

Is it inconsistent to argue that the aim of remedies for breach of contract is protection of the “performance interest” whilst denying that specific performance should be the primary remedy?

Specific performance is an equitable remedy of the English legal system, ordered at the discretion of the court and not available as of right, unlike an action for damages at common law. It is very much regarded as a secondary remedy, to be implemented only in cases where a pecuniary award of damages would be inadequate. However, some have argued that to subordinate the doctrine in this way is to act inconsistently with the underlying principle behind the law's remedies for breach of contract: the protection of the performance interest.

I will attempt to argue that whilst it would definitely be beneficial for the courts to shake off the traditional restrictive perception of the role of specific performance, the use of other remedies to settle a claim need not necessarily be inconsistent with the protection of the wronged party's performance interest. Furthermore, I will outline the theory expounded by Fuller and Purdue, who believe that the performance interest (or 'expectation interest', as they have controversially labelled it) is the least deserving of the interests which are protected by remedies for breach of contract. If this is the case, then the lack of primacy of specific performance as a breach remedy is hardly surprising.

I will begin by working on the assumption that the performance interest is the one which English courts are most keen to protect. Daniel Friedmann points out in his article *The Performance Interest in Contract Damages* that “the essence of contract is its performance”. He argues that the interest which the promisee has in getting the promised performance is the only pure contractual interest. But even Friedmann, self-professed champion of the performance interest, admits that specific performance is not the only effective way to protect it. He demonstrates how the interest can be protected by two types of remedy; specific

and substitutional. Specific performance, injunction and recovery of a debt fall into the former category; performance damages (to put C in as good a position as if the contract were performed), recovery of a substitute (i.e. third party put in place by a promisor who can no longer fulfil his promise), and recovery in restitution of profits made by D through the breach, all fall into the latter. He also highlights that in cases where the claimant's expectation is pecuniary, it does not matter whether he receives substitutionary damages for his loss of expectation, or specific performance – if the verdict is found in C's favour, both of these remedies would put him in the position he would have been in had the contract been fulfilled, and his performance interest will have been successfully protected whether specific performance was ordered or not.

Case law decisions must also be examined in order to assess whether reluctance to enforce specific performance is inconsistent with the law's protection of the performance interest. In *Ruxley Electronics and Construction Ltd v. Patatown Ltd*, D refused to pay C for a pool which they had contracted C to build to a specific depth, and which C had made too shallow. Not only did C's claim for payment fail, but D was also awarded £2,500 damages for 'loss of amenity'. However, the case was taken by C to the House of Lords after the Court of Appeal went further still, and awarded D £21,560 'cost of cure' damages to rebuild the pool. The House of Lords found in C's favour, on the basis that the cost of carrying out the work would be unreasonably disproportionate to the benefit which D would receive from the full performance of the contract.

With regard to how inconsistent it was in this instance to deny specific performance whilst still attempting to protect D's performance interest, there are two different views which one could take on the case. The first is that it was inconsistent to deny specific performance (or 'cost of cure' damages which would have enabled D to obtain what would essentially be specific performance from a third party). If D's interest in performance was mainly to satisfy his own personal preferences, then failing to uphold the preferences which the promisee thought he had secured through the contract is a failure to protect this interest. If this definition of performance interest is accepted, then the denial of specific

performance (or facilitation thereof) is inconsistent with the protection of the interest. In this case Lord Jauncey asserts that personal preference is only one factor in determining the reasonableness of the damages awarded, and does not per se determine what loss has been suffered.

However, the alternative view is that D's actual *interest* in the performance was not his satisfaction in obtaining an object which perfectly fulfilled his every specification, but the *gain* which he stood to make from the object itself. Thus in this case, there was no further benefit to be had from reinstating the pool to fit the initial dimensions agreed upon, because both D's use of the pool and the economic value of the property were found in fact to be unaffected by the slight lack of depth. If this is deemed to be the true concept of performance interest, then specific performance is not necessary to protect it – it would merely result in a substantial gratuitous benefit being conferred upon D (i.e. allow him to build two pools of equal functional and economic value).

The intention of the claimant is also taken into account in assessing whether or not specific performance is required to adequately protect his performance interest. For example, in *Radford v. DeFroberville* the claimant was awarded damages for the cost of the construction of a wall between his neighbour's property and his own, after he obtained a covenant with said neighbour, contracting him to build the wall on his own land. The claimant was a landlord who let his property out to tenants, and the absence of a wall did not reduce in value his reversionary interest – hence ultimately his interest in erecting it was to benefit his tenants, and not himself. D argued that therefore the damages awarded should be nominal because there was no loss suffered, rather than of a sum that would facilitate performance of the contract by other means. However, Oliver J stated that even if the performance was not objectively in C's financial interest, it is undesirable for the courts to hold that any other interests in performance "be they commercial, aesthetic or merely eccentric" are invalid. This case demonstrates that an award of damages instead of specific performance is not necessarily inconsistent with protecting the claimant's performance interest.

The English courts' reluctance to enforce specific performance has been widely criticised as inconsistent with their professed protection of the performance interest. However, I believe that the problem with the current state of affairs is not that the principle being applied by the courts is wrong, but that traditional restrictions on the remedy prevent it from being fully effective – something which trends in the development of the law seem set on remedying. The first criterion for specific performance is that damages are inadequate in the case in hand – i.e. where C is entitled to claim only nominal damages in respect of D's breach, or his loss is difficult to quantify or prove. However, it was suggested by Lord Pearce in *Beswick v. Beswick* that more emphasis should be placed on ordering specific performance simply because it is a more appropriate remedy on the facts of the case/produces a more just result. For example, in *Falcke v. Gray* the court could have awarded damages for the monetary value of the vases which D failed to deliver, but it was held that because of the "unusual beauty, rarity and distinction" of the objects, C's performance interest could only be upheld if he achieved possession of them.

In conclusion, the fundamental principle behind the law's stance on breach of contract is that C should be put in the same position which he would have been in had the contract been performed. It really depends on whether this is a financial or a circumstantial position as to whether the law's reluctance to enforce specific performance is inconsistent with the protection of the performance interest. However, the case law shows that where damages would provide insufficient protection, the courts are willing to resort to the secondary remedy. Furthermore, in most cases specific performance as under the original contract will not be required to obtain the same end result (i.e. compare the situations in *Falcke v. Gray* and *Radford v. DeFroberville*) – an award of 'cost of cure' damages will allow the claimant to achieve his object, and the basis upon which the decision to award such damages is made is likely to procure just results. If C's performance interest has truly been violated by the breach, then he will have a genuine intention to use the damages to carry out the performance, if not through the original contractor then by electing another to do it instead. The

courts will only award the damages if they can find evidence of this intention. The merits of this approach are demonstrated in *Ruxley*; if the court had not used the claimant's intentions to decide whether or not his performance interest had been compromised by the reduction in the pool's depth, then specific performance/cost of cure damages would have been awarded on the fact that there was a breach alone (as is the case in Scotland). This would have resulted in the claimant receiving either two equally valuable pools, or the funds for reinstatement when he did not intend to reinstate – is this protection of performance interest, or simply evidence that the claimant's interest had been secured even despite the breach?

One final viewpoint is this; Fuller and Purdue would probably agree that denying specific performance as a primary remedy is inconsistent with protection of the performance interest. However, in their opinion this in itself is consistent with the fact that the law's first priority is not to protect the performance interest at all, but rather those interests which are vested in restitution and reliance.