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Performance Interest and Unconscionability in Affirmation Cases

Sicheng Zhu

Abstract

*In deciding whether the claimant was entitled to disregard the defendant's repudiation of the contract, perform it and sue for the agreed price, Lord Reid in *White & Carter* articulated a two-limb test: (1) the claimant must be able to perform the contract without the defendant's cooperation; and (2) she must have a legitimate interest to affirm the contract.¹ The test, especially its 'legitimate interest' limb, is heavily criticised: (1) why must the claimant have a 'legitimate interest' to affirm the contract? And (2) what is the 'legitimate interest'?² This article is to defend the "legitimate interest" limb, criticise its previous interpretations and propose a more comprehensive unconscionability approach. Finally, it is submitted that the unconscionability test should be extended to the 'non-cooperation' limb; in other words, the claimant's need for defendant's cooperation should not exclude the availability of the agreed price.*

I. Introduction

When we order a pizza, what we want is something to eat, not someone telling us: "sorry the pizza is out of stock, here is your money". In other words, we want the agreement to be performed, not compensated.³ Our common sense thus tells us that our primary interest in the contract is to have it performed; however, in contract law, contrary to common sense, we often have monetary compensation instead of specific performance as the primary relief. Similarly, when we are sellers, we want to have our part of the bargain delivered to the buyer and then get the agreed price back; compensation, which represents a less amount of money and heavier burden of proof, is not what we want. But still, the law imposes many restrictions for us to get the (this?) price back. Hence, it is the task of this paper to analyse the criticism against these limitations, examine whether such restrictions are justified, discuss different interpretations to the rules, and argue how these rules could be improved.

Section II of the paper will start with the discussion on the current rules, which restrict

¹ *White and Carter (Councils) Ltd v McGregor* [1962] AC 413, pp 428-429

² See eg P Nienaber, "The Effect of Anticipatory Repudiation: Principle and Policy" [1962] *CLJ* 213; M Furmston, "The Case of the Insistent Performer" (1962) 25 *MLR* 364; W Goodhart, "Measure of Damages When a Contract is Repudiated" (1962) 78 *LQR* 263; and JW Carter, "*White and Carter v McGregor* – How Unreasonable?" (2012) 128 *LQR* 490

³ See D Friedmann, "The Performance Interest in Contract Damages" (1995) 111 *LQR* 628; see also C Webb, "Performance and Compensation: An Analysis of Contract Damages and Contractual Obligation" (2006) 26 *OJLS* 41

the claimant's right to affirm the contract and get the agreed price back. For the claimant to exercise such right, Lord Reid stated in *White & Carter (Councils) Ltd v McGregor* that she must satisfy a two-limb test: (1) the claimant must be able to perform the contract without the defendant's cooperation; and (2) she must have a legitimate interest to affirm the contract.⁴ But the test, especially the 'legitimate interest' limb, has been heavily criticised.

Section III continues to discuss the first main criticism: "why should the 'legitimate interest' limb exist?" It is submitted that although such criticism reflects the general perception that the performance interest is the primary interest of the contract, it is much better to see the *White & Carter* case as a 'no power' situation. In that circumstance, the question to be asked would *not* be "whether the 'legitimate interest' exists at all", but "whether there are any internal or external considerations which can *override* the pre-existing legitimate interest (i.e. performance interest) of the claimant".

In Section IV of this paper, the discussion will progress to how the 'legitimate interest' limb may be interpreted. It is observed that there are three salient approaches in interpreting the limb. Although authorities support all these approaches, none of them are immune from defects. Therefore, it is argued that the ideal approach when interpreting the 'legitimate interest' limb should be the *unconscionability* test, which would incorporate the policy considerations underlying the three previous approaches. Explanations are submitted to justify this umbrella test.

Finally, in Section V of this paper, it is submitted that the unconscionability test should be extended to the 'non-cooperation' limb. In other words, the claimant's need for the defendant's cooperation should not exclude the availability of the agreed price: whether the defendant's cooperation should be ordered would depend on whether it can be implied as a part of the agreement; from this perspective, the unconscionability test would help.

II. Facts and Holdings of *White & Carter*

To effectively analyse the criticism against *White & Carter*, it is necessary to refresh our memory about the case. In *White & Carter*, the defendant garage proprietor, through his representative, entered into an agreement with the claimant advertiser. On the day when the agreement was entered into, the defendant purported to cancel the contract on the ground that his representative had been mistaken as to his wishes. The claimant nevertheless went on to affirm the contract and chose to continue to perform it. After displaying the advertisement, the claimant brought an action for the entire contract price under a default clause of the contract. The claimant's case was rejected at both first

⁴ See n 1 above

instance and appeal level,⁵ and was eventually brought before the House of Lords.⁶ In the court of final appeal, Lord Hodson and Lord Tucker held for the claimant that: firstly, it was settled that repudiation by one of the parties to a contract does not itself discharge the party's obligation. The claimant's right to affirm the repudiated contract would then depend on whether she can perform her part of the bargain without the defendant's cooperation. Since in the given case, the claimant did not need court's assistance to complete her performance, she was therefore entitled to get the agreed contract price.⁷ Lord Morton and Lord Keith held differently. According to Lord Morton, the claim for an agreed sum was "a kind of inverted specific implement[ation] of the contract"; as a result, it was the discretion of the court to decide whether or not such remedy should be granted. In the end, the court should say "no"; the claimant's only remedy was damages, and she was "bound to take steps to minimise [her] loss".⁸ Lord Keith also held that it was inconsistent as a matter of 'duty' for the claimant not to minimise her loss and to claim the entire price.⁹

What made the case controversial was the judgment delivered by Lord Reid, who upheld the claimant's case and made it the majority decision. His lordship started the analysis by observing that there must be an option for the claimant to exercise: she could either accept the repudiation or affirm the contract. But what the claimant must keep in mind was that "a person is only entitled to enforce his contractual rights in *a reasonable way*";¹⁰ this necessarily means that the claimant cannot insist her performance if (1) she requires the defendant's cooperation so as to complete her part of bargain, or if (2) "it can be shown that a person has no legitimate interest, financial or otherwise, in performing the contract other than claiming damages".¹¹ This statement effectively imposed a two-limb test for the innocent party to affirm her contract: non-cooperation on the breaching party's side, and the legitimate interest on the claimant's side in continuing her performance.¹²

Lord Reid's speech was criticised for its lack of certainty; in fact, some scholars even made the observation that the 'legitimate interest' limb was mere *obiter* of the decision.¹³ But this observation may be set aside. First, one has to admit that without Lord Reid's concurrence in the result, the claimant would not have succeeded; therefore, Lord Reid's speech must be merged as part of the majority decision and the law. Second, as it has been followed by many subsequent cases and observed by both

⁵ *White & Carter (Councils) Ltd v McGregor* (1960) SC 276

⁶ See n 1 above

⁷ See n 1 above, p 434 per Lord Tucker, and p 444 per Lord Hodson

⁸ See n 1 above, p 433, per Lord Morton

⁹ See n 1 above, p 439, per Lord Keith

¹⁰ See n 1 above, p 430, per Lord Reid

¹¹ See n 1 above, pp 430-431, per Lord Reid

¹² D Winterton, "Reconsidering *White & Carter v McGregor*: The Aquafaitth", [2012] LMCLQ 6; E McKendrick, *Contract Law: Text, Cases, and Materials* (Oxford: OUP, 2014), 6th edn, p 801

¹³ See n 2 above (M Furmston, and JW Carter)

academia and judiciary, *White & Carter* has long been regarded as the leading authority for the existence of some restrictions on an innocent party's right to affirm the contract and to sue for the agreed price.¹⁴ Above all, it is more sensible for us to take this '*obiter*' observation as a criticism that 'legitimate interest' limb *should* not become part of the law; in substance, what this argument indicates is that there should not be a 'legitimate interest' limb at all. This would invite us to analyse whether the limb should be retained as good law.

III. Maintaining Legitimate Interest Limb

White & Carter is criticised for introducing the 'legitimate interest' limb. Critics argue that when the claimant entered into the agreement, she already got an interest that the contract should be performed.¹⁵ Why then, must the claimant show that she has some 'legitimate interest' to continue her side of the bargain and in order to get the agreed price back? In judicial practice, this position can be supported by Simon J's statement in *The Dynamic* case: it is the *defendant's* burden to show that the claimant has no legitimate interest in performing the contract. Therefore, from the evidential point of view, the legitimate interest is presumed to be existent.¹⁶

In a larger sense, the proposition reflects the idea that performance interest is the primary interest of the contract. The concept of performance interest can be understood from two perspectives. A narrow sense of performance interest is the interest in getting the promised performance itself:¹⁷ as it is pointed out by Professor Webb, "the law protects this interest by recognizing a *right* in the claimant that the defendant *perform* his part of the bargain, which entails a correlative duty on the part of the breaching party so to perform. This is the performance interest."¹⁸ A broad sense of performance interest reflects the purpose or the reason for entering the contract.¹⁹ It refers to the goal the innocent party expects to achieve through the contract. From this perspective, the broad interpretation of performance interest is equivalent to the 'expectation interest' introduced by Professors Fuller and Purdue.²⁰ The protection of this broad sense performance interest has long been established as a core principle of English common law: "the rule of [the contractual remedies] is, that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation ... as if the contract had been performed".²¹

It is correct to say that performance interest is the primary interest of the contract. This

¹⁴ *Hounslow v Twickenham* [1971] Ch 233, p 254; Also see n 12 above (D Winterton, p 7)

¹⁵ See D Friedmann, "The Performance Interest in Contract Damages" (1995) 111 *LQR* 628

¹⁶ *Ocean Marine Navigation Ltd v Koch Carbon Inc (The Dynamic)* [2003] 2 Lloyd's Rep 693

¹⁷ See n 15, p 629

¹⁸ See n 3 above, 45

¹⁹ See n 15 above, p 632

²⁰ L Fuller and WR Purdue, 'The Reliance Interest in Contract Damages' (1936) 46 *Yale Law Journal* 52

²¹ *Robinson v Harman* (1848) 1 Ex Rep 850

is supported by two reasons. First, the very notion of ‘breach of contract’ implies there is a duty for each party to get the contract performed – breach presupposes an obligation, and without such an obligation there would be nothing to breach. The obligation entails the correlative *right* in the innocent party to enforce the contract. This obligation-right relationship gives effect to the primary interest of the innocent party that the contracts should be performed.²² Second, from a policy perspective, one must appreciate that the nature of the contract is in essence the exchange of promise.²³ In that sense, if each promise only confers a right to get compensation but not the right for the claimant to enforce the promise, it would be contradictory against the general policy of contract law: a contract is an institution by which we can create *obligations* among ourselves. In fact, the sanctity of promise has long been preserved as part of our tradition under the common law. As observed by Professor Chen-Wishart, the existence of the tort of inducing breach of agreement indicates there is a right to enforce the promise and a correlative duty to perform. That is why it is objectionable for a third party to induce the breaching party not to perform; in some cases, the sanctity of promise would entitle the innocent party to sue the third party.²⁴

However, even though we say that performance interest is the primary interest of the contract, one must admit that in reality, the protection of performance interest is never absolute. In fact, contract law has shown some departures from this commitment. For example, specific relief is the most obvious way to protect the performance interest: by ordering the breaching party to enforce the agreement promised by him, the law protects the innocent party’s performance interest.²⁵ But the award of specific relief is subject to many doctrinal bars, and one of the major hurdles is the ‘adequacy of damages’ test – i.e., specific performance will not be ordered unless damages are inadequate; often, the damages are deemed as being adequate in compensating the claimant.²⁶ Also, in the cases where the remedy is monetary compensation, doctrinal restrictions such as mitigation²⁷ and remoteness²⁸ would limit the quantum of damages awarded to the claimant, and effectively weaken the protection of the innocent party’s performance interest – she cannot always get what she had expected at the time when the contract was made. Finally, in the affirmation cases, as discussed above, Lord Reid has introduced the controversial two-limb test in limiting the award of agreed sum.²⁹ Thus, one may ask: why have there been many departures from the protection of performance interest? And specifically in the affirmation cases, why must there be a ‘legitimate

²² See n 3 above, p 46

²³ C Fried, *Contract as Promise* (Cambridge: Harvard University Press, 1981), pp 7-21

²⁴ M Chen-Wishart, “Specific Performance: Enforcement, Liability and Change of Mind” in G Virgo and S Worthington (eds), *Commercial Remedies* (Oxford: OUP, 2016) (forthcoming)

²⁵ M Chen-Wishart, *Contract Law* (Oxford: OUP, 2012), 4th edn, p 537

²⁶ A Burrows, *Remedies for Torts and Breach of Contract* (Oxford: OUP, 2004), 3rd edn, p 458

²⁷ M Bridge, “Mitigation of Damages in Contract and the Meaning of Avoidable Loss” (1989) *LQR* 398, pp 404-405

²⁸ See J Cartwright, “Remoteness of Damages in Contract and Tort: A Reconsideration” (1996) 55 *CLJ* 488; and *Transfield Shipping Inc v Mercator Shipping Inc* (The “Achilleas”) [2008] UKHL 48

²⁹ See n 11 above

interest’? Does the interest, as a type of performance interest, exist from the outset?

It is submitted that a better view is to see the departures as a ‘no power’ situation in Hohfeldian terms.³⁰ As noted, ‘no power’ situation means that one does not have an affirmative *control* over a legal relation against another.³¹ This situation generally applies to the dispute of contractual remedies: when what the claimant has against the defendant is the right of claim, it is the state (court) who will decide which type of remedies should be awarded to protect the innocent party. Therefore in the affirmation cases, when answering why there must be a ‘legitimate interest’, explanations should be given in this way: (1) contract is a facility by which the state enables claimants to enforce the defendants’ obligations;³² (2) when the promise was made, the claimant would have an interest in the fulfilling the promise;³³ (3) but that does not mean the claimant has the *power* to compel the defendant to do so, because according to (1), that is the power of the state and the state could order him to *compensate* the promisee;³⁴ (4) therefore, the key of understanding ‘legitimate interest’ limb is not to find the existence of the claimant’s interest – it is always there, but to ask whether such interest has been *overridden* by other concerns.

The claimant’s interest is in essence a performance interest.³⁵ And it can be overridden by both internal and external considerations of the contract. Internal considerations denote those factors arising from the contractual relationship between the two parties. For example, the innocent party’s state of mind has been regarded as a strong concern in the courts’ decision to enforce the performance interest. If the innocent party was regarded as indifferent in enforcing her rights, it would be unlikely for the court to protect the performance interest by specific performance or cost of cure compensation. For the rejection of specific performance, the explanation could be a simple one: as the claimant is indifferent with whether the specific relief should be granted to protect her, the monetary award should be deemed as adequate for her compensation.³⁶ As to the rejection of monetary compensation by way of cost of cure, an example has been given in *Panatown*³⁷. In that case, Lord Clyde and Lord Jauncey nicely distinguished Lord Griffiths’s speech in *St Martin*:³⁸ to effectively assert the protection of her performance

³⁰ WN Hohfeld, “Some Fundamental Legal Conceptions as Applied in Judicial Reasoning” (1913) 23 *Yale LJ* 16, pp 44-55

³¹ D Campell and P Thomas (eds), *Fundamental Legal Concepts as Applied in Judicial Reasoning by Wesley Newcomb Hohfeld*, (Dartmouth: Ashgate, 2001), p 28

³² B Coote, “Contract Damages, *Ruxley* and the Performance Interest” [1997] 56 *CLJ* 537

³³ See n 15 above.

³⁴ See C Webb, “Performance and Compensation: An Analysis of Contract Damages and Contractual Obligation” (2006) 26 *OJLS* 41

³⁵ See n 15 above.

³⁶ A Reyes, “The Performance Interest in Hong Kong Contract Law”, in M Chen-Wishart, A Loke and B Ong (eds), *Studies in the Contract Laws in Asia I: Remedies for Breach of Contract* (Oxford: OUP, 2015), p 236

³⁷ *Alfred McApline Construction Ltd v Panatown Ltd* [2000] 3 WLR 946 (HL), pp 958-959, p 998

³⁸ *St Martin* [1995] 1 WLR 69, p 96;

interest, the claimant must at least show her reliance on or accountability to such interest, demonstrating a good will in seeking to enforce the interest.³⁹ On the other hand, when the innocent party has indeed demonstrated her genuine reliance on the performance interest, the protection may be strong and even go across doctrinal restrictions such as privity of contract: as it was illustrated in *White v Jones*, the claimant can sometimes even enforce her performance interest against a third party.⁴⁰

Another important internal consideration relates to the autonomy of contract – the breaching party’s ability to change one’s mind.⁴¹ As observed by Professor Chen-Wishart, while the freedom of contract gives the innocent party a right to enforce the agreement, it should be considered that, on the other side of the same coin, such freedom must also necessarily give weight to the breaching party’s change of mind – one must have the opportunity to undo his past foolishness.⁴² This may explain the existence of many doctrines which restrict the protection of performance interest: the breaching party’s autonomy may require no harshness imposed on him when he broke his early promise and when remedies were sought against him – therefore by virtue of this policy consideration, (1) he may be exempted from harsh specific relief; (2) the damages he could not reasonably foresee; and (3) the innocent party may undertake the duty to reasonably mitigate the damages.⁴³

From an external point of view, an important policy consideration is efficiency. It was argued that the protection of the performance interest is dictated by considerations of economic efficiency. This is because it encourages optimal reallocation of social resources, prevents wastefulness, and effectively promotes the proper functioning of the market mechanism.⁴⁴ Professor McCormick also points out the balancing between the protection of performance interest and efficiency: “[l]egal rules and doctrines are designed not only to prevent and repair individual loss and injustice [i.e. performance interest], but to protect and conserve the economic welfare and propensity of the whole community.”⁴⁵ The courts’ appreciation of economic efficiency can be demonstrated in two examples. First, as a general rule, the claimant should undertake the duty to act reasonably in mitigating the loss suffered by her from the breach of contract; the claimant’s duty to mitigate therefore ensures that she shall be liable for the wastefulness incurred by herself, and such duty objectively encourages the innocent party’s prompt and efficient actions.⁴⁶ Furthermore, the second example is about the courts’ general

³⁹ B Coote, “The Performance Interest, Panatown, and the Problem of Loss”, (2001) 117 *LQR* 81, p 91

⁴⁰ *White v Jones* [1995] 2 AC 207; also see 32 above (B Coote, p 547, pp 549-551)

⁴¹ See n 24 above

⁴² MR Cohen, *The Basis of Contract* (1933) 46 *Harvard LR* 553, p 572; also see n 24 above

⁴³ See n 24 above

⁴⁴ R Birmingham, “Breach of Contract, Damage Measures, and Economic Efficiency” (1970) 24 *Rutgers LR* 273, p 292

⁴⁵ McCormick C, *A Handbook on the Law of Damages* (West: 1935), p 128

⁴⁶ *British Westinghouse Electric v Underground Electric Rlys Co of London Ltd* [1912] AC 673

reluctance to entertain economic wastefulness.⁴⁷ Differing from the innocent party's duty to act reasonably, this level of mitigation doctrine suggests that the court is free to reject *any* wastefulness, notwithstanding the fact that innocent party has acted reasonably or not. Thus in *Ruxley Electronics and Construction Ltd v Forsyth*, the court held that it was unreasonable to allow the innocent party to rebuild the swimming pool; instead, the prevention of wastefulness would prefer the diminution in value as the proper measurement of damages.⁴⁸

Another external policy consideration in the courts' rejection of protecting performance interest is to avoid the undue harshness on the side of the third parties. This can be justified as an expansion of the efficiency consideration: by expanding the economic efficiency to include the *external cost*, the court may find sometimes it is more desirable to depart from enforcing the innocent party's performance interest. However, a better view is to see the avoidance of harshness on third party as an independent value.⁴⁹ Thus, in *Wroth v Tyler*, the court refused to grant a specific performance on the real property purchase agreement against the defendant. This was because enforcing the agreement would necessarily evict the defendant's wife, which would cause the severe hardship on the third party.⁵⁰ The third party's right to continue to live in the house and her immunity from the family-split were valued by the court as a strong objection to enforcing the protection of the innocent party's performance interest.

IV. Interpreting Legitimate Interest Limb

As discussed above, the key of understanding "legitimate interest" limb is to ask whether it has been overridden by other concerns. Since the claimant's interest, as a performance interest, is capable of being overridden by internal considerations of the contract - such as the claimant's state of mind and the defendant's autonomy to change his mind; and external policy factors - such as economic efficiency and third party interest - the next question is when this would be the case. That invites us to interpret the 'legitimate interest' limb.

a. Three Theories

There are three approaches to interpret the 'legitimate interest' limb. The first interpretation is to ask whether "the *hardship* an innocent party's affirmation places upon the breaching party is sufficient to outweigh any prejudice caused by restricting the innocent party to a claim for damages."⁵¹ This coincided with Lord Morton's speech

⁴⁷ See n 27 above

⁴⁸ *Ruxley Electronics and Construction Ltd v Forsyth* [1995] UKHL 8

⁴⁹ See n 26 above (Burrows, p 498)

⁵⁰ [1974] Ch 30

⁵¹ E Peel, *Treitel on Contract* (London: Sweet & Maxwell, 2011), 13th edn, 21.012; also see n 13 above (D Winterton, p 8)

in *White & Carter*: by equating the action for agreed sum to the specific relief, the harshness of the defendant and the adequacy of the damages should concretely play a role in the court's exercise of discretion.⁵² This view was also supported by Lord Denning's speech in *The Puerto Buitrago*. In that case, his Lordship believed that what the claimant did in that case was "seeking to enforce the specific performance of the contract".⁵³ Therefore, as long as the damages would be an adequate remedy to the claimant, she should be barred from seeking the agreed price.⁵⁴

But this 'hardship' interpretation was problematic. Firstly, it must be noticed that the award of an agreed sum is a common law remedy. Following this categorization, on the face of it, the remedy itself is not discretionary. Thus, it is wrong to link the action for price to the action for specific performance – adequacy of the damages should not bar the award of the entire price.⁵⁵ Secondly, in a strict sense, it can be hard to say that the claimant's insistence on her performance would cause any 'hardship' to the defendant: what the innocent party seeks to enforce is something that has been *promised* by the defendant – how can one suffer any 'hardship' if he simply would do what he has promised before? Professor Bridge has made an observation to support this point of view: in the real world, the breaching party can hardly be said as suffering any harshness; what the breaching party was fettered to do is simply that he cannot spend his money elsewhere.⁵⁶

The second approach necessarily relies on Lord Keith's dissenting opinion in *White & Carter*: whether the innocent party has acted reasonably to release her 'duty' to mitigate the loss.⁵⁷ This '*duty to mitigate*' approach has received many academic endorsements.⁵⁸ As it has been pointed out by Professor Burrows, the policy behind this approach is "one of encouraging the claimant, once a wrong has occurred, to be to a reasonable extent self-reliant, or, in economists' terminology, to be efficient".⁵⁹ Subsequent decisions may also lend some support to this approach: for example, one may distinguish *The Odenfeld* from *The Puerto Buitrago*⁶⁰, because in the former case, the ship-owners had acted reasonably in mitigating the loss. In *The Odenfeld*, the availability of the ship and the duty owed to third parties supported the innocent party's reasonable prudence in continuing to perform the contract and claim for the agreed

⁵² See n 1 above, p 433

⁵³ *Attica Sea Carriers Corporation v Ferrostaal Poseidon Bulk Reederei GMBH* (The "Puerto Buitrago") [1976] 1 Lloyd's Rep 250, p 255

⁵⁴ *Ibid.*

⁵⁵ S Rowan, *Remedies for Breach of Contract: A Comparative Analysis of the Protection of Performance* (Oxford: OUP, 2012), p 21

⁵⁶ See n 27 above (M Bridge, p 405)

⁵⁷ See n 1 above, 439

⁵⁸ Robert Stevens, "Right and Other Things", in D Nolan and A Robertson (eds), *Rights and Private Law* (Oxford: Hart Publishing, 2011), p 125; also see n 26 (Burrows, p 440) and n 50 (Peel, 21.013) above.

⁵⁹ See n 26 above, p 122

⁶⁰ *The "Puerto Buitrago"* [1976] 1 Lloyds Rep 250

hire.⁶¹

But this ‘*duty to mitigate*’ approach was misleading as well. First, as Professor McKendrick points out, the vital key to understanding the issue is the distinction between a claim in debt and a claim in damages. Since *White & Carter* involved an agreed sum that was sought by the innocent party, the general principle of mitigation in theory has no place to be applied.⁶² More importantly, the duty to mitigate seems to be ill-suited as an appropriate yardstick for determining the innocent party’s ability to earn the contract price by continuing the performance. One must keep in mind that in *White & Carter*, the claimant not only has a legal interest in the performance of the contract, but also undertakes an obligation to perform her own side of bargain. As a result, on its surface, the mitigation principle cannot apply – how can one’s discharge of her own obligation amount to an unreasonable act?⁶³ Lastly, one must appreciate that the duty to mitigate often encourages termination.⁶⁴ This encouragement may entail a consequence: the innocent party might be effectively deprived of the right to make an election between affirmation and termination, and as a result, the innocent party’s performance interest would be severely jeopardised.⁶⁵

The third approach says that the innocent party has no legitimate interest when her insistence on maintaining the contract is ‘perverse’.⁶⁶ This necessarily focuses on the issue of *wastefulness*, i.e. whether the wastefulness of the innocent party’s continuing performance is completely disproportionate to her interest in earning the agreed price.⁶⁷ Professor Liu further elaborates this approach: (1) this test by its nature is equitable; (2) although the innocent party is *prima facie* entitled to continue to perform her part of bargain, she needs to provide with a further good reason for her performance; and (3) the breaching party’s interest should also be regarded, but it is confined to the situation where the wastefulness is excessive.⁶⁸ Many legal scholars endorsed this elaboration:⁶⁹ as such approach provides with a coherent explanation of many of the authorities, it is an improvement that tried to resolve Lord Reid’s “uncharacteristically vague statement of principle”.⁷⁰

It is submitted that this improvement is also not satisfactory. First, one must keep in

⁶¹ *Gator Shipping Corporation v Trans-Asiatic Oil Ltd (The “Odenfeld”)* [1978] 2 Lloyd’s Rep 357, p 374; also see n 50 above (Peel, 21.013)

⁶² See n 12 (McKendrick, p 800) and n 54 (Rowan, p 102); and H Beale, *Chitty on Contract* (London: Sweet & Maxwell, 2012), 26.008

⁶³ Q Liu, “The *White & Carter* Principle: A Restatement” (2011) 74 *MLR* 171, pp 186-187

⁶⁴ See n 54 above, p 100

⁶⁵ A Mandaraka-Sheppard, “Demystifying the Right of Election in Contract Law” [2007] *JBL* p 442, pp 456-457

⁶⁶ See n 12 above (McKendrick, p 804)

⁶⁷ See n 61 above, p 194

⁶⁸ See n 61 above, pp 192-193

⁶⁹ See n 12 (Winterton, p 6; McKendrick, p 805) and n 25 (Chen-Wishart, p 479) above

⁷⁰ See n 2 above (Carter, 491)

mind that the action for an agreed sum is a common law remedy;⁷¹ on its surface, equity would not play a role – common law has vested the *right* (performance interest) in the innocent party. Therefore, there is a need for more justifications for the discretionary nature of the remedy. Second, this ‘excessive wastefulness’ position may somehow contradict the decision in *The Dynamics*; in that case, Simon J held that the burden of showing that the innocent party has no legitimate interest in performing the contract is on the breaching party’s side.⁷² If it is the breaching party who undertakes the burden of proof, why should the innocent party provide some ‘additional reason’ for enforcing the contract? Third, on a policy level, this position is not good for encouraging the innocent party to act reasonably and in good faith. For example, if the innocent party, out of her kindness, decided to accept the repudiation, she can only get discounted damages by virtue of mitigation or remoteness, which may often lead her to be undercompensated; on the other hand, if the innocent party, decided to be inconsiderate and insisted on the performance, she would be unlikely to suffer the loss. Comparing these two outcomes, why should the law protect those acting in bad faith and discourage those who are considerate and willing to be cooperative?

b. Unconscionability Test

It is argued that the benchmark for understanding ‘legitimate interest’ limb should be unconscionability. The unconscionability test is a more comprehensive umbrella that incorporates the key angles represented by previous interpretations. Therefore, the three approaches could be understood respectively as *defendant-centred* factors (e.g. *hardship* test), *claimant-centred* factors (e.g. *duty to mitigate* test) and *policy* factors (e.g. *excessive wastefulness* test) of the new test. Factors must first be considered from the innocent party’s perspectives. The innocent party’s motive in continuing to perform the contract would thus be critical: if she genuinely wanted to perform the contract so as to fulfil her part of the bargain, fairness would reinforce the presumption that she is entitled to do so. On the other hand, if the innocent party had known the commercial inconvenience that her continuing performance would bring to the breaching party, but nevertheless still insisted on the performance for the sole purpose of causing trouble for him, the hostility would cause unfairness. And this unfairness would lead the court to reject the protection of performance interest in that case. The genuineness can be substantiated by the reliance cost the innocent party has spent on the preparation of performance. It can be reinforced by the proof of difficulty for the innocent party to secure an alternative to the original contract.⁷³ It can also be supported by the legal liability the innocent party has undertaken to the third party arising from the original contract.⁷⁴

⁷¹ See n 54 (Rowan, p 100) and n 60 (Beale, 26.008) above

⁷² See n 16 above

⁷³ *Anglo-African Shipping Co of New York Inc v J Mortner Ltd* [1962] 1 Lloyd’s Rep 81; also see n 59 above (The Odenfeld)

⁷⁴ See n 59 above (The Odenfeld); *Reichman and Dunn v Beveridge and Gauntlett* [2006] EWCA Civ

Unconscionability must also be considered from the perspective of the defendant. Although this may be somehow linked to the test of ‘harshness’, which is rejected above, such a factor indeed existed as part of overall fairness consideration.⁷⁵, and exists in a narrow way. For example, if a car owner transferred his vehicle to an engineer for the installation of some immovable fixtures on that car, but after the transfer, the government had promulgated a regulation which would impose a penalty on any vehicle with such fixture installed, then the innocent party’s insistence on the performance would result in an administrative penalty, the loss of removal, or the depreciation of property value incurred by the car owner, who would definitely purport to breach the contract. In that circumstance, the harshness or the car owner’s right to change his mind would make fairness in favour of termination and award of damages. It would then be unconscionable for the claimant to affirm the contract.

The third perspective from which the issue of unconscionability may arise incorporates those external policy considerations. This indeed reflects a series of policies that the law would endorse.⁷⁶ For example, economic efficiency would be part of the consideration. Thus, in *The Alaskan Trader*, the court found that the defendant ship owner insistence on the continuing performance of hire agreement was disproportionately wasteful to the expectation interest it would have under the contract; as a result, it is fair for the court to decline the enforcement of the repudiated contract.⁷⁷ Another example of the policy reflection would be the case of continuing performance of an employment contract. If an employer as the wrongdoer breached the contract and refused to hire his employee, then in normal circumstances, even if the employee needs no cooperation from the employer, she may not be able to come back to the original employment relationship; she can only claim damages for the wrongful dismissal. This is because the core of an employment relationship is the mutual appreciation and support between the employee and employer. When one of them has been unwilling to show such good will, law should stop instead of continuing this relationship; otherwise there would be a risk of hostility, which goes against its core function.⁷⁸

These above factors should operate in this way: (1) unconscionability test is mainly about the balancing exercise between claimant’s legitimate expectation and the policy factors that may override her expectation; (2) claimant’s expectation interest exists *ab initio*, but it would be substantiated by reliance costs such as possible reputational

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⁷⁵ See n 50 (Peel, 21.012) and n 12 (Winterton, p 8) above

⁷⁶ See n 25 above, p 483

⁷⁷ *Clea Shipping Corp v Bulk Oil International Ltd* (The “Alaskan Trader”) [1984] 1 All ER 129, pp 136-137

⁷⁸ *Societe Generale, London Branch v Geys* [2012] UKSC 63, para 117, citing *Co-Operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1998] AC 1 pp 15-16

loss,⁷⁹ liabilities to third parties,⁸⁰ and no available substitutes;⁸¹ (3) policy factors can be excessive wastefulness, but also include other concerns such as preventing the risk of hostility,⁸² and (4) defendant-centred factors may be weighed against the claimant's expectation interest, but only in rare circumstances such as the claimant's continuing performance would bring harms to the defendant (e.g. the claimant's decoration on the defendant's property would lead to administrative penalties or the depreciation of value of the asset).

The test, which incorporates three perspectives of factors, puts its focus on the more natural sense of fairness. The test also effectively gives the court more discretion in refusing to award the agreed price by finding the 'absence (override)' of 'legitimate interest'. There are two justifications explaining why there should be a unified comprehensive unconscionability test. The first justification for introducing unconscionability is the courts' inherent jurisdiction to control unfairness in the contract. As observed by Professor Collins, despite the general reluctance, the court can indeed intervene and introduce the judicial control over contractual arrangements. From this perspective, the term 'legitimate interest' is a mere device employed by the court to achieve the judicial control.⁸³ This attitude was reflected in Supreme Court's recent decision in *Cavendish*, where it was held that the true concern of enforcing a liquidated damages clause should be whether the term itself was 'unconscionable and extravagant'; and this would involve the balancing exercise between the detriment on the defendant through enforcing his secondary obligation and the benefit of the claimant through enforcing the defendant's primary obligation.⁸⁴ Critics may argue that the unconscionability test should only be left to enforce secondary obligations, but this view is too limited. It must be noted that in *Cavendish*, Lord Atkinson's 'wider interest' approach was heavily relied on.⁸⁵ Additionally, the rationale is that primary and secondary obligations of the contract are intimately connected: the former is the *basis* and *purpose* of the latter.⁸⁶ From this aspect, both secondary obligation (liquidated damages clause) and primary obligation (agreed price) are enforced to fulfil the defendant's promise to pay a sum of money,⁸⁷ and such money is to serve one purpose: protecting the claimant's performance interest.

Critics may also argue that the court has no jurisdiction to review the substantive fairness of the primary obligations, which was the position recently upheld in

⁷⁹ Cf *Cavendish Square Holding BV v Talal El Makdessi* [2015] UKSC 67

⁸⁰ See n 72 above

⁸¹ *Anglo-African Shipping Co of New York Inc v J Mortner Ltd* [1962] 1 Lloyd's Rep 81

⁸² See n 76 above

⁸³ H Collins, *The Law of Contract* (London: LexisNexis, 2003), 4th edn, p 372

⁸⁴ See n 77 above (*Cavendish*, para 32)

⁸⁵ See eg n 77 above, paras 23, 172, 221

⁸⁶ See n 3 above, pp 46-49, 57

⁸⁷ See n 26 above (*A Burrows*, p 440).

Cavendish.⁸⁸ This invites the second justification: it is *implicitly* a concern for the claimant to perform the contract in good faith. It is true that the court would not interfere with a contractual arrangement to decide *what the primary obligation should be*, but it is also clear that the court has the power to determine *how the primary obligation should be protected*. Therefore whether the claimant has performed the contract in good faith would matter, and fairness always plays a role in awarding remedies: it is legitimate for the court to decline the specific enforcement of the claimant's primary interest and award the damages instead.⁸⁹ This position is supported by Hutchins LJ's statement in *Stocznia Gdanska v Latvian Shipping*: "... to be a legitimate interest the innocent party must have reasonable grounds for keeping the contract open *bearing in mind also the interest of the wrongdoer*".⁹⁰

V. Expanding Unconscionability Test

When the claimant needed the defendant's cooperation to finish the contract and claim the agreed price, she is seeking for the specific relief.⁹¹ Traditionally, the claimant was barred from doing this: when the innocent party needs the specific relief so as to continue her performance and claim the contract price, she cannot do so even if she has a performance interest in continuing such performance; damages would be her only remedy.⁹² There are two reasons: first, specific relief cannot co-exist with the action for the agreed price because the latter as a common law remedy, as it is *adequate* to protect the claimant's performance interest.⁹³ Second, specific relief refers to the fact that the defendant would be *compelled* to perform an obligation, which would be burdensome.⁹⁴

However, neither of them is tenable. First, one must appreciate that the adequacy of common law remedies is only a presumption that can be overthrown by facts.⁹⁵ In the affirmation cases, without the defendant's cooperation, normally the claimant would be prevented from finishing the contract and claim the agreed price; as a result, the claimant can only get damages, which would often lead her to be *undercompensated*. Second, it would be very hard to say that the defendant would be *compelled* to finish the obligation. This is because arguably the obligation to accept the claimant's performance was part of the defendant's promise; if so, one cannot say that the defendant was compelled to pay off his debt – he had a duty to do so.⁹⁶ Therefore, the claimant's need for cooperation should not by itself exclude the availability of the

⁸⁸ See eg n 77 above, para 283

⁸⁹ D Friedmann, "Good Faith and Remedies for Breach of Contract" in J Beatson and D Friedmann, *Good Faith and Fault in Contract Law* (Oxford: OUP, 1997), pp 405-406

⁹⁰ *Stocznia Gdanska SA v Latvian Shipping Co* [1996] 2 Lloyd's Rep 132, pp 138-139

⁹¹ See n 50 above (Peel, 21.010)

⁹² *Ibid.*

⁹³ See n 60 above (Beale, 27.006)

⁹⁴ See n 60 above (Beale, 27.004)

⁹⁵ See n 24 above

⁹⁶ See n 12 above (McKendrick, p 800) and n 60 (Beale, 27.004) above

agreed price.

The following issue would be when the obligation to accept would be treated as part of existing debt/duty of the defendant. This is a question of fact. It is submitted that the test should be whether it would be unconscionable to *imply* that the defendant has owed an independent duty to receive the claimant's performance. This test was partly (partially?) supported by *Ministry of Sound v World Online*.⁹⁷ In that case, the court ordered the defendant to pay the price to the claimant, even if such payment "clearly represents" the performance of the claimant's contractual obligations and the claimant has not been able to do so because of the defendant's non-cooperation.⁹⁸ The approach taken by the court was that it would find *an independent duty* for the defendant to pay the instalment on the specified date, if it could be implied from the fact.⁹⁹ It is submitted that this technique can lend some support to introducing the unconscionability test to the 'non-cooperation' limb of *White & Carter* test.

This view can be supported by two further reasons. First, one should note that there is a current trend in English common law that there should be an increased flexibility in courts' granting specific relief. As observed in *Chitty on Contract*, in light of recent authorities, the adequacy of damages bar to the specific relief should be relaxed; and therefore, a standard test for granting a specific relief should be "is it just, in all circumstances, that [the innocent party] should be confined to [her] remedy in damages".¹⁰⁰ This opinion can be substantiated in affirmation cases, where the defendant's cooperation is needed when the following conditions are met: (1) the innocent party, as a result of her legitimate expectation that the original agreement should be performed, has undertaken a substantial reliance costs, e.g. liability to third parties, or substantial expenses incurred by the claimant; (2) such costs itself is practically difficult to assess and it cannot be equitably barred; and (3) the breaching party's burden in cooperating with the innocent party is not substantial. In that circumstance, it would be fair and conscionable for the innocent party to seek for a specific relief and to continue her part of bargain – the need for cooperation would not be the end of matter.

Second, what makes affirmation cases particular is that, the breaching party has promised to complete the original contract; as a result, it could be argued that he has undertaken an 'obligation' to cooperate with the innocent party, or at least, he needs to perform his side of bargain, e.g. accepting the innocent party's performance in good faith.¹⁰¹ In fact, as it has been discussed above, although there is no general doctrine of

⁹⁷ *Ministry of Sound (Ireland) Ltd v World Online Ltd* [2003] EWHC 2178 (Ch)

⁹⁸ *Ibid*, para 45

⁹⁹ See n 95 above, paras 51-52

¹⁰⁰ See n 60 above (Beale 27.005), citing *Evans Marshall v Bertola* [1973] 1 WLR 349, at 379; also see n 36 above

¹⁰¹ See EA Farnsworth, "Good Faith in Contract Performance" in J Beatson and D Friedmann, *Good*

good faith under English common law, the duty to perform the contract *in good faith* has been largely incorporated as a factor in courts' decision of remedies, i.e. whether the parties that have acted in good faith would not affect the recognition of their rights under the contracts, but rather affect how the court would decide to protect the rights.¹⁰² This line of reasoning should also be applied to the cases where the defendant's cooperation is needed, especially considering he has a pre-existing broad sense of moral obligation to do so.

From the comparative perspective of law, it is noted that in the United States, both the case law and statutory rules seem to reject the innocent party's entitlement to affirm the repudiated contract and claim the agreed sum.¹⁰³ In contrast, in continental Europe, it is observed that the awards of the agreed sum are widely available; it is this way even if the innocent party needs the cooperation of the breaching party to finish their performance.¹⁰⁴ This arises from the civil law principle that specific reliefs and agreed sums should be the primary remedy and represent the enforcement of contractual rights.¹⁰⁵ Under civil law, doctrines such as good faith and fair dealings would largely influence courts' decision of contractual remedies. Thus, it seems that the concern of fairness, which underlies the unconscionability test proposed here, has also been the benchmark in testing whether the protection interest should be protected in affirmation cases in civil law jurisdictions.

VI. Conclusion

In conclusion, although the 'legitimate interest' limb has been criticised, it should be retained. The first criticism is that the limb should not become part of the law. From an evidential point of view, this proposition is well supported. And from a policy perspective, it reflects the general instinct that performance interest should be the primary interest of the contract; and this must be correct. However, in light of the reality, which shows that there have always been departures in contract law from protecting the claimant's performance interest, it is submitted that a better view is to see the affirmation cases as a 'no power' situation; and the true concern should be whether the claimant's performance interest has been overridden by other competing interests, such as the claimant's motive, the defendant's change of mind, economic efficiency and third party's interest.

Then we come to the second criticism as to how to interpret the 'legitimate interest' limb. It is argued in this paper that the unconscionability test should be introduced as the true interpretation of "legitimate interest" limb. And from this point of view, the previous 'hardship', 'duty to mitigate' and 'excessive wastefulness' tests should be

Faith and Fault in Contract Law (Oxford: OUP, 1997)

¹⁰² See n 87 above

¹⁰³ *Clark v Marsiglia* 1 Denio 317 (NY 1845); UCC s 2.709(1)(b); also see n 26 above, (Burrows, p 437)

¹⁰⁴ See n 54 above, p 37.

¹⁰⁵ B Nicholas, *The French Law of Contract* (Oxford, Clarendon Press, 1992), 2nd edn; also see n 24.

treated as three general factors under the umbrella of the new test. The court's jurisdiction in controlling the unfairness of the contract, and the inherent concern that the parties must perform their obligations in good faith when the court is granting the remedy, are the two principal justifications supporting this umbrella. Finally, it is argued that the application of unconscionability test should be extended to the 'non-cooperation' limb as well; therefore, the claimant's need for cooperation should not exclude the availability of the agreed price. It is also submitted that when the court is deciding whether or not to grant the specific relief requiring the defendant's cooperation, the test should be whether it would be unconscionable to *imply* that the defendant has owed an independent duty to receive the claimant's performance, so as to enable the innocent party to get the agreed price.