit of performance is to be conferred on a third party. As shown above, it may be possible for the claimant to recover damages on behalf of the third party. Such damages are compensatory. An alternative is for the claimant to recover damages to vindicate the performance right. These are not compensatory and are not recovered for the benefit of the third party. Take, as an example, *Jackson v. Horizon*.²²⁵ In that case, Mr Jackson booked a four week holiday in what was then Ceylon for himself, his wife and their twin boys. The cost of the holiday was £1,200. The holiday was a disaster. The defendants admitted liability for breach of contract but the parties failed to agree compensation. The trial judge, directing himself in accordance with *Jarvis v. Swans Tours Ltd.*,²²⁶ awarded damages of £1,100. The award was upheld by the Court of Appeal. The judge did not divide up the award of £1,100 but Lord Denning M.R. thought that the suggestion by Mr Jackson's counsel that the judge gave £600 for the difference in value, that is, normal loss, and £500 for the mental distress, that is, consequential loss, 'may well be right'.²²⁷ Lord Denning M.R. thought that the family had had about half the value of a holiday which cost £1,200. However, the judge's award of £500 would appear to relate solely to the mental distress suffered by Mr Jackson himself: it did not cover the distress of his wife and children. Lord Denning M.R. thought that the award on this basis would have been excessive. Nevertheless, the Master of the Rolls, with whom Orr L.J. agreed, felt able to uphold the award, on the ground that Mr Jackson could recover for the distress to his wife and children. However, the House of Lords in *Woodar v. Wimpey*, while agreeing with the outcome in *Jackson*, disapproved of Lord Denning M.R.'s reasoning.²²⁸ The other member of the court in *Jackson*, James L.J., also upheld the award and seems to have done so on the basis that Mr Jackson booked, but did not receive, a family

²²⁴ *Ibid.*, at para. 107.

²²⁵ *Jackson v. Horizon Holidays Ltd.* [1975] 1 W.L.R. 1468.

²²⁶ [1973] 1 Q.B. 233.

²²⁷ [1975] 1 W.L.R. 1468 at 1472.

²²⁸ *Woodar Investment Development Ltd. v. Wimpey Construction U.K. Ltd.* [1980] 1 W.L.R. 277 at 283-284 (*per* Lord Wilberforce), 293-294 (*per* Lord Russell of Killowen), and 297 (Lord Keith).

holiday.²²⁹ This approach was approved by Lord Wilberforce in *Woodar*.²³⁰ Lord Russell of Killowen in *Woodar* would have adopted the same approach, saying that the claimant ‘paid for a high class family holiday; he did not get it, and therefore he was entitled to substantial damages for the failure to supply *him* with one’.²³¹

A better basis for the decision in *Jackson*, it is suggested, is that the damages were, in part at least, vindictory in nature. Because some of the consequential loss caused by the breach was suffered by the wife and children, an award of damages to compensate for normal loss and Mr Jackson’s own consequential loss, would not have adequately vindicated his right to a family holiday. The damages may be seen as incorporating a vindictory element, based not on the loss suffered by the wife and children, but on the value to Mr Jackson of his right to a family holiday. The award does not represent recovery of third party loss, but enables the court to make good the infringement of a contractual right where conventional principles rule out an adequate award of compensation.²³²

Vindictory damages for breach of contract: loss of a chance

A fourth instance of the availability of vindictory damages in contract arises in the so-called ‘loss of a chance’ cases. In *Chaplin v. Hicks*²³³ the defendant failed, in breach of contract, to afford the claimant the opportunity to participate in the final round of a beauty contest. The claimant had been one of 50 finalists, 12 of whom were to be awarded three-year engagements with remuneration of at least £3 per week. The Court of Appeal upheld the jury’s award of £100 damages. In the same way that the damages in *Wrotham Park* cannot be considered as compensatory in the orthodox sense, nor can the award in *Chaplin*. The damages did not seek to put Miss Chaplin into the position she would have been in had the contract been performed. Had the contract been performed, Miss Chaplin would either have won an engagement, worth significantly more than £100, or won nothing at all: she would not, on either outcome, have been £100 better off.²³⁴ The same applies to the claim in *Spring v. Guardian Assurance plc*.²³⁵ When Mr Spring’s contract with the defendants was terminated he sought a position with Scottish Amicable. Scottish Amicable sought a reference from the defendants. The reference was negligently prepared and was, according to the trial judge, the ‘kiss of death’ as far as Mr Spring’s employment hopes were concerned.²³⁶ Having received the reference, Scottish Amicable wanted nothing more to do with him.²³⁷ In the House of Lords the cause of action was treated mainly as one arising in tort, but a majority of the law lords clearly envisaged liability in contract.²³⁸ The case was remitted to the Court of

²²⁹ [1975] 1 W.L.R. 1468 at 1474.

²³⁰ [1980] 1 W.L.R. 277 at 283.

²³¹ *Ibid.*, at 293.

²³² The enactment of the Contracts (Rights of Third Parties) Act 1999 allows for the vindication of the performance right by an award of damages to the third parties themselves.

²³³ [1911] 2 K.B. 786. Greater detail of the factual background is contained in the report at [1911-1913] All E.R. Rep. 224.

²³⁴ There is nothing in the report of the case to suggest that the award sought to put Miss Chaplin in the position she would have been in had the contract not been made, that is, to compensate her for her reliance losses. Given that the award was by a jury, one can only speculate as to its actual basis.

²³⁵ [1995] 2 A.C. 296.

²³⁶ See [1993] 2 All E.R. 273 at 276.

²³⁷ The reference was sent to two other prospective employers, both of whom ‘rejected him virtually out of hand’. See *ibid.*, at 282.

²³⁸ See *per* Lord Woolf at [1995] 2 A.C. 296, 353-354, *per* Lord Goff, *ibid.*, at 320, and *per* Lord Slynn of Hadley, *ibid.*, at 339-340.

Appeal for consideration of whether the breach of duty had caused Mr Spring loss. But, as Lord Lowry emphasised:

‘[Mr Spring] only has to show that by reason of that negligence he has lost a reasonable chance of employment (which would have to be evaluated) and has thereby sustained loss ... He does not have to prove that, but for the negligent reference, Scottish Amicable *would* have employed him.’²³⁹

Yet, had the contract been performed by the defendants, Mr Spring would either have been taken on or not taken on. By awarding damages based on his chance of securing the position, the court would be placing Mr Spring into a position he would not have been in had the contract been performed.²⁴⁰

The damages in *Chaplin*, and the prospective damages in *Spring*, are better viewed as vindictory. On conventional principles, Miss Chaplin was unable to prove that the breach of contract by Mr Hicks had caused her loss: she could not prove on the balance of probabilities that she would have won an engagement. But an award of nominal damages would have failed to vindicate her right to performance of the contract. The damages represented the value of the performance right:

‘The jury came to the conclusion that the taking away from the plaintiff of the opportunity of competition, as one of a body of fifty, when twelve prizes were to be distributed, deprived the plaintiff of something which had a monetary value.’²⁴¹

In this way the basis of the award in *Chaplin* is the same as that in *Wrotham Park* and *Ruxley*: the damages are for the ‘deprivation of a contractual benefit where it is apparent that the injured party has been deprived of something of value but the ordinary means of measuring the recoverable damages are inapplicable.’²⁴² In *Chaplin* the claimant’s right to performance was infringed but, on conventional compensatory principles, the defendant was not liable to pay substantial damages. By valuing the right to performance itself, the jury in effect awarded rights-based damages.

It follows that the dismissal by a majority of the House of Lords of the claim in *Gregg v. Scott* may be treated as a refusal to award vindictory damages.²⁴³ In that case Mr Gregg, having developed a lump under his arm, visited Dr Scott, his general practitioner. Dr Scott negligently advised that no action was necessary. Nine months later, Mr Gregg visited another general practitioner who arranged for him to undergo tests which revealed that the lump was cancerous. Evidence showed that at the time Mr Gregg visited Dr Scott, his chances of surviving the cancer had been less than 50%. On this basis, Dr Scott was not liable for depriving Mr Gregg of the prospect of a cure: on the balance of probabilities Mr Gregg had no prospect of a cure in the first place. Before the Court of Appeal and the House of Lords, Mr Gregg argued that Dr Scott’s negligence had further reduced Mr Gregg’s chances of survival, and that

²³⁹ *Ibid.*, at 327 (the emphasis is Lord Lowry’s).

²⁴⁰ Unless that chance was determined as either 100% or 0%.

²⁴¹ [1911] 2 K.B. 786 at 793 per Vaughan Williams L.J. Fletcher Moulton L.J. (at 796) adopts the same analysis:

‘Where by contract a man has a right to belong to a limited class of competitors, he is possessed of something of value, and it is the duty of the jury to estimate the pecuniary value of that advantage if it is taken from him.’

²⁴² *Farley v. Skinner* [2001] UKHL 49; [2002] 2 A.C. 732 at para. 86 per Lord Scott.

²⁴³ [2005] UKHL 2; [2005] 2 A.C. 176. The claim was one in tort but the same situation could arise in a contractual setting: for example, where the doctor is treating the patient privately.

damages could be awarded for this further reduction. Lord Nicholls, in his dissenting speech, favoured an award of damages based on Mr Gregg's reduced chances of recovery:

'In these cases a doctor's duty to act in the best interests of his patient involves maximising the patient's recovery prospects, and doing so whether the patient's prospects are good or not so good. In the event of a breach of this duty the law must fashion a matching and meaningful remedy. A patient should have an appropriate remedy when he loses the very thing it was the doctor's duty to protect.'²⁴⁴

Lord Nicholls accepted that his approach represented a development in the law. To the extent that the remedy involved applying the loss of a chance principle to medical negligence cases, that may be so. But whether an award of substantial damages to vindicate the claimant's infringed right would constitute a development is less obvious. Damages vindicating similar rights were, after all, made by the House of Lords in *Rees v. Darlington*²⁴⁵ and *Chester v. Afshar*.²⁴⁶ Just as it is hard to see why a violation of contractual rights should merit a lesser degree of remedy than a violation of property rights,²⁴⁷ it is hard to see why, as a matter of principle, the courts should be more willing to award damages to vindicate rights protecting economic interests than to vindicate rights protecting personal well-being.²⁴⁸

Concluding remarks

Speaking extra-judicially, Lord Scott recently lamented the incoherence of the current law of damages.²⁴⁹ In the context of contractual damages, any incoherence would seem to arise from those cases where substantial damages are awarded but where the claimant has not suffered any loss within the conventional meaning of the term. While some maintain that such awards comprise restitutionary damages, it has been argued that such an explanation is unsatisfactory. Restitution is better confined to a remedy whereby the defendant is ordered to restore to the claimant property or value belonging to the claimant, that is, where the defendant's gain equates to the claimant's loss. While *Reading v. Attorney-General* provides an example of a restitutionary remedy, awards of mesne profits and user damages fall outside the ambit of restitution. Even if restitution is used in a looser sense, to refer to a gain-based remedy, restitutionary awards ought logically to equate to all or part of the gain *actually* realised by the defendant. Just as actual loss forms the basis of compensatory damages, so too should actual gain form the basis of gain-based damages. As has been shown, awards of mesne profits and user damages are not based on any actual gain. The alternative explanation offered for these cases is that the remedy is compensatory. But that either involves over-stretching the conventional meaning of loss. The better approach, it has been argued, is to extend the availability of vindicatory damages to these cases. Awards of vindicatory damages seek to make good the claimant's performance right, and would give

²⁴⁴ *Ibid.*, at para. 42. For reasons 'very close' to those of Lord Nicholls, Lord Hope also favoured an award of damages: see *ibid.*, at para. 92.

²⁴⁵ *Rees v. Darlington Memorial Hospital NHS Trust* [2003] UKHL 52; [2004] 1 A.C. 309.

²⁴⁶ [2004] UKHL 41; [2005] 1 A.C. 134; see below.

²⁴⁷ *Attorney General v. Blake* [2001] 1 A.C. 268 at 283 *per* Lord Nicholls.

²⁴⁸ See *Winfield & Jolowicz on Tort* at para. 6-15.

²⁴⁹ "Damages and Incoherence", University of Liverpool Law School Annual Public Law Lecture, 23 February 2007.

substance to the principle that a claimant has a legally enforceable right to the performance of the contract. Vindictory damages represent one way in which the courts may exercise one of their principal functions: that of making good legal rights by the grant of adequate remedies. While orthodox principles of contract law demonstrate that the vindictory function is long-standing, it is possible to detect, both in contract and the wider law, a willingness to adapt existing principles quite radically so as to ensure that the victim of an infringed right receives due satisfaction.

Vindication should be recognised as an important principle driving development of the law, and vindictory damages as a significant means of giving effect to that principle. But the importance of vindictory damages lies not just in ensuring a just outcome for a claimant where no other remedy is available: vindictory damages may be also used to ensure that the remedy awarded to a claimant does not impose undue liability on the defendant. *Chester v. Afshar* is a case where an award of vindictory damages would have been preferable to an award of compensation for that very reason.²⁵⁰ In *Chester* the defendant, a neurosurgeon, had advised the claimant to undergo surgery on her spine but negligently failed to warn the claimant of a small risk that the surgery, even if performed with due care and skill, might lead to her developing a particular adverse condition, cauda equina syndrome. The claimant underwent the surgery, which was performed by the defendant with due care and skill, but later developed the syndrome. She sued the defendant in negligence. The judge found that had the claimant been warned by the defendant of the risk of developing the syndrome, she would not have had the surgery on that particular day but would have sought further advice elsewhere. The judge did not find that the claimant, if duly warned, would not have undergone surgery at a later date. The risk of developing the syndrome would have been the same whenever the surgery took place. The House of Lords unanimously held that on conventional principles of causation the claim failed.²⁵¹ The defendant's breach had been neither the effective cause of the injury nor had it increased the risk of the injury. On ordinary principles, no obligation to compensate arose. Yet the majority held that the defendant was liable in damages: the defendant had been under a duty to warn of the risk of injury and the injury resulted from the risk. Assuming that the damages were to be assessed in the ordinary way,²⁵² the liability imposed on the defendant may be criticised as too onerous. The defendant did not cause the loss, liability for which was nevertheless imposed on him. The majority clearly believed that a remedy ought to be available to the claimant. But the heart of the complaint was that the defendant had infringed the claimant's right to be warned of the risks of the proposed operation. That infringement had caused no loss on conventional compensatory principles. An outright refusal of damages would have failed to vindicate the right to be warned.²⁵³ But to impose a liability on the defendant to compensate for loss arising from the outcome of the surgery was unduly onerous on ordinary principles. The better solution would have been to award vindictory damages. This would have better reflected the reality of the situation: that the victim's legal rights had been violated but that that violation did not bring about the loss of which complaint was made.

²⁵⁰ [2004] UKHL 41; [2005] 1 A.C. 134.

²⁵¹ *Ibid.*, at para. 8 (*per* Lord Bingham), para. 22 (*per* Lord Steyn), para. 32 (*per* Lord Hoffmann), para. 84 (*per* Lord Hope), and para. 90 (*per* Lord Walker of Gestingthorpe).

²⁵² The verdict at trial was as to liability only with damages being left to be assessed.

²⁵³ As the claim arose in negligence, it would seem that the remedy of nominal damages would not have been available.