

**BOOK REVIEW\****Money Awards in Contract Law*

David Winterton

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(including Acknowledgements and Index)

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In recent years there have been a number of books on remedies for breach of contract.<sup>1</sup> For a contract scholar this state of affairs is to be applauded, with each instalment offering new insights into this often complex topic. One recent contribution is Dr David Winterton's *Money Awards in Contract Law*.<sup>2</sup> Unlike other recent works, Winterton does not restrict himself to a subset of the damages suite but takes on the whole of the underlying framework for assessing monetary awards for breach of contract.

The longstanding, guiding principle for the award of contract damages is that stated by Parke B in *Robinson v Harman*: '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, with respect to damages, as if the contract had been performed'.<sup>3</sup>

In many cases the application of this principle is straightforward. For example, consider a contract for the supply of services. Before performance of those services has commenced the defendant wrongfully terminates the contract. The plaintiff service provider will be entitled to recover damages for the loss of the profit expected from performance of the contract and for consequential losses arising from the breach, subject to principles of causation, remoteness and mitigation.<sup>4</sup> In other cases the application of the *Robinson v Harman* principle is

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1 See, eg, Katy Barnett, *Accounting for Profit for Breach of Contract: Theory and Practice* (Hart Publishing, 2012); Ralph Cunnington and Djahongir Saidov (eds), *Contract Damages: Domestic and International Perspectives* (Hart Publishing, 2008); Herfried Wöss et al, *Damages in International Arbitration under Complex Long-term Contracts* (Oxford University Press, 2014); James Edelman, *Gain-Based Damages: Contract, Tort, Equity and Intellectual Property* (Hart Publishing, 2002); Adam Kramer, *The Law of Contract Damages* (Hart Publishing, 2014); Solène Rowan, *Remedies for Breach of Contract: A Comparative Analysis of the Protection of Performance* (Oxford University Press, 2012); Bruno Zeller, *Damages under the Convention on Contracts for the International Sale of Goods* (Oxford University Press, 2<sup>nd</sup> ed, 2009).

2 David Winterton, *Money Awards in Contract Law* (Hart Publishing, 2015).

3 (1848) 1 Ex 850, 855; 154 ER 363, 365.

4 Cf *Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64, 81 (Mason CJ and Dawson J) ('*Amann Aviation*').

more difficult. What if all the plaintiff has been promised under contract is the chance of a benefit?<sup>5</sup> What if the contract is loss making?<sup>6</sup> What if the work the plaintiff contracted for is defective, but the value of the property on which the work has been done has not declined?<sup>7</sup> What if the plaintiff has not made a financial loss as a result of the breach but the defendant has made a profit?<sup>8</sup>

Winterton necessarily touches on principles of causation, remoteness and mitigation. However, his primary focus is on the principles guiding the quantification of contract damages. The cover of the book explains that ‘Dr Winterton proposes a new account of the money awards provided in response to breach of contract which draws an important distinction between substitutionary and compensatory awards’. In this ambition, the book differs from the masterful work by Adam Kramer, *The Law of Contract Damages*,<sup>9</sup> whose treatment of the topic is organised primarily by reference to the nature of the complaint. While reference is made to Australian and Canadian law, Winterton’s book is not overtly comparative, differing in this regard from Solène Rowan’s comprehensive work, *Remedies for Breach of Contract: A Comparative Analysis of the Protection of Performance*.<sup>10</sup>

Winterton starts with the proposition that, at least in England, the orthodox understanding of the *Robinson v Harman* principle is that damages in contract ‘compensate the innocent party for “loss” caused by the relevant breach of contract that falls within the limits defined by the applicable rule of remoteness and mitigation’<sup>11</sup> and, moreover, that loss is narrowly defined to mean primarily financial loss. There is significant uncertainty and disagreement in the decided cases as to how this orthodox understanding is implemented and the calculation of loss is made. Winterton argues that the major source of confusion is that there are two different kinds of money awards: ‘[t]he first is a money award that substitutes for the promised performance. ... The second kind of money award is one that aims to compensate for (ie “make good”) loss’.<sup>12</sup>

The purpose of the book is to ‘decouple’ these principles and allow them to be understood more clearly. Winterton explains that ‘substitutionary awards’ are close on the remedies continuum to the coercive remedy of specific performance.<sup>13</sup> The primary aim of substitutionary awards is not compensation, but to provide a monetary substitute for the promised performance.<sup>14</sup> The focus of concern is not financial detriment at all. This analysis has some similarities with rights-based theories, such as that of Robert Stevens, who argues that damages

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5 See, eg, *Howe v Teefy* (1927) 27 SR (NSW) 301.

6 See, eg, *Amann Aviation* (1991) 174 CLR 64.

7 See, eg, *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* (2009) 236 CLR 272 (‘*Tabcorp Holdings*’).

8 Cf *Hospitality Group Pty Ltd v Australian Rugby Union Ltd* (2001) 110 FCR 157.

9 Kramer, above n 1.

10 Rowan, above n 1.

11 Winterton, above n 2, 2.

12 Ibid 3.

13 Ibid 4.

14 Ibid 5–6.

awards for breach of contract are a substitute for the rights infringed.<sup>15</sup> Winterton explains that under his approach damages awards are premised on substituting for the promised performance itself, not the right to performance.<sup>16</sup> Winterton considers that his work is more closely aligned to the theories of scholars who view ‘cost of cure’, rather than diminution in value, as the primary measure of damages.<sup>17</sup>

The book is elegantly structured into three parts. Part I considers the accepted orthodoxy in English law regarding monetary awards for breach of contract. Chapter 1 deals with the orthodox account of the *Robinson v Harman* principle. Chapter 2 deals with cases that do not match the damages awarded with the factual deterioration in the plaintiff’s position, for example nominal damages, gain-based damages awarded in *Attorney-General (UK) v Blake*,<sup>18</sup> *Wrotham Park* damages,<sup>19</sup> and damages for breach of a contract of sale where the award may exceed the plaintiff’s factual loss. Chapter 3 challenges conventional orthodoxy, noting the ambiguity in the reference to loss in *Robinson v Harman* and its failure to recognise the existence of two distinct principles: substitutionary and compensatory. Part II of the book presents an alternative account of monetary awards in English contract law. The new framework is outlined in Chapter 4. Chapter 5 explains the quantification of and limits on substitutionary monetary awards. Chapter 6 explains the place of compensatory awards. Part III of the book uses this new theoretical account to explain the ‘outlier’ English cases. Chapter 7 considers decisions that are not adequately explained by the orthodox understanding of contract damages. Chapter 8 considers decisions that might be thought to undermine the theory.

Winterton has proposed an interpretative legal theory. Stephen Smith has identified four criteria for assessing such a theory: fit, coherence, morality and transparency.<sup>20</sup> The ‘fit’ of Winterton’s theory with the outcomes of the cases it explains is generally very close; after all, providing a better explanation of the law relating to monetary awards for breach of contract is the primary aim of his endeavour.<sup>21</sup> The explanation is largely coherent and persuasive. That is not to say that it will explain every case.

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15 Robert Stevens, ‘Damages and the Right to Performance: A *Golden Victory* or Not?’ in Jason W Neyers, Richard Bronaugh and Stephen G A Pitel (eds), *Exploring Contract Law* (Hart Publishing, 2009) 171.

16 Winterton, above n 2, 9, 168–72.

17 Ibid 9. See Brian Coote, ‘Contract Damages, *Ruxley*, and the Performance Interest’ (1997) 56 *Cambridge Law Journal* 537; Brian Coote, ‘The Performance Interest, *Panatown*, and the Problem of Loss’ (2001) 117 *Law Quarterly Review* 81; Stephen A Smith, ‘Substitutionary Damages’ in Charles Rickett (ed) *Justifying Private Law Remedies* (Hart Publishing, 2008) 93; Charlie Webb, ‘Justifying Damages’ in Jason W Neyers, Richard Bronaugh and Stephen G A Pitel (eds), *Exploring Contract Law* (Hart Publishing, 2009) 139.

18 [2001] 1 AC 268.

19 *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 1 WLR 798 (‘*Wrotham Park*’).

20 ‘Fit’ is one of the evaluative criteria for an interpretative legal theory identified by Stephen A Smith, *Contract Theory* (Oxford University Press, 2004) 7.

21 See Winterton, above n 2, 17, noting that fit is the criteria most important to the work.

Take, for example, the perennially difficult case of *Wrotham Park*.<sup>22</sup> In that case, a developer built housing on land in deliberate breach of a restrictive covenant in favour of the plaintiffs' land. The value of the land had not been diminished, so compensation measured on that basis would result in the plaintiffs getting nothing at all. Justice Brightman refused to grant an injunction ordering the developer to demolish the houses but awarded damages under *Lord Cairns' Act*.<sup>23</sup> These damages were assessed by reference to the sum that might reasonably have been demanded by the plaintiffs for relaxing the covenant, namely 5 per cent of the developer's anticipated profit.<sup>24</sup> There have been numerous competing explanations of *Wrotham Park*, and subsequent similar cases,<sup>25</sup> including characterising the award as compensation for the loss of the opportunity to bargain,<sup>26</sup> as restitutionary damages,<sup>27</sup> and as the value of a licence.<sup>28</sup> Winterton frames the award as the cost of 'a hypothetical release bargain'.<sup>29</sup> He explains that the award provides a substitute for performance in circumstances where curing the breach is impossible and hence damages are 'a reasonable approximation ... of the price at which the promisee would have accepted to "release" the breaching party from further performance'.<sup>30</sup> This fits with Winterton's approach but seems to be open to the criticism that it is artificial to speak of a fee for release in a context when the plaintiff would never have agreed to a release at all.<sup>31</sup>

The moral premise underlying the theoretical framework proposed by Winterton is consistent with that of contract law, namely privileging promised performance or *pacta sunt servanda*.<sup>32</sup> However, one wonders if at times the development of this area of law has as much to do with the pragmatism of English contract law and the value it places on commercial certainty.<sup>33</sup> Certainly, these values would explain many of the market-based rules for sales of goods; for example, cases where the court does not take into account subsequent

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22 [1974] 1 WLR 798.

23 Ibid 811.

24 Ibid 816 (Brightman J).

25 See, eg, *WWF–World Wide Fund for Nature v World Wrestling Federation Entertainment Inc* [2008] 1 WLR 445; *Experience Hendrix LLC v PPX Enterprises Inc* [2003] 1 All ER (Comm) 830.

26 Robert J Sharpe and S M Waddams, 'Damages for Lost Opportunity to Bargain' (1982) 2 *Oxford Journal of Legal Studies* 290.

27 Edelman, above n 1.

28 Ralph Cunnington, 'The Measure and Availability of Gain-Based Damages for Breach of Contract' in Ralph Cunnington and Djakhongir Saidov (eds), *Contract Damages: Domestic and International Perspectives* (Hart Publishing, 2008) 207.

29 Winterton, above n 2, 60.

30 Ibid 65, 202–5.

31 Andrew Burrows, 'Are "Damages on the *Wrotham Park* Basis" Compensatory, Restitutionary or Neither?' in Ralph Cunnington and Djakhongir Saidov (eds), *Contract Damages: Domestic and International Perspectives* (Hart Publishing, 2008) 165, 178. Cf Winterton, above n 2, 207–8, explaining that these characteristics of the plaintiff would not be taken into account in setting the reasonable price of release.

32 *Radford v De Froberville* [1977] 1 WLR 1262, 1270 (Oliver J).

33 Michael Bridge, 'The Market Rule of Damages Assessment' in Ralph Cunnington and Djakhongir Saidov (eds), *Contract Damages: Domestic and International Perspectives* (Hart Publishing, 2008) 431.

transactions made by the plaintiff when it assesses damages, with the result that the plaintiff is placed in a better position than if the breach had not occurred.<sup>34</sup> Nonetheless, Winterton's account brings some much needed rigour to this topic.<sup>35</sup>

The major tension between Winterton's theory and the body of decided case law arises in terms of 'transparency'. The substitutionary approach is not always consistent with what judges themselves say they are doing in awarding damages. However, in many instances the real basis of the award is quite unclear. With the law in this state, 'transparency' is a hard criterion for any new theory to pass. The coherence of the theory may provide the language for future clarity.<sup>36</sup>

The level of transparency is higher in Australian case law. Although not using the framework of substitutionary and compensatory damages, the High Court of Australia has forged its own interpretation of the *Robinson v Harman* principle that is not too distant from Winterton's theory. Thus, in *Amman Aviation*, Mason CJ and Dawson J stated that '[t]he award of damages for breach of contract protects a plaintiff's expectation of receiving the defendant's performance'.<sup>37</sup> As Winterton notes, *Clark v Macourt*<sup>38</sup> provides a 'striking example' of the substitutionary approach.<sup>39</sup> In *Tabcorp Holdings* the High Court emphasised that the task of awarding damages is one of making good the expected performance, not merely responding to the financial position of the plaintiff.<sup>40</sup> Winterton might indeed have made more use of Australian case law in exploring the 'reasonableness' limitation he suggests applies to contain the award of substitutionary damages.<sup>41</sup> Winterton indicates this concept may be informed by the idea of proportionality from *Ruxley Electronics and Constructions Ltd v Forsyth*,<sup>42</sup> but does not develop the idea much further.<sup>43</sup> Australian cases offer a number of observations about the various factors that may be influential in deciding when a monetary award based on the cost of rectification is reasonable, or at least not unreasonable.<sup>44</sup>

Notwithstanding this largely English focus, there is much in the book to interest Australian practitioners and academics. Winterton's analysis provides thought-provoking insight on the important and sometimes difficult topic of monetary awards for breach of contract. This is precisely what a good monograph on the law of contract should do.

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34 Winterton, above n 2, 68–79.

35 See *ibid* 166.

36 Andrew Robertson, 'Rights, Pluralism and the Duty of Care' in Donal Nolan and Andrew Robertson (eds), *Rights and Private Law* (Hart Publishing, 2012) 435, 438.

37 (1991) 174 CLR 64, 80.

38 (2013) 253 CLR 1.

39 Winterton, above n 2, 162.

40 (2009) 236 CLR 272, 285–6 [13] (French CJ, Gummow, Heydon, Crennan and Kiefel JJ).

41 Winterton, above n 2, 188–201.

42 [1996] AC 344.

43 Winterton, above n 2, 199–200.

44 See, eg, *Bellgrove v Eldridge* (1954) 90 CLR 613, 616 (Dixon CJ, Webb and Taylor JJ); *Tabcorp Holdings* (2009) 236 CLR 272, 289 [18] (French CJ, Gummow, Heydon, Crennan and Kiefel JJ); *Westpoint Management Ltd v Chocolate Factory Apartments Ltd* [2007] NSWCA 253, [61] (Giles JA); *Cordon Investments Pty Ltd v Lesdor Properties Pty Ltd* (2013) 29 BCL 329, 367 [230] (Bathurst CJ).