Taking trusts seriously

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Table of Contents

Journal Article

Law Quarterly Review

L.Q.R. 2021, 137(Apr), 305-329

Subject
Trusts

Other related subjects
Damages; Jurisprudence; Legal systems

Keywords
Breach of trust; Common law; Compensatory damages; Equity; Jurisprudence; Trustees' powers and duties

Cases cited
Target Holdings Ltd v Redferns [1996] A.C. 421; [1995] 7 WLUK 293 (HL)
AIB Group (UK) Plc v Mark Redler & Co Solicitors [2014] UKSC 58; [2015] A.C. 1503; [2014] 11 WLUK 99 (SC)
Various Claimants v Giambrone & Law [2017] EWCA Civ 1193; [2018] P.N.L.R. 2; [2017] 7 WLUK 765 (CA (Civ Div))
Knight v Haynes Duffell Kentish & Co [2003] EWCA Civ 223; [2003] 2 WLUK 482 (CA (Civ Div))
Brudenell-Bruce v Moore [2014] EWHC 3679 (Ch); [2015] W.T.L.R. 373; [2014] 11 WLUK 202 (Ch D)
Auden McKenzie (Pharma Division) Ltd v Patel [2019] EWCA Civ 2291; [2020] B.C.C. 316; [2019] 12 WLUK 399 (CA (Civ Div))

*L.Q.R. 305 **I. Introduction**

"The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it—and nothing else" [1]

Oliver Wendell Holmes' characterisation of contractual obligation has not, at least in England, [2] aged well. To speak of a "right" that one's contractual debtor perform is immediately, at least implicitly, to claim that the law ought not to be ambivalent as between performance and the payment of damages. As a result, there are those who have railed against orthodoxy to claim that the principal remedy for breach of contract is not, and ought not to be, compensatory damages. [3] Traditionally this was a battle into which equity lawyers never sought, nor needed, to wade; the principal response following [4] a breach of trust was to seek an account from the trustee and, in effect, to insist upon what the trustee ought to have done all along. [5] Yet there has been a sea change in English law at the ultimate appellate level. "Compensation for loss" now seems to be the name of the game. And so it seems that equity lawyers must respond, lest it soon becomes difficult to resist the claim that trusteeship means no more than a prediction that one's unfaithfulness will lead to an award of damages. In other words, we must start to take trusts seriously.

The purposes of this paper are threefold. The first is descriptive, in that it seeks to show that, on the law as it stands, "falsification" is not yet dead in the water. Instead, in a dualism which will be familiar to many common lawyers, the right we call "trust" is capable of generating both primary (specific) and secondary (compensatory) [6] responses. The second is prescriptive; it will suggest that there are lessons which equity can draw from the common law in seeking to develop this hitherto unrecognised remedial dualism. Finally, the paper will conclude with *L.Q.R. 306 an evaluative footnote by making some brief claims about why remedial dualism is desirable in the law.

II. Trusts and the Positive Law

1. Orthodoxy

Much has already been written about equity's traditional response to a breach of trust, and so this paper does not seek to re-tread that now well-worn ground [7] for very long. In brief, much of what needs to be said for context may be taken from Lord Millett N.P.J.'s judgment in *Libertarian Investments Ltd v Hall* [8] in the Hong Kong Court of Final Appeal:

"It is often said that the primary remedy for breach of trust or fiduciary duty is an order for an account … [In fact] an order for an account does not in itself provide the plaintiff with a remedy; it is merely the first step in a process which enables him to *identify and quantify any deficit in the trust fund and seek the appropriate means by which it may be made good* … If the account discloses an unauthorised disbursement the plaintiff may falsify it, that is to say ask for the disbursement to be disallowed. *This will produce a deficit which the defendant must make good, either in specie or in money*." [9]

In other words, a beneficiary of a trust was traditionally entitled to inquire into the content of the trustee's duty to hold on trust (i.e. to call for an account and falsify any unauthorised disbursements, which would show what rights the trustee was *meant* to be holding on trust) and then specifically to enforce that duty. [10] What the claimant asserted was, effectively, that: "You, trustee, are obliged to hold such and such rights on trust for me; do so"—and so a trustee who, in fact, was *not* conforming to their duty under the trust would come under an obligation to make good any shortfall out of their own resources. Where it was no longer possible to hold the very rights in question on trust, the trustee would instead be ordered to hold on trust rights to money of equivalent value to the original rights; however, this should not be allowed to mislead: the (rights to) money being held on trust represented a substitute for the *rights* lost by the breach, not the pecuniary loss *caused* by the breach. [11]

Further evidence for the view that the claimant was specifically enforcing the trustee's duty to hold certain rights on trust is found in the wording of the court *L.Q.R. 307 order obtained by a successful claimant in such an action prior to *Target Holdings Ltd v Redferns* [12] (a case to which we will return below), which read:

"[I]t is adjudged that the defendant do pay the plaintiff the amount *certified due on the taking of the following accounts* … The amount found due to the plaintiff under this judgment having been certified at £–". [13]

The emphasised words demonstrate that the court's order responded to a duty which *already existed* (and hence could be "certified" to be "due"), and that the quantum of the order was fixed by the content of that duty.

It will be seen at once that a claim for a remedy of this type is not dissimilar to one for a debt, as a claimant who sues to recover a debt effectively asserts: "You, debtor, are obliged to pay me so many pounds and pence; do so". [14] Indeed, in an obiter dictum in *Re Collie*, [15] James L.J. and Baggallay L.J. stated that:

"The Court of Chancery never entertained a suit for damages occasioned by fraudulent conduct or for breach of trust. The suit was always for an *equitable debt or liability in the nature of debt*". [16]

Therefore, questions of remoteness, causation, and indeed of loss altogether, were irrelevant to claims brought in this manner —as is always the case when what is sought is specific enforcement of a primary duty. [17]

That the traditional remedy was enforcement of a primary duty to hold rights on trust is also well evidenced by the decision in *Cocker v Quayle*. [18] In *Cocker*, money was held on trust under a marriage settlement, and the trustees had a power to lend some of the capital held on trust to the husband, provided that two conditions were satisfied—that the wife had given written consent, and that the husband had provided a bond as security. The trustees made such an advance but, in breach of trust, did not obtain a bond from the husband, who was subsequently adjudged bankrupt and defaulted on the loan. The wife sought, and successfully obtained, an order requiring the trustees to pay back into the trust fund an amount of money equivalent to the sum paid out to the husband. Counsel for the trustees had argued that no loss was occasioned by the breach of trust, as the husband's bond would have given the trustees no greater protection in the event of the husband's bankruptcy than they had in fact enjoyed; however, Sir John Leach M.R. refused to deny relief on this basis. Had the claim been one for compensation, rather than ***L.Q.R. 308*** specific enforcement, then relief *should* have been denied for want of counterfactual loss.

2. From account to damages

That a breach of trust may instead, nowadays, give rise to a compensatory—as opposed to specific—remedy is beyond doubt; nevertheless, it will be helpful to begin by examining three leading cases, so as to set the stage for the discussion which follows.

The first ripples of the sea change to come were visible in *Target Holdings Ltd v Redferns*. [19] In that case, the defendant solicitors (Redferns) were instructed by Crowngate Developments Ltd to act on their behalf in the purchase of two titles to land. The purchase was to be financed by a loan from the claimant, Target Holdings Ltd. The claimant transferred £1,525,000 into one of Redferns' client accounts, and it was common ground that Redferns had implied authority to pay that money over to Crowngate when (and only when) the titles had been conveyed to Crowngate, and Crowngate had executed first legal charges in favour of Target Holdings. Unbeknownst to Target Holdings, [20] Crowngate had in fact designed fraudulently to inflate the apparent purchase price of the titles, which were in reality being purchased (by an intermediary) for £775,000. In breach of trust, Redferns paid the money over to a nominee of Crowngate *prior* to the execution of any such charges. Roughly a week later, the appropriate charges were executed. Crowngate ultimately defaulted on the loan, and Target Holdings exercised their power of sale; however, they were able to recover only £500,000 on the sale. Target Holdings sought an order that Redferns pay over [21] money equivalent in value to that which was wrongfully paid away in breach of trust. Redferns, in defence, contended that no such order was available as their breach of trust had not caused Target Holdings any loss—Target Holdings ultimately received the very charge to which they were entitled, and their pecuniary detriment was wholly causally attributable to Crowngate's fraudulent inflation of the value of the titles. [22]

Although successful before the Court of Appeal, [23] Target Holdings' application failed before the House of Lords. Target Holdings advanced two arguments [24] (labelled "A" and "B") in favour of the quantum of recovery for which they contended; both of these were rejected. Lord Browne-Wilkinson (who gave the only reasoned speech) grounded his analysis firmly in the idea of "compensation for loss", drawing heavily upon parallels with common law damages. For instance, his Lordship stated:

"At common law, there are two principles fundamental to the award of damages. First, that the defendant's wrongful act must cause the damage ***L.Q.R. 309*** complained of. Second, that the plaintiff is to be put 'in the same position as he would have been in if he had not sustained the wrong for which he is not getting his compensation or reparation' … *[I]n my judgment, those two principles are applicable as much in equity as at common law*. Under both systems liability is fault based: the defendant is

only liable for the consequences of the legal wrong he has done to the plaintiff… He is not responsible for damage not caused by his wrong or to pay by way of compensation more than the loss suffered from such wrong." [25]

Therefore, on one reading at least, *Target Holdings* denied that the beneficiary of a trust is entitled specifically to enforce the duty to hold on trust (i.e. the duty enforced in *Cocker v Quayle*); they are instead confined *solely* to a compensatory claim. On this reading, both Argument A and Argument B were aimed at convincing (but failed to convince) the House that falsification, as opposed to compensation, was the proper remedy following an unauthorised disbursement of rights held on trust. The difference between the arguments, on this view, was as to whether any award made should be held on the original trusts (Argument A) [26] or paid over directly to the beneficiary (Argument B).

However, *Target Holdings* was perhaps more ambiguous than it may at first have seemed. On an alternative reading of the case, Argument A was concerned with whether there was actually a subsisting obligation to hold anything on trust, susceptible of specific enforcement; and Argument B (in the alternative) sought to bring a claim for compensation, the quantum of which "froze in time" at the moment of breach. [27] In other words, Argument A sought, and failed, to show that falsification was the appropriate remedy *in this case*, and Argument B (in the alternative) sought, and failed, to show that, if the proper remedy was instead compensation, then the measure of loss ought to be assessed at the time of breach. This interpretation of the decision is supported by the report of Redferns' argument, in which counsel's reply to the former argument was said to be concerned with "restitutionary orders", [28] whereas the latter was concerned with "ascertaining the loss". [29] Moreover, in his Lordship's discussion of Argument A, Lord Browne-Wilkinson considered that "reconstitution of the trust fund" [30] —read: falsification —would be the proper remedy in the case of "traditional trusts", [31] whereas this was not necessarily the case with either "commercial" [32] or ***L.Q.R. 310*** "completed" [33] trusts. If what was at issue was to whom payment should be made, it is difficult to see the relevance of whether the trust arose in a commercial or non-commercial context.

Despite the merits of this alternative reading of *Target Holdings*, the tide continued to turn in *AIB Group (UK) Plc v Mark Redler & Co Solicitors*. [34] The facts of *AIB* were similar to those of *Target Holdings*. The defendant firm (Mark Redler & Co) was instructed by the claimant (AIB) to act on its behalf on a refinancing loan of £3.3 million secured by the re-mortgage of a title to land—then valued at £4.25 million—held by the borrower. The title was subject to a first legal charge in favour of Barclays, securing a debt of roughly £1.5 million (in total) owed on two accounts, and so AIB instructed Mark Redler & Co not to pay over the balance of the loan monies until they had ensured the discharge of Barclays' prior charge, and secured a first legal charge in AIB's favour. However, Mark Redler & Co only discharged the debt owed under one of the Barclays accounts, and so an amount of roughly £300,000 was outstanding when Mark Redler & Co paid over the remainder of the loan monies to the borrower. Negotiations between AIB and Barclays ensued, with the result that, ultimately, AIB was able to obtain only a second charge, with Barclays having priority to the extent of the unpaid amount on the second account. Subsequently, the borrower defaulted, and the title was sold for £1.2 million. AIB sought an order requiring that Mark Redler & Co pay over the full value of the loan (less the amount recovered by AIB, roughly £900,000, on the sale).

As was the case in *Target Holdings*, the claimant was unsuccessful in recovering the full value of the loan; the Supreme Court held that they were entitled to recover only their counterfactual loss (i.e. £300,000). Importantly, we see in both leading judgments dicta which are decidedly hostile towards non-compensatory remedies for breach of trust. For instance, Lord Toulson stated:

"Where there has been a breach of [trust], the basic purpose of any remedy will be … to put the beneficiary in the same position as if the breach had not occurred … A monetary award which reflected neither loss caused nor profit gained by the wrongdoer would be penal." [35]

Similarly, Lord Reed considered that the proper remedy was to:

"require the trustee to restore the trust fund to the position it would have been in if the trustee had performed his obligation". [36]

Lord Reed's employment of counterfactual reasoning makes clear that his Lordship is concerned with a loss-based, rather than a specific, remedy. Only an inquiry into loss is concerned with the difference between the "breach" and "non-breach" counterfactuals; a specific claim need only be concerned with the content of the original obligation which is being enforced. Tangentially, it should be mentioned that Lord Reed noted the distinction which Lord Browne-Wilkinson had drawn in *Target Holdings* between "traditional" and "commercial" trusts, and stated that this "is not to say that there is a categorical distinction

between trusts in commercial *L.Q.R. 311* and non-commercial relationships". [37] The significance of "completed" trusts was, however, apparently preserved. [38]

This line of authority culminated in *Various Claimants v Giambrone and Law (A Firm)*. [39] The case was, again, concerned with solicitors who paid away money held in their client account in breach of trust. This time, the defendant firm (Giambrone) acted on behalf of a number of individuals in England and the Republic of Ireland who had arranged to purchase property in Italy "off plan". Under the terms of their instructions, Giambrone were to hold the deposits paid by the purchasers on trust until the developers procured guarantees compliant with the Italian Legislative Decree No.122, one of the conditions of which was that the guarantor be a body registered under art.107 of the Italian Consolidated Law on Banking and Credit (CLBC). Instead, the developers tendered to Giambrone only guarantees procured from bodies registered under CLBC art.106, which have less share capital than those registered under CLBC art.107. Ultimately, only a small handful of the buildings were completed and, in 2013, the Italian Financial Police seized the development site in relation to suspected money laundering. The purchasers sought to recover from Giambrone the deposits paid away in breach of trust. Giambrone, however, contended that, since none of the events which occurred would have caused the guarantors to be obliged to pay out had the correct guarantees been procured, the breach of trust had caused the claimants no loss.

Perhaps surprisingly, given *Target Holdings* and *AIB*, the claimants in *Giambrone* were successful. Three aspects of the judgment warrant mention. First, although differing in the result from *Target Holdings* and *AIB* (both of which were distinguished, on grounds to be discussed below), it is clear that the Court of Appeal was applying the compensatory reasoning which predominated in those cases, particularly the latter. [40] Secondly, building upon the first, the employment of comparisons with common law damages led the court to apply the *SAAMCO* "scope of the duty" inquiry [41] to the amount recoverable for breach of trust, albeit that this made no difference on the facts. [42] Though never before applied in the trusts context, this was a natural consequence of taking seriously the comparisons with common law damages drawn in *Target Holdings* and *AIB*. [43]

The third point to notice, however, is that the means by which *Target Holdings* and *AIB* were distinguished is somewhat suspect. Jackson L.J. stated that, in both *Target* and *AIB*, the plaintiff's claim failed on the "but for" test, but that, "[i]n the present case the claimants' claim passes the 'but for' test". [44] In other words, the appropriate "non-breach counterfactual" in *Giambrone* did not involve the claimants *L.Q.R. 312* suffering any loss, whereas it did in the other two aforementioned cases. The most obvious way in which this would be true is if, on the facts of *Giambrone*, the proper counterfactual was that Giambrone would not have paid away the money. [45] The difficulty is that it is far from straightforward to see why *this* would be true; there simply was no finding of fact at first instance as to *what* would have occurred but for Giambrone's breach. Indeed, since *Giambrone* was heard as an appeal from summary judgment, [46] it would have been inappropriate to decide the case on this basis: what would have occurred but for the breach is a matter which should have been explored at trial.

It is possible that their Lordships considered that the largely passive nature of Giambrone's duty was conclusive of the counterfactual question (which could therefore be answered *without* requiring any findings of fact). Indeed, there are a number of dicta supportive of this interpretation. For instance, Jackson L.J. stated that the defendants in both *Target Holdings* and *AIB* had positive duties to bring about the condition under which they were to pay away the money, [47] whereas in *Giambrone* the defendants merely had "an obligation to act as custodians of the deposit monies indefinitely [until compliant guarantees were procured]". [48] From this it was reasoned that, but for the breach:

"Giambrone should have remained as custodians of the deposit monies until the preliminary contracts were rescinded, and then paid those monies back to their clients". [49]

This argument is, however, plainly unsound; there is nothing in the nature of custodial duties which is determinative of the proper non-breach counterfactual. It is true that one way in which Giambrone could have conformed to the custodial was retention of the funds; however, equally, the duty would have been conformed to if the funds had merely been retained *until* compliant guarantees were procured, and *then* were released to the developers. Therefore, absent a finding of fact that compliant guarantees would never have been forthcoming, it is simply impossible to say what was the extent of the counterfactual loss. [50] Ultimately, this invites the question whether the Court of Appeal gave the right reasons in *Giambrone* for the award it made (i.e. full recovery of the money paid away).

3. Remedial dualism

Notwithstanding this line of authority, there are at least four cases decided subsequent to *Target Holdings* which strongly suggest that the "traditional" specific remedy still co-exists alongside the "modern" compensatory claim. ***L.Q.R. 313***

The first two cases [51] which merit discussion are ones in which the remedy ordered appears to have been falsification—*Knight v Haynes Duffell Kentish & Co* [52] and *Brudenell-Bruce v Moore*. [53] In the former case, Aldous L.J. noted Lord Browne-Wilkinson's discussion of completed trusts, and from this concluded that "the principle in *Target* only applies where the underlying transaction covered by the trust had been completed". [54] On the facts, this meant that the claimant would have been entitled in the main action [55] to recover the full amount paid away by the trustee notwithstanding having not proved any pecuniary loss. In the latter, Newey J.—also following Lord Browne-Wilkinson—considered that, in the case of "traditional trusts where the trusts are still subsisting", the normal approach should be reconstitution of the trust fund (albeit this statement was obiter insofar as it concerned falsification, as the claim was for surcharge of the trust account). [56] Both cases, therefore, offer some support for the view, discussed above, that Lord Browne-Wilkinson left open the possibility of falsification in cases involving uncompleted and/or traditional trusts respectively. Especially important is the fact that "reconstitution of the fund" and "compensation" would have led to different measures of recovery in *Brudenell-Bruce*, and so this casts doubt on the feasibility of reading Argument A in *Target Holdings* as concerned solely with the question to whom payment should be made. [57]

The two cases are also significant in that both offer reasons to suppose that, if the aforementioned alternative reading of *Target Holdings* is correct, then it survived *AIB* notwithstanding the strongly compensatory dicta in the latter case. *Brudenell-Bruce* was decided after *AIB*, and made explicit reference to that decision. [58] *Knight*, on the other hand, admittedly predates *AIB*, and was not cited by the Supreme Court therein; however, it is clear from the *Appeal Cases* report of *AIB* that *Knight* had been cited *to* the Supreme Court, [59] and neither Lord Toulson nor Lord Reed disapprove of the decision anywhere in their respective judgments.

The third case is the unusual decision in *Interactive Technology Corp Ltd v Ferster*. [60] Put simply, the case concerned the meaning of the words "equitable compensation" in a consent order—a matter of significance as the language of "equitable compensation" has been taken by some as representative of the proposition that the remedy for breach of trust is (now) necessarily compensation for loss. David Richards L.J. held that the term "equitable compensation" "is not in principle confined to the recovery of reparation for loss", [61] and that it:

"is apt to include a payment made to restore to a claimant the value of assets or funds removed without authority by a trustee". ***L.Q.R. 314*** [62]

Indeed, his Lordship expressly referred to the specific remedy described (above) by Lord Millett N.P.J. in *Libertarian Investments* [63] as an example of "equitable compensation". It is clear that his Lordship had considered *Target Holdings* and *AIB*, [64] and so *Ferster* suggests that one cannot simply use the words "equitable compensation" as a blanket warrant to doubt the existence of a specific remedy (albeit now clothed in newly compensatory language) following a breach of trust.

A similar point can be made about the fourth case, *Auden McKenzie (Pharma Division) Ltd v Patel*, [65] which was also a decision of David Richards L.J. For present purposes, the decision may be summarised rather briefly. The two defendants were the sole directors and shareholders of the claimant company. In breach of fiduciary duty, they caused the claimant to pay out a total of £13,763,452 to intermediary companies in Dubai, who then paid the bulk of the sums thus obtained on to the two defendants. Subsequently, the claimant company brought proceedings against the two defendants to recover the sums so paid as "equitable compensation" for breach of fiduciary duty. [66] By his defence to an application for summary judgment, the first defendant pleaded that, but for the wrongful payments, he and the second defendant would have caused the same sums to be paid to them lawfully (e.g. by the payment of dividends); as such, the claimant company suffered no loss as a result of their breaches of fiduciary duty.

Three, related, features of *Auden McKenzie* are notable. The first is his Lordship's re-affirmation that "equitable compensation [is] … a wide concept capable of more than one application"; in other words, its use as a label denoting a remedy compensatory of loss is not (necessarily) its only possible use. Indeed, the second notable point is that David Richards L.J. expressly recognises that the term "equitable compensation" might be used to denote the order made consequent upon falsification of an account in

common form, [67] and cited with approval a dictum of Lord Millett which stated that such an order is "not compensation for loss" [68] (though it is fair to note that, on other occasions, David Richards L.J. does slip into the language of "loss"). [69] The third, and perhaps most significant, point is the apparent rejection of a requirement of counterfactual (i.e. "but-for") causation in this context. David Richards L.J. concluded that:

"[the first defendant] is not entitled to rely on the assumed fact that dividends equal to the Payments would [lawfully] have been paid to [the second defendant] and himself in response to the claim for equitable compensation". [70]

However, his Lordship, for reasons which bear setting out in full, nonetheless set aside the summary judgment entered against the first defendant at first instance:

"However, the order below was for summary judgment, not judgment on a preliminary issue, and we must be satisfied that Mr Patel's [the first ***L.Q.R. 315*** defendant's] defence is unsustainable in law … I am far from saying that Mr Patel has a defence that will succeed if he establishes the facts on which he relies, but nor am I prepared to say that it is unsustainable in law. As with many questions in a developing area of the law, it is an issue which requires much fuller submissions than is normally appropriate on a summary judgment application … I would accordingly allow the appeal and set aside the summary judgment against Mr Patel." [71]

Given that one hallmark of specific claims is that they do not depend upon proof of but-for causation of any counterfactual loss, David Richards L.J.'s (albeit tentative) conclusion is strongly supportive of the "remedial dualism" thesis.

III. Trusts and the Common Law

We are left, then, with what appears to be a loosely-connected bundle of puzzling questions. What is the modern significance of the traditional language of "equitable debt"? How can the references to "traditional", "commercial" and "completed" trusts be understood, and their relevance to the outcomes of cases explained? How can the compensatory language of *AIB* be reconciled with cases such as *Knight*, *Brudenell-Bruce*, *Ferster* and *Auden McKenzie* ? Is there any way to justify satisfactorily the result reached in *Giambrone* ? The common thread to answering these questions is, it will be argued, properly understanding the analogies between remedies for breach of trust and remedies at common law (principally, remedies for breach of contract).

1. Trusts and debts

A breach of contract gives rise to two possible remedies, not one—first, specific enforcement of the contracted-for obligation (whether positive or negative); or, secondly, damages to make good the pecuniary loss caused by the breach. [72] The clearest case is when the relevant obligation is an (accrued) obligation to pay money as, in that case, both the specific and compensatory remedies are available at common law. Generally speaking, the common law specific remedy (the action for the agreed sum) is available as of right, provided only that the obligation to pay has accrued. An important caveat to this, however, is the rule laid down in *White & Carter* [73] —a claimant is not entitled to claim the agreed sum when they have "no legitimate interest" in performance of the contract. [74] Simply put, therefore, an action for the agreed sum is available at common law if, and only if: (1) the obligation sought to be enforced is owed; and (2) there is a legitimate interest in enforcing that obligation. Otherwise, a claimant is confined to the (compensatory) claim for damages. ***L.Q.R. 316***

Applying the same conditions to the remedy of falsification (which, it will be remembered, is a specific remedy like the action for the agreed sum) [75] explains both the results and the reasoning in the cases discussed above. Most straightforwardly, this analysis can easily explain the pre-*Target Holdings* case law. Decisions such as *Cocker* are simply those in which the dual conditions for the availability of the specific remedy were satisfied. Similarly, the language of "equitable debt" in cases such as *Re Collie* is clearly seen to be especially apposite, as the applicable rules are the very same rules as those which determine the availability of claims for debts at common law. More importantly, this analysis can explain the importance of the concepts of "traditional", "commercial", and "completed" trusts: these terms are best interpreted as grasping attempts to elucidate in an unfamiliar context the two pre-conditions for specific enforcement (i.e. "subsisting obligation" and "legitimate interest") described above.

2. Subsisting obligations and "completed" trusts

Beginning first with "completed trusts"—the term is, I suggest, most naturally interpreted as identifying those trusts which have ceased to exist. This condition is, on this view, the obverse of the requirement that contractual debts must have accrued before they are specifically recoverable. In the trust context, it is not that the obligation must have come into being (for, ex hypothesi, it did at the very moment the trust itself was created), but rather that it must not have come to an end. Where there is no longer any duty to hold on trust, i.e. where the trust has been "completed", it must follow that specific enforcement of the said duty cannot be ordered (and so the remedy of falsification is unavailable).

持有某些信託權利的義務可以在這些權利的揮霍中倖存下來（以便容易受到隨後的具體執行）

In order to defend this analysis, it is necessary first to demonstrate the truth of two propositions from which I have thus far prescinded. First, that a duty to hold certain rights on trust can survive the dissipation of those rights (so as to be susceptible of subsequent specific enforcement). And, secondly, in the case of a duty to hold rights other than a right to money on trust, that the holding of rights to money of equivalent *value* to those rights can amount to performance of the original duty.

The key to the first proposition is that not every breach of duty will extinguish the duty breached thereby. The most obvious examples of "continuing" duties are those protected by the law of torts: if I am battered by John on Monday, my right to bodily integrity plainly survives; the rest of the world is not at liberty to batter me as they wish on Tuesday, and neither is John. Yet contractual duties function in precisely the same way: if I contract to purchase a title to a unique chattel, and such title is not conveyed to me by the time for completion, I am (prima facie) entitled to specific performance of this obligation. [76] This presupposes, of course, that the obligation survived the breach (viz. late delivery), else there is no subsisting obligation of which specific performance can be ordered. Perhaps the clearest ***L.Q.R. 317*** judicial statement of principle on this point is to be found in *Astor Management AG v Atalaya Mining Plc*, [77] in which Leggatt J. stated that:

"When a contract imposes an obligation to do something by a particular date, this does not usually mean that the obligation expires on that date. For example, if a seller agrees to deliver goods to the buyer on or before a specified date, this would not normally be understood to mean that, if the goods are not delivered by that date, a once and for all breach of contract occurs at that time, after which the seller is no longer under any obligation to deliver the goods. Rather, the ordinary understanding would be that, once the specified date has passed, there is a breach that continues until such time as the goods are delivered (or the obligation ceases, for example because performance is waived or the contract is terminated) … [It is] unreasonable (absent some special factor) to regard failure to achieve the objective by the given date as a reason for releasing the party which has given the undertaking from any further performance." [78]

On the other hand, there are clearly some breaches of duty which *will* extinguish the duty in question. If I contract to have my house cleaned, and the cleaner sets fire to the house whilst doing so, reducing it to ash, it is doubtful that there is any sense in which the original duty can survive.

Determining *which* breaches of duty will extinguish the underlying duty, and which will not, is a question on which there is little direct authority. The most plausible answer is that a duty will be extinguished by breach if, and only if, the effect of that breach is to render any subsequent attempts to perform "thing[s] radically different from that which was undertaken". This language is, of course, borrowed from *Davis Contractors Ltd v Fareham Urban DC*, [79] and I intend thereby to rely upon the justification for frustration offered therein: "Non haec in foedera veni. It was not this that I promised to do". [80] To say that a duty exists (or continues to exist) is, because "ought" implies "can", that is impliedly to affirm that performance of the duty is (or remains) possible. However, as the preceding discussion shows, performance "*sensu stricto*" is too narrow a concept in this context; late "performance", for example, still properly counts as performance (in much the same way that not all changes of circumstances which affect the mode of performance will frustrate a contractual obligation). Where, however, any subsequent attempt to perform would be "radically different" from performance *sensu stricto*, the situation is analogous to that which Lord Radcliffe described in *Davis* —and so there are no candidate acts or forbearances which can properly count as performance. In those circumstances, it must follow that the duty is extinguished due to impossibility of performance.

Where, in the converse situation, some substitute performance which is not "radically different" remains possible (to avoid ambiguity, we may call this performance "*sensu lato*"), there are good reasons both descriptively and ***L.Q.R. 318*** conceptually to suppose that the antecedent duty continues. On the descriptive front, this understanding coheres with cases like *Astor*, and also makes sense of the availability of specific performance in cases of late performance. Conceptually, the idea of a duty as a non-optional reason for action tends to favour the continuation of duties post-breach. Whether or not to breach a duty lies at the option of the obligor, and so a narrow conception of when duties will continue post-breach leads to a correspondingly broader range of ways in which one can unilaterally free oneself of one's duties. [81] This, therefore, provides a prima facie

reason of consistency (with our intuition that duties are non-optional) to prefer a more capacious conception of the conditions under which duties will continue post-breach.

The preceding analysis leads, in turn, to the second proposition, namely, that holding rights to money on trust can amount to specific enforcement of a duty to hold rights *other than* rights to money on trust. As cases like *Astor* and *Falcke* [82] demonstrate, performance at a different time is not always "radically different" to performance at the originally-required time. But it is equally not true that late performance will *never* be "radically different"—the facts of *Jackson v Union Marine Insurance Co Ltd* [83] provide a possible example. That case, it will be remembered, concerned the charter of a ship from Liverpool to Newport, where it was to be loaded with iron rails for use in the construction of a railway line in San Francisco. The ship needed repairs shortly after leaving Liverpool, and those repairs took longer to effect than the procurement of iron rails could wait. What this shows is that whether a change in the time of performance renders performance "radically different" will depend upon interpretation of the duty in light of the factual context. It seems equally true, therefore, that the question whether performance in money (e.g. of a duty to hold rights on trust) is "radically different" from performance *in specie* will also depend upon a similar process of interpretation. In other words, there can be no general rule that performance in money does not amount to performance (*sensu lato*) of some continuation of the breached duty. [84] It follows that if, and only if, performance in money may, on a given set of facts, count as performance *sensu lato*, then a duty to hold certain rights on trust will not be extinguished by the dissipation of those rights in breach of trust.

Having laid the conceptual groundwork, we may now examine how the idea of "completed trusts" applies in the cases discussed above. To start, contrast *Knight* [85] with *Target Holdings*. [86] In the latter case, the appropriate charge was subsequently acquired —at this point, it is hard to see how the original duty to hold on trust could have survived. Although the relevant duty continued post-breach, the duty in that case was always disjunctive: it was a duty to hold certain money on trust, *unless* ***L.Q.R. 319*** *and until* a first legal charge was obtained. Therefore, despite the initial breach of trust, the duty was ultimately performed (and extinguished thereby). The situation in *Target* was no different to late performance of a contractual obligation to deliver goods: the late delivery is a breach of contract, which sounds in damages, but nevertheless extinguishes by performance the obligation to deliver the goods. In *Knight*, on the other hand, the breach consisted in the payment out of money without obtaining an assignment of certain trademarks, and such assignment was never subsequently acquired. It is straightforwardly analogous to a case of non-delivery. Aldous L.J. was therefore correct in holding that the transaction was not complete, [87] and so the underlying obligation was amenable to specific enforcement.

The proper analysis of *AIB* is somewhat different. Lord Toulson held that "as a commercial matter the transaction was executed or 'completed' when the loan monies were released to the borrowers". [88] But the relevant duty was to secure a first legal charge; to this duty, the defendants never conformed. This, therefore, cannot be a case where the trust was "completed" due to eventual performance. However, the parallels with *Jackson v Union Marine* are striking. In *Jackson*, it was clearly still possible for the ship to be taken from Liverpool to Newport; what was not possible was doing so *in order to* procure iron rail for the San Francisco railway line. Similarly, while it is possible to hold some substitute rights on trust following the dissipation of the original trust rights, it is not possible to do so *in furtherance of the making of a loan* once the borrowers-to-be cease to be "the borrowers-to-be" and instead merely become "the borrowers". This is, most plausibly, what Lord Toulson meant when he described the situation as "a fait accompli". [89] In other words, once the money was paid away in breach of trust, there ceased to be any possibility of subsequent performance (whether *sensu stricto* or *sensu lato*). Therefore, *AIB* —like *Jackson* —involved the extinction of a duty by impossibility, rather than by performance.

This shows that there is no real inconsistency between the results in *Target*, *Knight* and *AIB*. In *Target* and *AIB*, the relevant obligation of which specific enforcement was sought had been extinguished (by performance in the former case, and by impossibility in the latter), and so the only possible remedy was Text —as is the case at common law—for compensation in respect of the previous breach of duty. In *Knight*, the duty was not extinguished in either such manner, and so specific enforcement was still possible.

Legitimate interests is different to the other lawful bases as it is not centred around a particular purpose (eg performing a contract with the individual, complying with a legal obligation, protecting vital interests or carrying out a public task), and it is not processing that the individual has specifically agreed to (consent).

3. "Legitimate interests" and "commercial"/"traditional" trusts

The idea and significance of "commercial trusts" is of a rather different character, and is perhaps a far less precise replication of the common law rules. Unlike the "completed trust" condition, which concerned whether there was *any* extant obligation to hold on trust, this condition appears instead directed to the secondary question whether there is a legitimate interest in the enforcement of that obligation.

Importantly, at the level of general principle, there is some judicial support for the view that the *White & Carter* "legitimate interest bar" applies to ***L.Q.R. 320*** (non-compensatory) remedies throughout English law, rather than being a principle peculiar to actions for the agreed sum. For instance, in *Makdessi v Cavendish Square Holdings BV; ParkingEye Ltd v Beavis*, [90] Lord Neuberger and Lord Sumption stated that:

"the law will not generally make a remedy available to a party, the adverse impact of which on the defaulter significantly exceeds any legitimate interest of the innocent party". [91]

They then used this principle to reason from the action for the agreed sum to a derivation of the applicable test for whether a contractual clause was penal. Their Lordships also considered this principle to be embodied in the "adequacy of damages" bar to specific performance. [92] Therefore, its application to remedies following a breach of trust, traditionally clothed as they were with the language of "equitable debt", is not at all implausible.

Since trusts in commercial contexts have, as their primary aim, the making of pecuniary gains for the immediate parties involved, there is some argument for saying that it will only be in exceptional cases that there is a legitimate interest in enforcement of the primary obligation (whether *sensu stricto* or *sensu lato*) rather than the making good of losses occasioned by the breach. [93] Provided this is done, it ought to be a matter of commercial ambivalence to the parties whether their gain was brought about by actual compliance with the trust duties, or by the payment of compensation (and so a specific remedy putting the claimant in a better position than this is one in which their interest is illegitimate). Conversely, in the case of so-called "traditional" trusts, the trust may be for the benefit of future parties or the rights held on trust may be to property which is of some sentimental value —in both such cases, the beneficiary has an interest beyond their financial position.

Nevertheless, there are at least three reasons why describing the "legitimate interest" bar in terms of "commercial" trust is misleading. First, it is far from clear why the fact that a trust is "commercial" means, ipso facto, that there is *necessarily* no legitimate interest in its specific enforcement—it merely suggests that this *might* be the case. Secondly, there are many instances of commercial *contracts* in which the claimant *was* held to have a legitimate interest in recovering the agreed sum. [94] Prima facie, there are good reasons of consistency for treating commercial contracts and commercial trusts similarly if we are to reason from one to the other. Thirdly, the obverse of the "commercial trust" question—whether the trust is "traditional"—is also no guarantee of getting the right answer to the underlying question whether there is a legitimate interest in specific enforcement, even if we are only concerned with "un-completed" traditional trusts. (It is also doubtful whether, in any event, "commercial" and "traditional" trusts actually form mutually exclusive and jointly exhaustive categories). For instance, where a family trust ***L.Q.R. 321*** consists purely of money to be invested, the reasons which count against commercial trusts seem to apply mutatis mutandis.

However, the law seems to be moving in the right direction. As was mentioned above, Lord Reed held in *AIB* that there was no "categorical distinction" between commercial and traditional trusts, and that instead the important question was what were the terms of the trust. [95] This, perhaps, is best seen as a veiled recognition that the commercial/traditional split is a poor proxy for the fundamental question whether the claimant has a legitimate interest in specific enforcement. [96]

Again, this analysis is more than capable of explaining the results in *Target Holdings* and *AIB*, and in justifying the obiter dicta in *Brudenell-Bruce*. The former two cases are the best possible examples of the identification of "commercial" with "absence of legitimate interest"—in both, the entire purpose of the transaction was financial, and so preservation of the claimant's financial position was perhaps an adequate limit on the extent of the claimant's remedial interest. Nevertheless, the point made above regarding legitimate interests and commercial *contracts* looms large, and it is open to question whether this feature alone would have justified the result reached (so it is happily convenient that both *Target Holdings* and *AIB* failed in any event on the prior question whether there was a subsisting trust at all). In *Brudenell-Bruce*, by way of contrast, any remedy granted would have had to take into account the fact that the claimant was not the only person interested in the trust, and so there clearly was a legitimate interest in enforcing the trust duty in toto, rather than looking only to the loss of the claimant. [97]

4. Explaining Giambrone

The framework described thus far can also provide a more satisfactory explanation of the result in *Giambrone* [98] than the reasoning of the Court of Appeal. Given the absence of factual findings as to the proper non-breach counterfactual, the result

in *Giambrone* must instead be explained (if it is to be explained) on the basis of a falsification order; on the account described above, this requires that both the "extant obligation" and "legitimate interest" requirements are satisfied.

"現存的義務"

As to the first, we see immediately the relevance of the "passive duty". Giambrone's obligation was to hold on trust until the procurement of compliant guarantees; from this it follows that the obligation was to be extinguished only upon the happening of that event. Since the guarantees *were not* acquired, it follows that Giambrone continued to have a duty to hold on trust.

As to the second, I suggest that the "legitimate interest" may be located in the nature of the statutory scheme in play. The claimants were entitled to the relevant guarantees in virtue of Italian Legislative Decree No.122, which was a piece of protective legislation that aimed to insulate consumers from the risks inherent in "off plan" purchasing. Admittedly, the obligation created by Decree No.122 was owed by the developers, not Giambrone, but it is still true to say that the obligation which the claimants sought to enforce (i.e. the trust obligation) existed only in virtue of the non-fulfilment of the Decree No.122 obligation. Had the latter ***L.Q.R. 322*** obligation been performed, the former would, for that reason, have ceased to exist. It would be inconsistent for the law to say that there was no legitimate interest in the enforcement of an obligation which exists only contingently, in virtue of the obligee not receiving what was due to them under a protective statutory scheme. Or, to put it another way, the purpose of Giambrone's obligation was to act as an interim safeguard until the Decree No.122 guarantee had been put into place, and so enforcement of the former obligation was parasitically legitimised by the legitimacy of the former (i.e. were it the case that, as ex hypothesi it was, enforcing the Decree No.122 obligation would be "legitimate", then it is also the case that enforcing the interim protection by Giambrone was "legitimate").

Therefore, the result in *Giambrone* can straightforwardly be explained as an example of falsification. Moreover, although not consistent with the bulk of the court's reasoning, this analysis does have the added virtue of making sense of the court's emphasis on the passive nature of Giambrone's duty.

5. Ferster, Auden McKenzie, and linguistic clarity

Admittedly, the decisions in *Ferster* [99] and *Auden McKenzie* [100] leave a somewhat unsatisfactory loose end to this otherwise tidy picture. True, the overarching pluralist approach to "equitable compensation" is consistent with—and, indeed, is perhaps the most unequivocal support for—the broader thesis of this paper; nevertheless, it is less than ideal that both remedies on which this paper focuses were lumped within the single heading of "compensation". Although David Richards L.J. made clear that the word "compensation" was being employed in two different senses, this terminology runs the risk of eliding the distinction sought to be drawn here between specific and compensatory remedies. One might ask: What's in a name? That which we call a specific remedy by any other name would yield the same order. But that would be to miss the point. The division between specific and compensatory [101] remedies has linguistic advantages in that both terms are being used in their conventional (at least within the technical legal context) senses; labelling both as species of compensation is liable only to create potential for confusion. [102] Few, I suspect, would celebrate the state of the law if we were to refer to both the action for the agreed sum and the claim for compensatory damages for breach of contract as types of "common law compensation". [103]

IV Trusts and Rights

Thus far, we have been concerned with the state of the positive law; we turn now to a rather different venture: defending on principle what this paper has called "remedial dualism". In particular, two questions call for some examination: first, why it is that the law should *ever* award specific remedies; and, secondly, why it is that the law should not *always* award specific remedies. ***L.Q.R. 323***

1. Rights and their enforcement

One would be forgiven for thinking that the fact we speak in terms of, and so recognise the existence of, a *right* to performance is enough to dispel the notion that the only proper response to a breach of duty is compensation. Yet to look at matters this way would be to overlook much of the conventional learning on breaches of duty within the common law of obligations. [104] In that context, orthodoxy holds that a breach of duty prima facie generates only a secondary right [105] to compensation for losses occasioned by that breach unless, and only unless, there exist some further feature or features (such as inadequacy of damages) justifying a specific remedy. Implicit in this analysis is the claim that the justification for the specific remedy is grounded in those further exceptional features, rather than the prior right simpliciter. A brief refutation of this idea is, therefore, necessary.

That the law must prima facie specifically enforce legal duties flows, I suggest, as a matter of rational necessity (or at least does so provided we accept that the law must enforce legal duties in *some* manner, a proposition which I take to be relatively uncontroversial). That is to say, a legal system, must, on pain of self-contradiction, accord priority to specific responses to duties. To see that this is so requires establishing the truth of two propositions about the law's claims.[106]

> 1) **To say that "P is under a legal duty to X in C"**[107] **just is to say that "the law claims that P ought to X in C".** This is true in virtue of the facts that: first, the statement "P is under a legal duty to X" means[108] that "the law claims that P is under a duty to X"; and, secondly, the statement "P is under a duty to X" is synonymous with "P ought to X".
>
> 2) **To say that "P is liable to be ordered by a court to X, and the court is under a duty so to order" just is to say "the law claims that P ought to X".** This point is somewhat unintuitive, but easily provable. When a court orders a defendant to X, it places the defendant under a legal duty to X.[109] Therefore, from 1) above, the making of such an order makes it the case that the law claims that the defendant ought to X. Accordingly, if a legal rule stipulates that such an order *ought to* be made, it follows that the law claims that it *ought to* be the case that the defendant ought to X. ***L.Q.R. 324*** The law could not coherently assert both (A) that it ought to be the case that P ought to X, and (B) that it is not the case that P ought to X,[110] because, at least for moral realists, the content of our moral duties are—with perhaps one anomalous exception[111]—what they ought to be. This impels the conclusion that the existence of a legal rule which states that P ought to be ordered to X implies that the law claims that P ought to X.

Taking these two propositions together, we see that if the default response to a breach of duty were a compensatory remedy, the law would inconsistently assert that "the defendant ought to perform their duty" and "the defendant ought to pay damages".

Two points should be made for the avoidance of doubt. First, this argument is concerned with assessing the position *post-breach*. In other words, the circumstances "C" to which reference was made are—in the case of both proposition 1) and 2)—those which obtain *after* the defendant has initially failed to conform to their duty. That being so, it is clear that the argument works only in those situations in which the duty to perform continues post-breach.[112] This is unsurprising, given that there can be no rational priority of specific enforcement in situations where specific enforcement is impossible. Secondly, the inconsistency, of course, arises only where the award of compensation is made in respect of non-performance, rather than late performance; there is no inconsistency in maintaining that an obligor must perform (late) their duty *as well as* compensate the obligee for the consequences flowing from their lateness. In other words, the inconsistency arises only when the obligor's *full* legal answerability is satisfied by *either* performance *or* the payment of damages.

An example may help to clarify the argument being made. Suppose we have a Duty Rule which states that John has a legal duty to build a house for Jack, and that we have a Liability Rule which states that John is under a duty to pay compensation (to Jack) if John does not build a house for Jack. Suppose further that John does not (and will not) do so, in circumstances which do not extinguish the duty. We would then hit the paradox that, according to the Duty Rule, the law claims that John ought to build a house for Jack; whereas, according to the Liability Rule, the law claims that John ought to pay Jack compensation for his (John's) failure to build the house. These two propositions cannot—in the context of non-performance rather than late performance—both be true: if they were cumulative duties, then John would in effect be obliged to "perform" twice over; if they were alternative duties, this would overlook the fact that neither of the individual duties are framed as disjunctive (and would in any event transmogrify ***L.Q.R. 325*** an initial duty to perform simpliciter into a duty to perform *or* to pay compensation à la Holmes).

For this reason, it follows from the fact that the law recognises a legal right to performance that the law must, prima facie, be prepared to order the obligor to render such performance.

2. Rights and their non-enforcement

Having established this, one might ask why, if ever, the law would *refuse* to order a specific remedy. As noted above, there are two conditions which seem to apply when one is seeking to enforce a debt at common law, or a trust in equity: first, the obligation sought to be enforced must be presently owed; and, secondly, the claimant must have a legitimate interest in obtaining such a remedy. The first condition strikes me as self-evident: the specific enforcement of a duty necessarily presupposes the existence of that duty.[113] The justification for the latter is far less obvious.

There are two possible interpretations of the operation of the "legitimate interest bar". First, it could operate as between obligor and obligee. On this view, the effect of the bar is to make it the case that a pro tanto obligation is not in fact owed (all things considered) if its performance would exceed the legitimate interest of the obligee. Alternatively, it could operate as between obligee and the state. On this view, the legitimate interest bar identifies cases in which the state has a compelling reason to depart from the prima facie position of specific enforcement (as argued for in the preceding section) and, instead, to award only a compensatory remedy. The first therefore looks principally to the *right*, and the second to the *remedy*.

The judicial references to a legitimate interest bar are generally couched in terms which favour the latter;[114] however, this interpretation faces two insuperable obstacles and so should be rejected. First, if the legitimate interest bar operates between state and claimant, then it clearly must respond to features which are relevant between state and claimant, rather than claimant and defendant. Examples of such features may be that the enforcement of some specific remedies, such as specific performance, require far greater state resources than the execution of orders to pay damages.[115] However, no such considerations exist in the central case of obligations to pay money: as far as the state is concerned, monetary obligations are all alike whether they take the form of specific enforcement or of compensation. This would make the legitimate interest bar inexplicable in the very context in which it is most explicitly recognised. The second obstacle is that, if the legitimate interest bar operates between state and claimant (i.e. speaks *only* to the proper remedy), then it causes the law to become embroiled in the "right-remedy contradiction" discussed above, where the law's remedial claims paint a different normative landscape to its claims made by the substantive law. ***L.Q.R. 326***

It might be suggested that the claimant-defendant view of the legitimate interest bar falls prey to a different problem, namely, that it fails to explain the positive law. As mentioned above, the legitimate interest bar *does not* "bar the right" in the context of contractual claims, but bars only the remedy.[116] Yet, so it is claimed, the former is precisely the role that it plays, potentially, as between claimant and defendant. However, this objection fails properly to distinguish between legal and moral rights. It is perfectly coherent to say that the legitimate interest bar alters[117] the *moral* entitlements between claimant and defendant, while only affecting legal *liabilities* (i.e. the range of remedies available)—in other words, it bars the *moral* right and the *legal* remedy.

It may then be said that the claimant-defendant conception of the legitimate interest bar no longer avoids the right-remedy contradiction, since it postulates a legal right which differs from the appropriate legal remedy. Again, this is not necessarily the case. The supposed tension arises from treating "legal duties" as falling exclusively into one of two categories: valid (extant) obligations, and invalid (non-extant) obligations, whereas in reality there is a *tertium quid*, namely, "unenforceable obligations". This set comprises those obligations which, having been performed are unimpeachable, but the performance of which is uncompellable. That such obligations are known to English law is beyond doubt.[118] Admittedly, their breach conventionally gives rise to *no* remedy, rather than to a remedy sounding only in damages; however, given the range of situations in which legal obligations *do* sound only in damages, it is not implausible that the conventional account has merely failed to distinguish between obligations unenforceable in toto and obligations unenforceable specifically.[119] The best account of the normative status of unenforceable obligations of this latter kind is that they identify those legal duties the underlying *moral* "duty" of which is in fact supererogatory—in other words, where the normative claim is not that the duty-bearer ought (in the obligatory sense) to so act, but rather that it would be *good* of them to so act. Unenforceable obligations therefore do not involve any tension between the law's moral claims arising in virtue of its substantive and its remedial rules.[120] In the case of unenforceable obligations, the law *does not* claim ***L.Q.R. 327*** that there is a moral duty so to act; therefore, the law's remedial rules do not need to reflect any such duty.

☆ The clarity of the preceding argument may benefit from some summarisation. I take the following six propositions to encapsulate the above:

1) The "legitimate interest bar" operates as between the obligor and obligee, rather than between the obligee and the state.

2) Proposition 1) means that, within the scope of the "legitimate interest bar", there is no "duty" to perform.

3) Proposition 2) identifies the absence of a *moral* duty to perform (it is, instead, morally supererogatory to perform); it does not identify the absence of a *legal* duty to perform.

4) Instead, the legal duty changes from a legal duty simpliciter into a specifically unenforceable legal duty.

5) Accordingly, there is no "right-remedy contradiction" in the primary remedy for breach of such a duty not being specific enforcement.

6) The primary remedy in cases to which the "legitimate interest bar" applies is, instead, compensation.

One question which arises out of this analysis is why a defendant is nonetheless required to pay compensation for breach of a specifically unenforceable legal duty. If the underlying moral duty is supererogatory, what unfairness to the claimant is there in not requiring the defendant to compensate? This question, however, is premised on an over-broad conception of the sense in which the underlying moral norm is non-obligatory. Consider the facts of *Vincent v Lake Erie Transport Co*: [121] a ship was caught in a storm at harbour and—to preserve the safety of the ship and its crew—the defendant shipowner tied the ship to the claimant's dock, with the result that the dock was damaged. It was held that the defendant was liable to compensate the claimant. Undoubtedly, had a travelling judge been present dockside, the defendant would not have been enjoined from acting as they did. To risk the safety of the ship and its crew to preserve the integrity of the claimant's dock would have been supererogatory (if morally permissible at all). The defendant therefore had a liberty to act as they did. But this is perfectly consistent with the defendant remaining under a weaker obligation to compensate the claimant for the consequences of so acting; in other words, it is perfectly consistent with the liberty being qualified. [122]

This still leaves unanswered the further question *why* the concept of "legitimate interest" should affect our moral entitlements, to which I now turn. To say that some conduct is obligatory (or, conversely, that there is conduct to which someone has a right) is usually taken to mean that it must be done *irrespective* of the balance of convenience. However, in reality, our moral obligations are never unlimited in scope. Suppose, for example, that John promises to drive his friend Jack to the airport. Unfortunately, hours before Jack is due to leave, John's parents fall seriously ill and are in need of immediate care. Intuitively, we do not think that John is still bound by his promise in these circumstances (if one has doubts, replace ***L.Q.R. 328*** John's ill parents with any other suitably serious event of choice). [123] An explanation for why this is so can be found in the nature of "obligation". If we take Raz's account, that obligations are protected reasons for action, [124] we see that there is no conceptual necessity in the exclusionary role of the protected reason covering all possible circumstances. Thus, John's promise might exclude the reason "I would rather spend the time watching television" from his practical deliberations about driving Jack to the airport, but need not exclude "I should look after my ill parents".

The example given differs slightly from the legitimate interest bar, in that it is concerned with facts about John (the promisor/defendant), rather than Jack (the promisee/claimant). However, there are equally plausible examples of the latter kind. Suppose this time that, after John promises to drive Jack to the airport, he is given a last-minute work deadline the meeting of which will be difficult if he makes the promised journey. Whether or not this countervailing reason is excluded by the promise appears to turn on factors principally about Jack; in particular, on Jack's interest in having John drive him. To take one extreme example, if it is essential for Jack to get to the airport, and Jack has no other means of getting there on time, [125] John probably remains bound by the promise to drive Jack. On the other hand, if Jack has any number of friends available to take him to the airport last minute, but he asked John because John has the best taste in music whilst driving, then the promise probably *does not* exclude the work-deadline reason. The latter variant is, I suggest, an indistinguishable moral analogue of the legitimate interest bar at work.

3. "Legitimate interests" revisited

當情況獲得相關義務未排除的賦予理由時，對特定執法沒有合法利益

This analysis allows us to return briefly to the positive law in order to explain what is meant by a "legitimate interest" (and, therefore, to identify when it is that a claimant will not have a legitimate interest). If, as was suggested above, a claimant will not have a legitimate interest in specific enforcement when circumstances obtain the reason-giving force of which was not excluded by the relevant duty, it must follow that whether any given claimant has a legitimate interest will depend upon construction of the duty in question. Where the relevant duty was voluntarily assumed—as is the case with express trusts—this will resolve into a question of construction of the agreement giving rise to the relevant duty; in other words, into a question of the objective common intention of the right-holder and duty-bearer. Indeed, Lord Reed seems to have said as much when his Lordship stated in *AIB* that:

"the duties and liabilities of trustees may depend, in some respects, on the terms of the trust in question and the relationship between the relevant parties". ***L.Q.R. 329*** [126]

Of course, the parties may not have expressly turned their minds to the circumstances which have arisen, but it is far from uncommon for courts to be called upon to determine the effect of an agreement in circumstances unforeseen by either party. It therefore follows that there exists no single answer to what features constitute a "legitimate interest" (or lack thereof): the crucial determinant in every case will be agreement giving rise to the trust viewed in light of its surrounding circumstances.

V. Conclusion

It is a mistake to treat equity as "special", or as founded upon different moral considerations to the common law. There is no need to refrain from reasoning by analogy between the two historical branches of the court system. Yet in doing so, we must take care to draw the right analogies. The over-reliance on comparisons with common law damages in cases such as *Target Holdings* and *AIB*, rather than with the holistic body of common law remedies, has obscured the fundamental truth that "trust" is a species of legal *right*. If the law is to take rights seriously, then it must give analytical priority to their enforcement; and, if we are to take trusts seriously, we can no longer think of them as generating only one possible remedial response. It would be a wrong to shackle the institution of the trust to its remedial history, but an equally grave mistake to treat it as a mere gateway to compensation: the only satisfactory approach to both articulating and justifying the law is to begin and end with the trust as right.

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Footnotes

1 O. Holmes, "The Path of the Law" (1897) 10 Harv. L. Rev. 457 at 462.

2 Or Australia: see *Mann v Paterson Constructions Pty Ltd [2019] HCA 32; (2019) 93 A.L.J.R. 1163* at [195].

3 For a sample, see *D. Winterton, Money Awards in Contract Law (Oxford: Hart Publishing, 2015)*; *R. Stevens, "Damages and the Right to Performance: a Golden Victory or not?" in J. Neyers, S. Bronaugh, and R. Pitel (eds), Exploring Contract Law (Oxford: Hart Publishing, 2009)*; and *S. Smith, "Substitutionary Damages" in C. Rickett (ed.), Justifying Private Law Remedies (Oxford: Hart Publishing, 2008)*; cf. *A. Burrows, "Damages and Rights" in D. Nolan and A. Robertson (eds), Rights and Private Law (Oxford: Hart Publishing, 2010)*; and K. Barnett, "A Critical Consideration of Substitutive Awards in Contract Law" (2018) 81 M.L.R. 1064.

4 I say "following" because, strictly, the beneficiary of a trust need not prove a breach in order to seek an account: *Libertarian Investments Ltd v Hall [2013] HKCFA 93; (2013) 16 H.K.C.F.A.R. 681* at [167] (Lord Millett N.P.J.). For the same reason, I use the word "response" instead of "remedy" where liable to cause confusion. See also fn.10 below.

5 See e.g., *L. Smith, "The Measurement of Compensation Claims Against Trustees and Fiduciaries" in E. Bant and M. Harding (eds), Exploring Private Law (Cambridge: Cambridge University Press, 2010)* and P. Davies, "Remedies for Breach of Trust" (2015) 78 M.L.R. 68.

6 It is possible that there are non-compensatory secondary responses, such as negotiating damages or accounts of profits; I refrain here from expressing any opinion as to whether such remedies are best categorised as primary or secondary, or indeed fall into some other category altogether.

7 See the articles listed at fn.5 above, as well as Sir Peter Millett, "Equity's Place in the Law of Commerce" (1998) 114 L.Q.R. 214 at 223–227 and *J. Penner, "Falsifying the Trust Account and Compensatory Equitable Compensation" in S. Degeling and J. Varuhas (eds), Equitable Compensation and Disgorgement of Profits (Oxford: Hart Publishing, 2017)*.

8 *(2013) 16 H.K.C.F.A.R. 681*.

9 *Libertarian Investments (2013) 16 H.K.C.F.A.R. 681* at [167]–[168] (emphasis added).

10 It is, therefore, incorrect to use the terminology of "falsification" or "account" to describe the remedy (both of which are instead merely precursors to the remedy); however, this paper will adopt the label "falsification" simply for ease of exposition.

11 See, in particular, the last sentence of Lord Millett N.P.J.'s dictum, which makes clear that making good "in money" has the same objective as making good "in specie". I discuss at greater length below (see Pt III.2 below), the questions how a duty to hold certain rights on trust can survive the dissipation of those rights, and in what way holding the monetary value of those rights—if those rights were not themselves rights to money—on trust can count as "specific" enforcement of such a duty.

12 *[1996] A.C. 421; [1995] 3 All E.R. 785*.

13 *Sir Jack Jacob, Chitty & Jacob's Queen's Bench Forms, 21st edn (London: Sweet & Maxwell, 1986), Order No.1599* (emphasis added).

14 It is interesting to note that, unlike the order following an account (see text to fn.13 above), the wording of the court order following a successful claim in debt *did not* make any reference to there being a prior obligation to pay (since the same wording was used for orders following both claims in debt and claims for damages). See *Jacob, Chitty & Jacob's Queen's Bench Forms (1986), Order No.872*.

15 *Re Collie Ex p. Adamson (1878) 8 Ch. D. 807*.

16 *Re Collie (1878) 8 Ch. D. 807* at 819 (emphasis added).

17 See e.g., *Jervis v Harris [1996] Ch. 195 at 202–203; [1996] 1 All E.R. 303* at 308 on this point in respect of actions for the agreed sum. The point appears to be so obvious in the context of specific performance as not to have generated any direct authority; however, see the obiter dictum of Oliver J. in *Radford v de Froberville [1977] 1 W.L.R. 1262 at 1286; [1978] 1 All E.R. 33* at 56. One exception to this general proposition may be where the primary duty is itself a duty to avoid the *risk* of harm (most notably, the duty not to communicate defamatory material; see the Defamation Act 2013 s.1(1)), in which case the likelihood of harm plainly *is* relevant—though I suspect that such duties are rare.

18 *(1830) 1 Russ. & M. 535; 39 E.R. 206*. See also the helpful dictum of Blackburne J. in *Re Lehman Brothers International (Europe) (No.2) [2009] EWHC 2141 (Ch)* at [53]: "[the] remedy … for breach of trust is principally directed to securing performance of the trust, rather than to the recovery of compensation".

19 *[1996] A.C. 421*.

20 There was some suggestion that Redferns may have had notice of the fraud; however, as *Target Holdings* was heard as an appeal from an application for summary judgment, the appeal proceeded on the footing that this was not the case.

21 I intentionally choose the ambiguous "pay over", rather than either "pay damages" or "account", in light of the controversies raised by this case.

22 There was, it should be noted, a triable issue whether, but for the breach of trust, Target Holdings would have withdrawn from the transactions (in which case the loss suffered *would* have been causally attributable to the breach).

23 *Target Holdings Ltd v Redferns [1994] 1 W.L.R. 1089; [1994] 2 All E.R. 337*.

24 See *Target Holdings Ltd v Redferns [1996] A.C. 421* at 433. I refrain from attempting to summarise those arguments here since, as will become apparent, I consider that their proper interpretation is a matter of some controversy.

25 *Target Holdings Ltd [1996] A.C. 421* at 432 (emphasis added).

26 For support of this reading, see especially *Target Holdings Ltd [1996] A.C. 421* at 435, in which Lord Browne-Wilkinson stated that, once a beneficiary becomes absolutely entitled, the proper remedy will be "not restitution *to* the trust estate, but the payment of compensation directly to the beneficiary. [But] the measure of such compensation is the same" (emphasis added). The use of the emphasised preposition "to" (rather than "of") in the first sentence quoted, as well as the explicit acknowledgement that the quantum of recovery would not differ in either case, supports the view that Lord Browne-Wilkinson may have been concerned with—in Argument A—to whom payment should be made, rather than whether the proper remedy is specific or compensatory.

27 Incidentally, this reading of *Target Holdings* is supportive of the "remedial dualism" which forms the broader thesis of this paper. On the question whether duties to hold on trust can continue notwithstanding dissipation of the trust rights in breach of trust, which is presupposed by this reading of Argument A, see Pt III.2 below.

28 The language of "restitution" has, on occasion, been used to describe the specific order following falsification. On this terminology, see S. Elliott and J. Edelman, "Money Remedies Against Trustees" (2004) 18 T.L.I. 116.
29 *Target Holdings Ltd v Redferns [1996] A.C. 421* at 425. See also, at 423: "the function of equity was historically to enforce the performance of legal and equitable obligations in specie".
30 In particular, note the use here of the preposition "of", rather than "to" as discussed at fn.26 above.
31 *Target Holdings Ltd v Redferns [1996] A.C. 421* at 434.
32 *Target Holdings Ltd [1996] A.C. 421* at 435.
33 *Target Holdings Ltd [1996] A.C. 421* at 436.
34 *[2014] UKSC 58; [2015] A.C. 1503*.
35 *AIB Group (UK) Plc [2015] A.C. 1503* at [64].
36 *AIB Group (UK) Plc [2015] A.C. 1503* at [134] (emphasis added).
37 *AIB Group (UK) Plc [2015] A.C. 1503* at [102].
38 See *AIB Group (UK) Plc [2015] A.C. 1503* at [74], where Lord Toulson stated that "as a commercial matter, the transaction was executed or 'completed'" in *AIB*, which would have been mere surplus verbiage if no significance attached to whether or not this was the case.
39 *[2017] EWCA Civ 1193; [2018] P.N.L.R. 2*.
40 See e.g., the Court of Appeal's attempts to identify counterfactual loss: *Giambrone and Law (A Firm) [2018] P.N.L.R. 2* at [63]. This makes sense only within a compensatory framework.
41 See *South Australia Asset Management Corp v York Montague Ltd; Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd [1997] A.C. 191; [1996] 3 All E.R. 365*.
42 *Various Claimants v Giambrone and Law (A Firm) [2018] P.N.L.R. 2* at [84]–[87]. See also *Brudenell-Bruce v Moore [2014] EWHC 3679 (Ch); [2015] W.T.L.R. 373* at [144]–[155], in which Newey J. applied (obiter) the principles determining whether a claimant seeking damages for breach of *contract* was entitled to recover the "difference in value" or "cost of cure" measure to the quantum recoverable under a claim for breach of trust.
43 See further P. Davies, "Equitable Compensation and the SAAMCO Principle" (2018) 134 L.Q.R. 165.
44 *Various Claimants v Giambrone and Law (A Firm) [2018] P.N.L.R. 2* at [63].
45 See e.g., *Giambrone and Law (A Firm) [2018] P.N.L.R. 2* at [63] in which Jackson L.J. stated that the proper measure of damages was "the amount of the deposits, *because* those monies have now vanished" (emphasis added). The word "because" implies that his Lordship considered that, but for the breach, the money would not have vanished.
46 *Various Claimants v Giambrone and Law (A Firm) [2015] EWHC 3315 (QB)*.
47 *Various Claimants v Giambrone and Law (A Firm) [2018] P.N.L.R. 2* at [61].
48 *Giambrone and Law (A Firm) [2018] P.N.L.R. 2* at [62].
49 *Giambrone and Law (A Firm) [2018] P.N.L.R. 2* at [62].
50 And, again, whether compliant guarantees would ever have been forthcoming is a matter which would have required exploration at trial.
51 Also of some note are *DB UK Bank Ltd v Edmunds & Co [2014] P.N.L.R. 12* and *Madoff Securities International Ltd (In Liquidation) v Raven [2013] EWHC 3147 (Comm); [2014] Lloyd's Rep. F.C. 95*.
52 *[2003] EWCA Civ 223*.
53 *[2015] W.T.L.R. 373*.
54 *Knight v Haynes Duffell Kentish & Co [2003] EWCA Civ 223* at [38] (emphasis added).
55 The claim was, in fact, against the solicitors who had acted on the claimant's behalf against the trustees in the "main action", and by whose negligence the claim in said "main action" had been struck out for want of prosecution.
56 *Brudenell-Bruce v Moore [2015] W.T.L.R. 373* at [245]–[248].
57 Discussed at the text to fn.27 above.
58 *Brudenell-Bruce v Moore [2015] W.T.L.R. 373* at [249].
59 *AIB Group (UK) Plc v Mark Redler & Co Solicitors [2015] A.C. 1503* at 1505.
60 *[2018] EWCA Civ 1594; [2018] 2 P. & C.R. DG22*.
61 *Ferster [2018] EWCA Civ 1594* at [26].
62 *Ferster [2018] EWCA Civ 1594* at [16].
63 See the text to fn.9.
64 *Interactive Technology Corp Ltd v Ferster [2018] EWCA Civ 1594* at [30].
65 *[2019] EWCA Civ 2291; [2020] B.C.C. 316*.

66 It was rightly noted that "directors, while not strictly trustees, because title to their company's assets are not vested in them, are in a closely analogous position to trustees": *Auden McKenzie [2020] B.C.C. 316* at [57].
67 *Auden McKenzie [2020] B.C.C. 316* at [32]–[33].
68 *Auden McKenzie [2020] B.C.C. 316* at [35]. The dictum in question is found in *Libertarian Investments Ltd v Hall (2013) 16 H.K.C.F.A.R. 681*.
69 See e.g., *Auden McKenzie [2020] B.C.C. 316* at [37] and [44].
70 *Auden McKenzie [2020] B.C.C. 316* at [59].
71 *Auden McKenzie [2020] B.C.C. 316*. The first sentence quoted is to be found at [59]; the remainder, at [64]–[65].
72 Opinion is divided on in which category so-called "cost of cure" damages should be placed; I suggest, though I do not argue for it here, that they are a pecuniary form of *primary* enforcement. For a comparative perspective, see fn.84 below.
73 *White & Carter (Councils) Ltd v McGregor [1962] A.C. 413; [1961] 3 All E.R. 1178*.
74 *White & Carter [1962] A.C. 413* at 431. Crucially, we know from *Geys v Société Générale [2012] UKSC 63; [2013] 1 A.C. 523* that this "legitimate interest" condition bars, when unsatisfied, the *remedy* of the action for the agreed sum, rather than the underlying obligation (see especially at [15] (Lord Hope), at [42] (Baroness Hale) and at [97] (Lord Wilson); cf. the judgment of Lord Sumption).
75 Like "falsification", the "action for the agreed sum" is not, technically, the name of the remedy itself. But, for ease of exposition, it will be used as such.
76 *Falcke v Gray (1859) 4 Drew. 651; 62 E.R. 250*.
77 *[2017] EWHC 425 (Comm); [2018] 1 All E.R. (Comm) 547*. See also the cases cited therein: *Patel v Brent LBC [2004] EWHC 763 (Ch); [2005] 1 P. & C.R. 20*; and *KS Energy Services Ltd v BR Energy (M) Sdn Bhd [2014] SGCA 16*.
78 *Astor Management AG [2018] 1 All E.R. (Comm) 547* at [79].
79 *[1956] A.C. 696 at 729; [1956] 2 All E.R. 145* at 160.
80 *Davis Contractors Ltd v Fareham Urban DC [1956] A.C. 696* at 729. That being said, I hasten to add that I do not intend to suggest that what counts as "radically different" will necessarily be the same for all legal purposes.
81 Subject, of course, to the secondary responses also generated by breaches of duty. I reserve judgment on what might justify these responses; in particular, I express no opinion on whether they might also be justified by some—perhaps broader—notion of "continuity". See e.g., J. Gardner, "What is tort law for? Part 1: The place of corrective justice" (2011) 30 Law and Philosophy 1 and S. Steel, "Compensation and Continuity" (2019) Oxford Legal Studies Research Paper No.49/2019.
82 *Falcke v Gray (1859) 4 Drew. 651*.
83 *(1874-75) L.R. 10 C.P. 125*.
84 For a comparative recognition of this concept, see §887(1) of the German *Zivilprozessordnung* and art.1222 of the French *Code civil*.
85 *Knight v Haynes Duffell Kentish & Co [2003] EWCA Civ 223*.
86 *Target Holdings Ltd v Redferns [1996] A.C. 421*.
87 *Knight v Haynes Duffell Kentish & Co [2003] EWCA Civ 223* at [39].
88 *AIB Group (UK) Plc v Mark Redler & Co Solicitors [2015] A.C. 1503* at [74].
89 *AIB Group (UK) Plc [2015] A.C. 1503* at [74].
90 *[2015] UKSC 67; [2016] A.C. 1172*.
91 *Makdessi [2016] A.C. 1172* at [29]. Although their Lordships do not limit themselves to non-compensatory remedies, I doubt that such a bar could be applied to compensatory remedies without violation of the maxim *ubi ius, ibi remedium*.
92 *Makdessi [2016] A.C. 1172* at [30].
93 The objection that there is *never* a legitimate interest in a remedy for a breach of duty beyond the making good of losses occasioned by that breach is a matter to which I will return below; see Pt IV.1 below.
94 e.g. *Gator Shipping Corp v Trans-Asiatic Oil Ltd SA (The Odenfeld) [1978] 2 Lloyd's Rep. 357*.
95 *AIB Group (UK) Plc v Mark Redler & Co Solicitors [2015] A.C. 1503* at [102].
96 See Pts IV.2 and IV.3, below, for an analysis of what is the meaning of "legitimate interest" in this context.
97 *Brudenell-Bruce v Moore [2015] W.T.L.R. 373*.
98 *Various Claimants v Giambrone and Law (A Firm) [2018] P.N.L.R. 2*.
99 *Interactive Technology Corp Ltd v Ferster [2018] EWCA Civ 1594*.

100 *Auden McKenzie (Pharma Division) Ltd v Patel [2020] B.C.C. 316*.

101 As at fn.6, I prescind from whether this dichotomy is exhaustive.

102 See, for instance, the confusion which has resulted from Lord Reed's description of negotiating damages as compensatory of "loss, albeit not loss of a conventional kind" in *One Step (Support) Ltd v Morris-Garner [2018] UKSC 20; [2019] A.C. 649* at [30].

103 This is not, it must be said, intended as any criticism of David Richard L.J.'s judgments—his Lordship was of course bound by *Target Holdings* and *AIB* to speak the language of compensation.

104 See e.g., *A. Burrows, "Damages and Rights" in Rights and Private Law (2011)*. For challenges to this account, see the material cited at fn.3 above.

105 Or, on some views, liability: see e.g., S. Smith, "Why Courts Make Orders (and What This Tells Us About Damages)" (2011) 64 C.L.P. 51. For present purposes, I doubt that it matters which characterisation, if either, is correct.

106 On whether the law makes claims and has perspectives see *J. Gardner, "How Law Claims, What Law Claims" in M. Klatt (ed.), Institutionalized Reason: The Jurisprudence of Robert Alexy (Oxford: Oxford University Press, 2012)*.

107 Shorthand, abbreviating the phrase: "In a given set of circumstances (C), some person (P) is under a legal duty to perform some act (X)". To avoid clutter, I will henceforth omit the qualifier "in C".

108 At a minimum. It is likely also to entail some claims about the existence of legal responses to a failure by P to X, as well as claims about the existence of some particular grounds of the legal duty to X.

109 Or replicates a prior duty to X, depending on one's view. See fn.105 above.

110 To clarify, I speak here only of the law's perspectives on our *moral* duties. There is clearly no logical inconsistency in the law claiming both that P has no legal duty to X and that P ought to have a legal duty to X—indeed, such thinking is implicit in the idea that a defendant is *liable* to a court order.

111 In particular, one may undertake voluntary obligations to performs acts which one ought not to be obliged to perform. A simple example, for which I am obliged to Sandy Steel: a parent (P) promises their friend (F) that they will go out to dinner together on some given day; in fact, P ought, on that day, to look after their children instead. It is at least plausible that P is, in these circumstances, under a promissory obligation to go out to dinner with F, *and* that it ought not to be the case that P is so obliged. However, I am not sure that any further examples exist (or, indeed, whether it might be more accurate to describe P as being under a merely pro tanto, but not all-things-considered, promissory obligation).

112 See discussion in Pt III.2, above.

113 In other words, "the law should enforce the obligation" implies the existence of an obligation that the law could enforce in the same way that "we should go to the beach" implies the existence of a beach to which we could go. The Russellian analysis of the definite article "the" probably explains why, semantically, this is the case: B. Russell, "On denoting" (1905) 14 Mind 479.

114 For instance, a dictum in *Makdessi v Cavendish Square Holdings BV; ParkingEye Ltd v Beavis [2016] A.C. 1172* at [29], states that "*the law* will not generally make a remedy available … which … exceeds any legitimate interest of the innocent party" (Lord Neuberger and Lord Sumption; emphasis added).

115 See further, *S. Smith, Rights, Wrongs, and Injustices (Oxford: Oxford University Press, 2019)*.

116 *Geys v Société Générale [2013] 1 A.C. 523* at [15] (Lord Hope), at [42] (Baroness Hale) and at [97] (Lord Wilson).

117 As will be seen below, it may be more accurate to speak in terms of identifying the scope of the moral obligation, rather than altering the moral obligation.

118 The paradigmatic case is that of obligations the causes of action in respect of which are time-barred. Thus, a debtor who pays a time-barred debt cannot recover it on the basis that it was not owed; but the creditor could not compel payment if the debtor refused to pay: *Moses v Macferlan (1760) 2 Burr. 1005 at 1012; 97 E.R. 676* at 680–681. See also *Morgan v Ashcroft [1938] 1 K.B. 49; [1937] 3 All E.R. 92*, a case which may be best rationalised as another example of an "unenforceable obligation", as well as *Tootal Clothing Ltd v Guinea Properties Ltd (1992) 64 P. & C.R. 452; [1992] 41 E.G. 117*.

119 One hallmark of unenforceable obligations is that the obligor cannot recover, for unjust enrichment, their performance: *Moses (1760) 2 Burr. 1005*. Obligations which are merely not *specifically* enforceable do satisfy this criterion—for instance, if John is under an obligation to convey generic goods to Jack at above their market price, and does so, then John has no claim against Jack notwithstanding the specific unenforceability of the obligation.

120 Clearly this reasoning offers no route out of the right-remedy contradiction for the view that the prima facie remedy ought to be compensation, as to characterise *all* legal duties as identifying supererogatory

conduct would both render the idea of a legal "duty" nugatory, and would also implausibly treat certain quintessentially obligatory norms (such as "do not interfere with the bodily integrity of others", "do not interfere with the property of others", "convey title to the goods which one has agreed to sell" etc) as merely supererogatory. In all such cases, the law makes moral sense only if those norms are obligatory, rather than supererogatory, moral norms—which in turn requires, for the reasons above, that the default remedy be specific enforcement.

121 *109 Minn. 456; 124 NW 221 (1910)*. I am not sure that *Vincent* is, itself, properly analysed as a case concerned with "no legitimate interest"; I rely on it here purely for its salient facts.

122 I owe this example to *R. Stevens, Torts and Rights (Oxford: Oxford University Press, 2007), at p.104*.

123 Albeit John's failure to perform the promise may still give rise to some ancillary duties, such as a duty to apologise, and so there is *some* sense in which the promise still affects John's normative landscape.

124 By which is meant that they are the combination of at least one first-order reason in favour of the obligatory act and at least second-order reason to exclude some further reasons from the obligor's practical reasoning. See e.g., *J. Raz, The Authority of Law: Essays on Law and Morality (Oxford: Clarendon Press, 1979), at pp.17–19*.

125 And, possibly, John knows of these facts.

126 *AIB Group (UK) Plc v Mark Redler & Co Solicitors [2015] A.C. 1503* at [102].

