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*Of Ceilings and Flaws: An Analytical Approach to the Minimum
Performance Rule in Contract Damages*

David Pearce*

Abstract - The minimum performance rule applies where the defendant who has repudiated his contract would have had a choice as to how to perform it. The rule requires that damages be assessed on the basis that the defendant would have chosen to perform in the least onerous manner. Two principal criticisms of the rule are made. The first is that the rule's fundamental assumption, that minimum performance is all the claimant is entitled to, rests on a flawed understanding of what it means to have a choice as to how to perform a promise. The second concerns the rule's application to consequential loss. Where the benefit of which the claimant has been deprived comprises consequential, as opposed to immediate, loss the absence of an entitlement to that benefit is not a bar to recovery, liability being limited by the doctrine of remoteness instead. The article then considers whether the rule has a continuing role in contract law. Given that those cases within its remaining area of application, being claims for the recovery of contractual benefits as to which the defendant made no promise, are not, properly considered, minimum performance cases at all, the conclusion reached is that the rule should be abandoned.

Keywords: contract, damages, loss, legal theory

1. Introduction

Suppose a seller promises to deliver 100 tons of coal, 5% more or less at his option, but repudiates the contract without delivering any quantity at all. Are damages for non-delivery to be assessed on the basis of a notional delivery of 100 tons, 95 tons, 105 tons or some other quantity? Given that the 'governing'¹ principle of contract damages is that the claimant is to be placed in the same position as if the contract had been performed,² it might reasonably be expected that the buyer's damages would be based on the quantity within the agreed range which the seller would in fact have chosen to deliver had he not repudiated the contract. But it is clear that the choice

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¹ *Golden Strait Corporation v Nippon Yusen Kubishka Kaisha (The Golden Victory)* [2007] UKHL 12, [2007] 2 AC 353 [9] (Lord Bingham).

² *Robinson v Harman* (1848) 1 Ex 850, 855 (Parke B).

which the seller would have made has no relevance to the assessment of damages. Regardless of the quantity he would actually have delivered had he performed the contract, the minimum performance rule dictates that damages be assessed on the basis of a notional delivery of 95 tons. For the rule holds that the claimant is 'only entitled to be compensated for the loss of those benefits which he would have been legally entitled to claim if his contract had been performed'.³ Had the contract remained in being, the buyer could not have insisted that the seller deliver any more than 95 tons. In this way, what constitutes the floor as regards the discharge of the defendant's primary obligation to perform his promise acts as the ceiling for his secondary obligation to pay damages for non-performance.

The minimum performance rule has been said to make 'perfectly good sense'⁴ and the great majority of writers seem happy enough with it.⁵ Nevertheless, the view put forward in this article is that the rule represents a misconceived extension of the orthodox principle 'that no man can be held liable in contract for failing to do what he is not obliged to do'.⁶ The rule will, in some cases at least, lead to an award of damages which fails to achieve that remedy's overriding purpose of placing the claimant in the same position as if the defendant had performed those promises which at the date of repudiation⁷ he had an outstanding primary obligation to keep.⁸ In the

³ *Lavarack v Woods of Colchester Ltd* [1967] 1 QB 278 (CA) 296 (Diplock LJ). For helpful commentaries on the operation of the rule see Adam Kramer, *The Law of Contract Damages* (Hart 2014) 257-269 and Andrew Tettenborn and David Wilby, *The Law of Damages* (2nd edn, Butterworths 2010) paras 19.08-19.15.

⁴ *Lion Nathan Ltd v C-C Bottlers Ltd* [1996] 1 WLR 1438 (PC) 1446 (Lord Hoffmann). But cf *Mulvenna v Royal Bank of Scotland plc* [2003] EWCA Civ 1112 [35] (Sir Anthony Evans); *Horkulak v Cantor Fitzgerald International* [2004] EWCA Civ 1287, [2004] IRLR 942 [48] (Potter LJ); *Jones v IOS (RUK) Ltd (in liquidation)* [2012] EWHC 348 (Ch) [86] (Hodge QC).

⁵ A notable exception to this general acquiescence is provided by Professor Ogus who calls for the rule's abolition: AI Ogus, *The Law of Damages* (Butterworths 1973) 313-14.

⁶ *Beach v Reed Corrugated Cases Ltd* [1956] 1 WLR 807 (QB) 817 (Pilcher J).

⁷ As matters stand, the application of the rule to cases where the parties have continued to perform the contract notwithstanding the defendant's breach is uncertain: compare *Ferruzzi France SA v Oceania Maritime Inc (The Palma)* [1988] 2 Lloyd's Rep 261 (Com Ct) and *Kurt A Becher GmbH & Co KG v Roplak Enterprises SA (The World Navigator)* [1991] 2 Lloyd's Rep 23 (CA).

examination of the rule which follows, three categories of claim are identified. The first, and most significant, category comprises those claims where the defendant would have had a choice under the contract as to how to perform a promise which he had a primary obligation to keep. The second category comprises claims for the loss of an extra-contractual benefit⁹ which the defendant, had he performed the contract, might have chosen to confer on the claimant. The third category consists of claims for the loss of a discretionary contractual benefit¹⁰ which the defendant, had he performed the contract, might have chosen to confer on the claimant.

The article makes two principal criticisms of the rule. First, it challenges the validity of the rule's fundamental assumption that in claims falling within the first category, performance in the least onerous manner 'is all the claimant is legally entitled to'.¹¹ It is shown that this assumption rests on an inadequate understanding of what it means for the defendant to have a choice as to how to perform his promise. For where a promise provides for alternative ways of performance, the promisee may be seen to enjoy contingent rights to each alternative, and not, as the minimum performance rule holds, merely a right to the least onerous alternative. Given that the claimant's damages should reflect 'the value of the contractual benefit to which he

⁸ A point recognized by Waller LJ in *Mulvenna v Royal Bank of Scotland plc* [2003] EWCA Civ 1112 [19].

⁹ For present purposes, an extra-contractual benefit is one as to which the contract makes no provision and hence as to the conferral of which the defendant makes no promise in the contract. An example of a claim for an extra-contractual benefit in this context would be where the claimant alleges that, had the contract not been repudiated, the defendant would have chosen to enter into a follow-on contract with the claimant, the repudiated agreement having contained no provision for renewal.

¹⁰ In contrast to claims under the second category, the benefit involved in a claim under the third category is contractual, in the sense that the contract makes provision for the benefit. But, in contrast to claims under the first category, the provision falls short of a promise, express or implied, by the defendant as to its conferral. In other words, the contract provides that the defendant has an absolute discretion to confer or refrain from conferring the benefit. In practice, where the benefit forms a substantial element of the overall consideration, the court will be reluctant to construe the discretion as being absolute and will look to impose certain restrictions on the defendant as to its exercise: see, eg, *Horkulak v Cantor Fitzgerald International* [2004] EWCA Civ 1287, [2004] IRLR 942.

¹¹ Andrew Burrows, *Remedies for Torts and Breach of Contract* (3rd edn, OUP 2004) 151.

was entitled but of which he has been deprived',¹² it follows that the claimant is entitled to compensation which reflects the value of his contingent right to the alternative which the defendant would have chosen. In this way damages are to be based on how the defendant *would*, and not *could*, have performed his promise. Nor is such an approach inconsistent with contractual principle. There is nothing inherently heterodox in the idea that the content of the secondary obligation to pay damages for non-performance of a promise may represent a level of performance greater than that which would have been sufficient to discharge the primary obligation to perform: what constitutes the floor as regards the primary obligation need not act as the ceiling for the secondary obligation. The second criticism relates to claims falling within the second category identified above and concerns the rule's failure to distinguish between the loss of contractual and extra-contractual benefits. The distinction is important because the loss of an extra-contractual benefit which the defendant might have chosen to confer on the claimant had the contract been performed constitutes consequential, and not immediate, loss. Where the benefit of which the claimant has been deprived comprises consequential loss the absence of an entitlement to that benefit is not a bar to recovery, liability for consequential loss being limited by the doctrine of remoteness instead. It follows that the minimum performance rule should not have any application to claims falling within either the first or second categories: not to the former because the claimant has a sufficient entitlement to the benefit of which he has been deprived; and not to the latter because there is no need for an entitlement to the benefit of which he has been deprived.

On the basis that these criticisms are valid, the final substantive section of the article considers whether there remains a continuing, albeit much reduced, role for the

¹² *The Golden Victory* (n 1) [32] (Lord Scott).

minimum performance rule. At first sight, the existence, identified above, of the third category of claim to which the rule currently applies holds out the prospect of continuing work for the rule to do. Yet, on closer consideration, it is clear that claims for the loss of a discretionary contractual benefit, that is, a benefit as to which the contract makes provision but as to the conferral of which the defendant has made no promise, are not minimum performance cases at all. For these are not cases in which the defendant's liability turns on the application of an irrebuttable presumption as to how the defendant would have chosen to perform. Where the defendant has not promised to confer a contractual benefit, the absence of liability in damages for the loss of that benefit is not dependent upon any presumption as to how the defendant would have chosen to act. Rather, the defendant is not liable for the simple reason that he did not promise to confer the benefit. The conclusion to which this reasoning leads is that the minimum performance rule should have no role in the law of contract damages.

2. The Defendant Would Have Had a Choice as to How to Perform His Promise

The first category, and the most common situation in which the minimum performance rule is applied, arises from the non-performance of a promise which provides on its 'face . . . for alternative methods of performance'.¹³ Such a promise

¹³ *Abrahams v Herbert Reiach Ltd* [1922] 1 KB 477 (CA) 480 (Bankes LJ). It should be noted that the minimum performance rule is not applicable to every situation where the defendant would have had a choice as to how to perform a promise. For the courts draw a sharp distinction between the situation where the defendant would have had a choice as to how to perform a single but broadly-defined obligation (a promise to do *x*, where the content of *x* is uncertain) and a choice between so-called alternative obligations where the contract expressly provides distinct alternatives (a promise to do *x* or *y*, or to do not less than *x*, or to do *x* unless *y*). The distinction seems to have first been made in the *Abrahams* case (ibid) where Bankes and Atkin LJ held that the minimum performance rule had no application to an obligation to publish a book. Their approach was endorsed in *Durham Tees Valley Airport Ltd v bmibaby Limited* [2010] EWCA Civ 485, [2011] 1 Lloyd's Rep 68 where the Court of Appeal unanimously held that the rule had no application to an obligation to carry on a two aircraft based operation at the claimant's airport. While, with respect, the distinction between single and alternative obligations is one without a difference, the point will not be pursued in light of the article's

will typically assume one of three forms.¹⁴ The first is where the defendant promises a minimum level of performance while enjoying the right to exceed that level: a promise to do not less than x . For example, a seller promises to deliver 200 tons of beef tallow 5% more or less at his option,¹⁵ or an employer promises to pay his employee an annual salary of not less than £4,000.¹⁶ When it comes to compensation for non-performance of the promise, the fundamental principle that 'a defendant is not liable in damages for not doing that which he is not bound to do'¹⁷ is said to require the courts to assume 'that the defendant has performed or will perform his legal obligations under his contract with the plaintiff and nothing more'.¹⁸ So damages for non-delivery of the beef tallow are assessed on the basis that the seller would have chosen to deliver just 190 tons and for wrongful dismissal of the employee on the basis that the employer would have paid an annual salary of £4,000 and not a penny more.

The second variant is where the defendant's promise affords him a choice between different alternatives: a promise to do x or y . For example, a charterer may have a choice from a range of ports as to the particular port at which re-delivery of the vessel is to take place.¹⁹ As far as damages for non-performance are concerned, the assumption adopted in the case of a promise to do not less than x , that the

broader argument. It is, however, worth noting that the comments of the Court of Appeal in *Durham Tees* were limited to single obligation cases and do not affect the applicability of the minimum performance rule to the three variants examined in this section: see, eg, at [69] and [78] (Patten LJ) and [131] (Toulson LJ). Further, while Toulson LJ was clearly sceptical (see, eg, at [144]) as to the correctness of the approach in *Paula Lee Ltd v Robert Zehil & Co Ltd* [1983] 2 All ER 390 (QB) (where Mustill J held that the minimum performance rule applies to a single obligation which is subject to an implied obligation to act reasonably), Patten LJ does not appear to share those doubts.

¹⁴ The rule is not, in principle, limited to promises made by the defendant. Because damages aim to put the claimant in the position in which he would have been had the contract been performed, the rule may be invoked where the defendant would have had the right to fix the content of the claimant's duty.

¹⁵ *Re Thornett & Fehr v Yuills Ltd* [1921] 1 KB 219 (DC).

¹⁶ *Lavarack* (n 3).

¹⁷ *Abrahams* (n 13) 482 (Scrutton LJ).

¹⁸ *Lavarack* (n 3) 294 (Diplock LJ).

¹⁹ *Santa Martha Baay Scheepvaart v Scanbulk A/S (The Rijn)* [1981] 2 Lloyd's Rep 267 (Com Ct).

defendant would have performed his obligation and done nothing more, does not resolve the issue of how the defendant would have chosen to act. The assumption is accordingly modified so that it is assumed that the defendant would have chosen the alternative which is 'the least profitable to the plaintiff, and the least burthensome to the defendant'.²⁰ So where the vessel lies outside the agreed re-delivery range when the charterer repudiates the charter, damages are based on a notional final voyage in ballast to the nearest safe port within the redelivery range.²¹

The third variant is where the defendant promises to do one thing while having the option to substitute another: a promise to do *x* unless he elects to do *y* instead.²² For example, a theatre company may engage a variety artiste to perform his sketch at the London Palladium for three weeks, while reserving the right to transfer the engagement to a different theatre.²³ Here again the form of the assumption is modified. For in these cases the defendant is assumed to have exercised his right of substitution in the way which minimizes his liability in damages: 'if the defendant has under the contract an option which would reduce or extinguish the loss, it will be assumed that he would exercise it'.²⁴ Whether the defendant would in fact have exercised the option is irrelevant: all that matters is that he could have done so.²⁵

²⁰ *Cockburn v Alexander* (1848) 6 CB 791, 814; 136 ER 1459, 1470 (Maule J). This assumption has been formulated in different ways: see, eg, *Robinson v Robinson* (1851) 1 D & G 247, 258; 42 ER 547, 551 (Lord Cranworth LC); *Withers v General Theatre Corporation* [1933] 2 KB 536 (CA) 551 (Scrutton LJ); *The World Navigator* (n 7) 31 (Staughton LJ). In *Pacific Maritime (Asia) Ltd v Holystone Overseas Ltd* [2007] EWHC 2319 (Comm) [39] Christopher Clarke J thought that 'where the formulation of the assumption makes a difference, the assumption should be that [the defendant] would perform in the way most beneficial to itself, not that it should perform in the way least beneficial to the [claimant]'.
²¹ *The Rijn* (n 19) 270.

²² But note that the minimum performance rule does not apply to an agreed damages clause, where the defendant might be said to have a duty to perform the obligation unless he elects to pay the agreed damages instead: see, eg, *Deverill v Burnell* (1873) LR 8 CP 475 (CP).

²³ *Withers v General Theatre Corporation* [1933] 2 KB 536 (CA).

²⁴ *Maredelanto Compania Naviera SA v Bergbau-Handel GmbH (The Mihalis Angelos)* [1971] 1 QB 164 (CA) 196 (Lord Denning MR).

²⁵ See *Kurt A Becher GmbH & Co KG v Roplak Enterprises SA (The World Navigator)* [1991] 2 Lloyd's Rep 23, 33 (Staughton LJ); *Automotive Latch Systems Ltd v Honeywell International Inc* [2008] EWHC 2171 (Comm) [712] (Flaux J). To similar effect see *The Golden Victory* (n 1) [2005]

Hence damages for the artiste's wrongful dismissal are assessed on the basis that his engagement would have been transferred from the Palladium to a provincial theatre at the earliest opportunity.²⁶

While the way in which the assumption is expressed may vary, the fundamental idea in all of these cases is the same: had the defendant delivered only 190 tons, paid just £4,000, re-delivered the vessel at the nearest port or immediately transferred the artiste's engagement to a provincial theatre, such performance would not have amounted to a breach of contract. Nevertheless, that is not the issue. What the court has to establish is what the claimant was entitled to at the time the contract was repudiated. And to say that at that time the claimant was only entitled to performance in the least onerous manner demonstrates a flawed understanding of what it means to have a choice as to how to perform a promise.

A. *What it Means to Have a Choice*

Having a choice means having a 'bilateral'²⁷ right: the right to do a thing *and* the right to refrain from doing that thing.²⁸ In Hohfeldian terms, a bilateral right will be either a liberty-right or a power-right.²⁹ A liberty-right is 'simply the absence of a duty not to

EWCA Civ 1190, [2006] 1 WLR 533 [6] where Lord Mance noted the arbitrator's conclusion that the defendant charterers were 'entitled to the benefit of a presumption that they would . . . have cancelled the charter'. As to the relationship between the minimum performance rule and the rule in *The Golden Victory*, see Tettenborn and Wilby (n 3) para 19.08.

²⁶ *Withers* (n 23) 551.

²⁷ As opposed to a 'unilateral' right: see HLA Hart, 'Bentham on Legal Rights' in AWB Simpson (ed), *Oxford Essays in Jurisprudence: Second Series* (OUP 1973) 175-76. Sumner prefers 'full' and 'half' respectively: see LW Sumner, *The Moral Foundation of Rights* (OUP 1989) 27.

²⁸ This explains why the right giving rise to a choice will be either a liberty-right or a power-right, and not a claim-right or an immunity-right. A buyer cannot have a claim-right that the seller deliver goods which correspond with their description at the same time as having a claim-right that the seller refrain from delivering such goods. In the same way, an employee cannot have an immunity-right that his employer cannot terminate his employment on less than six months' notice at the same time as having an immunity-right that his employer cannot refrain from terminating his employment on less than six months' notice.

²⁹ WN Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23 Yale LJ 16. Hohfeld wrote of rights, privileges, powers and immunities (ibid 30). The corresponding terms here are claim-rights, liberty-rights, power-rights and immunity-rights.

perform [an] action'.³⁰ The defendant's liberty-right to do x signals that the defendant has no duty not to do x and that the claimant has no claim-right that the defendant not do x . In the contractual context then, a liberty-right to do x tells us that the holder *may* do x without thereby being in breach of contract. But, crucially, that is all a liberty-right tells us.³¹ For liberty-rights 'do not themselves place restrictions on anyone'.³² The defendant's liberty-right to do x of itself 'entails no obligation'³³ on the claimant as regards x : the claimant will have no duty to co-operate in the doing of x , no duty not to interfere in the doing of x and no duty 'positively to see to it'³⁴ that the defendant can in fact do x . It is this 'lack of guarantee'³⁵ that distinguishes a liberty-right from a claim-right³⁶ and explains why liberty-rights are seen as 'very weak rights'.³⁷ A power-right, by contrast, confers on the holder 'affirmative "control"' over some aspect of a legal relation.³⁸ A power-right signals that the holder has the ability to 'expand or reduce or otherwise modify, in particular ways, his own entitlements or the entitlements held by [the other party]'.³⁹ So while a liberty-right tells us what the holder *may* do, a power-right tells us what the holder *can* do. Thus a critical distinction between liberty-rights and power-rights relates to the nature of their respective content. Liberty-rights, like claim-rights, 'occupy the plane of primary

³⁰ Nigel E Simmonds, *Central Issues in Jurisprudence* (4th edn, Sweet & Maxwell 2013) 300.

³¹ 'It is hard to overemphasize the importance and difficulty of correctly understanding what an Hohfeldian liberty is . . . It is easy to read more into a liberty than is there.' George W Rainbolt, *The Concept of Rights* (Springer 2006) 6.

³² Matthew H Kramer, 'Rights Without Trimmings' in Matthew H Kramer, NE Simmonds and Hillel Steiner, *A Debate Over Rights* (OUP 2000) 11. See also Simmonds (n 30) 300; Rainbolt (n 31) 6.

³³ R M Hare, *Moral Thinking* (OUP 1981) 149.

³⁴ *ibid* 150.

³⁵ Joel Feinberg, *Social Philosophy* (Prentice-Hall 1973) 57

³⁶ 'To say that a claim-right is *directly* correlated with a duty is simply to say that if X has a right, with respect to Y . . . to ϕ . . . that fact entails that Y has a duty to X not to *interfere with* X's ϕ ing.' William A Edmundson, *An Introduction to Rights* (2nd edn, CUP 2012) 73.

³⁷ Judith Jarvis Thomson, *The Realm of Rights* (Harvard UP 1990) 47. Thomson continues (*ibid* 52): 'it is not easy to imagine a background against which it can easily be understood why a man might be interested in getting the privilege, if he knows he is only going to get the privilege'.

³⁸ Hohfeld (n 29) 55.

³⁹ Kramer (n 32) 20.

rules which are concerned directly to prescribe conduct'.⁴⁰ As such, they may be termed 'first-order' rights.⁴¹ Power-rights, like indemnity-rights, on the other hand, 'exist on the plane of secondary rules, which are concerned not to prescribe conduct so much as to provide facilities for the alteration of prescriptions that obtain at the primary level'.⁴²

The distinction between liberty-rights and power-rights is thus crucial where the defendant has a choice as to how to perform his promise. In such cases, the right comprises the ability of the defendant to modify the content of his own duty.⁴³ A liberty-right, as a first-order right, will not have a duty as its content and so a liberty-right will not enable the holder to modify the content of a duty. As a matter of definition, the right enjoyed by a promisor who has a choice as to how to perform his promise must necessarily be a bilateral power-right, and not a liberty-right. As will be shown immediately below, this analysis has far-reaching consequences for the minimum performance rule.

(i) *A promise to do x or y*

The defendant who promises to do *x* or *y* assumes a disjunctive and indeterminate duty.⁴⁴ The choice inherent in such a promise comprises a bilateral power-right: the defendant enjoys the ability to fix the precise content of the duty. He can modify the content of the original duty, to do either *x* or *y*, into *either* a duty to do *x* or a duty to do *y*. It follows that by promising to do *x* or *y* the defendant assumes a contingent duty to do *x* and a contingent duty to do *y*. Depending on the choice he makes, the

⁴⁰ NE Simmonds, 'Rights at the Cutting Edge' in Kramer, Simmonds and Steiner (n 32) 221.

⁴¹ Sumner (n 27) 27.

⁴² Simmonds (n 40) 221. As such, they may be termed 'second-order' rights: Sumner (n 27) 27.

⁴³ It is 'a right of election which fixes the content of his obligation': *Paula Lee Ltd v Robert Zehil & Co Ltd* [1983] 2 All ER 390 (QB) 393 (Mustill J).

⁴⁴ cf the contention in HG Beale (ed), *Chitty on Contracts* (29th edn, Sweet & Maxwell 2004) para 21-006 that 'there is no primary or basic obligation' but a requirement to make an election.

defendant will come under either a duty to do *x* or a duty to do *y*. If he chooses to do *x*, the contingent duty to do *x* becomes unconditional and the contingent duty to do *y* is extinguished. It further follows that until the defendant makes his choice, the claimant enjoys a contingent claim-right to *x* *and* a contingent claim-right to *y*. It is only when the defendant makes his choice to do, say, *x* that the claimant's contingent claim-right to *x* becomes unconditional and his contingent claim-right to *y* is extinguished. So until the charterer chooses the particular port at which the vessel is to be re-delivered, he has a contingent duty, and the owner a contingent claim-right, as regards each port within the range. It is not correct to say that the only duty and claim-right which exists is that concerning the nearest port.

In applying the minimum performance rule to a promise to do *x* or *y*, the courts treat the contract as imposing a duty on the defendant to do the less onerous alternative, say *x*, and conferring on him the right to do the more onerous alternative, *y*, instead.⁴⁵ It is implicit in their approach that the right to do the more onerous alternative, *y*, is a liberty-right because the claimant is said to have no right to *y*: '[t]he plaintiff cannot prove a contract for performance of the more onerous obligation'.⁴⁶ But such an analysis does not stand up to scrutiny. A liberty-right, as a first-order norm, cannot modify a duty. A liberty-right to do *y* would mean that the defendant had no duty not to do *y* so that the doing of *y* would not amount to a breach of contract. Equally, it would mean that the doing of *y* would not affect or extinguish the duty to do *x*. Having chosen to do *y*, the defendant would nevertheless remain bound to do *x*. But the right to do *y* must be a right to do *y* *instead of x*. By recognizing that

⁴⁵ The effect of the minimum performance rule is thus to re-write the contract: a promise to do *x* or *y* is treated as if it were a promise to do *x* or *y* 'whichever is the less onerous'. But such a promise does not give the defendant a choice and is not the same as a promise to do *x* or *y*.

⁴⁶ *Abrahams* (n 13) 483 (Atkin LJ).

the defendant has the ability to modify the content of his duty, to substitute y for x , it is apparent that the defendant has a bilateral power-right, not a liberty-right.

(ii) *A promise to do x , unless the promisor elects to do y instead*

When we turn to a promise to do x unless the promisor elects to do y instead, it is perhaps more immediately evident that the option comprises a power-right. The defendant's duty to do x is contingent because by choosing to do y he can extinguish his obligation to do x . It follows that the claimant's claim-right to x is also contingent. It further follows that the defendant has a contingent duty to do y , and the claimant a contingent claim-right to y . But to award damages on the basis that the defendant would have exercised the option in the way which minimizes damages when the evidence indicates that he would not have exercised the option in that way will lead to an award of compensation which is inconsistent with the overriding purpose of damages because the award will not reflect the value of the contractual entitlement of which the claimant has been deprived.

(iii) *A promise to do not less than x*

The proper treatment of a promise to do not less than x is less clear-cut because here different analyses are possible. As was noted above, damages for the non-performance of a promise to deliver 200 tons 5% more or less will be calculated on the basis of a hypothetical delivery of 190 tons.⁴⁷ The effect of the rule is that the seller is treated as having no choice as to how to perform the promise. The content of his duty is fixed: to deliver 190 tons. This corresponds to a claim-right on the part of the buyer to delivery of that quantity and no other. The seller's right to deliver an additional quantity not exceeding 20 tons is treated as a bilateral liberty-right: the

⁴⁷ *Thornett* (n 15).

seller may deliver, or may refrain from delivering, up to 20 tons more. Corresponding to the seller's liberty-right is a no-claim-right on the buyer's part. The buyer has no claim-right to the additional 20 tons or any part thereof, and accordingly no claim for the non-delivery of any part thereof. Liability attaches to the non-performance of a promise and the promise is to deliver 190 tons.

While this approach is analytically sustainable, it is unlikely to reflect the parties' intentions.⁴⁸ By treating the seller as having a duty of fixed content and a separate right to do more, the court deprives the seller of the very control which he presumably wished to retain. A duty to deliver 190 tons coupled with a liberty-right to deliver up to a further 20 tons means that the seller must deliver 190 tons and may deliver any or no part of the additional quantity without thereby being in breach of contract. But that is all it means. Crucially, it does not follow that there would be any obligation on the buyer to accept delivery of the additional quantity: a liberty-right does not entail any obligation of co-operation on the party against whom the liberty-right avails. It follows that were the seller to deliver 210 tons, then applying section 30(2) of the Sale of Goods Act 1979,⁴⁹ there would be no duty on the buyer to accept any part of the delivery as the seller has only 'contracted to sell' 190 tons. It would also follow, on the assumption that payment would fall due on or after delivery, that the buyer's obligation to pay the price would not accrue. A more credible construction is that the parties intended that the buyer be obliged to take delivery of any quantity between 190 and 210 tons, the point presumably being to give the seller control over delivery by enabling him to insist that the claimant take delivery of any quantity

⁴⁸ It also sits uneasily with the actual wording of the contract: why, it might be asked, if the seller's obligation is to deliver 190 tons, does the contract explicitly refer to 200, and not 190, tons? See *Thornett* (n 15) 220.

⁴⁹ 'Where the seller delivers to the buyer a quantity of goods larger than he contracted to sell, the buyer may accept the goods included in the contract and reject the rest, or he may reject the whole.'

within that range.⁵⁰ On this construction the content of the original duty is indeterminate, and not fixed, with the seller having the ability, in the form of a power-right, to fix the content of the duty at any quantity between 190 and 210 tons. It would follow that the seller had a contingent duty, and the buyer, a contingent claim-right, in respect of any quantity within that range.

The same argument holds with respect to the employer's promise to pay an annual salary of not less than £4,000. The courts treat the contract as imposing a duty of fixed content, to pay a salary of £4,000, and conferring the right, a bilateral liberty-right, to pay, or refrain from paying, an additional amount.⁵¹ But if such a construction is correct, it would follow that there would be no obligation on the employee to accept a payment which exceeds £4,000.⁵² Again, it seems more likely that the parties would intend that the employee be bound to accept a sum exceeding £4,000 so as to discharge the employer's salary obligation. And again, it would follow that the employee would have a contingent claim-right to such a sum.⁵³

B. *Valuing Contingent Claim-Rights*

The preceding analysis demonstrates that where the defendant has a choice under the contract as to how to perform a promise which he has a primary obligation to keep, it

⁵⁰ It seems that the parties to the *Thornett* case itself intended something different: that the seller had a duty to deliver 200 tons, the tolerance of 10 tons either way only excusing accidental variation. In other words, the seller had no choice as to the contract amount, only a margin for inadvertent error. The court nevertheless rejected this construction: see *Thornett* (n 15) 224.

⁵¹ *Lavarack* (n 3). Again, a difficulty with this construction is its consistency with the actual wording of the contract: if the employer is promising to pay a fixed sum of £4,000 the words 'not less than' are otiose.

⁵² Why might an employee wish to reject payment of a sum greater than that stipulated? One reason is that it would absolve him of the obligation to continue to make himself available for work without thereby being in breach of contract. Another is that acceptance of such a sum might trigger a liability to a third party, such as liability to tax (or, in these days of negative interest rates, liability to pay 'interest').

⁵³ A further reason to prefer the power-right construction becomes evident where the employer does pay more than £4,000 in salary. Generally, where an employee's salary is increased, the parties are assumed to have intended that the modification cannot be reversed. So, where the employer decides one year to pay £5,000, the employee's entitlement in the following year would be £5,000. But if the right to pay an additional sum is construed as a liberty-right, the salary entitlement for the following year would remain at £4,000.

will be generally be incorrect to say that the claimant is only entitled to minimum performance. On the contrary, the claimant is likely to have contingent claim-rights to each lawful alternative. How does the existence of these contingent rights affect the assessment of damages? The starting point is to recognize that where the defendant's promise, say his promise to do x or y , remains unperformed as at the date of his repudiation of the contract, there is substituted by implication of law for his outstanding primary obligation to keep the promise a secondary obligation to pay damages for the loss sustained by the claimant in consequence of the non-performance of the promise.⁵⁴ Such loss is generally measured by comparing the claimant's actual position with the position he would have been in had the promise been performed. Further, it is generally for the claimant to prove on the balance of probabilities that the loss for which he claims compensation would not have been suffered but for the repudiation. It follows that where the claimant can show that, had the contract been performed, the defendant would probably have performed the promise by choosing to do y , the claimant is entitled to damages for the loss of y notwithstanding that it would have been less onerous for the defendant to have chosen to do x .⁵⁵ In short, what matters as far as the assessment of damages is concerned is how the promise would, rather than could, have been performed. While

⁵⁴ *Photo Production Ltd v Securicor Ltd* [1980] AC 827 (HL) 849 (Lord Diplock).

⁵⁵ See *The Palma* (n 7) 271 where Phillips J adds that where the claimant is unable to show on the balance of probabilities which alternative the defendant would have chosen, the claimant 'must accept that the Court will proceed on the basis of the version of possible events which is least favourable to them' (ibid). But query whether the same approach applies where, had the contract remained alive, the choice would have fallen to be made by the defendant after the date on which damages are being assessed (ie the court is dealing with a hypothetical future, rather than a hypothetical past, event). It seems that damages here would be assessed on what may loosely be termed the 'loss of a chance' basis: see, eg, *Mallett v McMonagle* [1970] AC 166 (HL) (NI) 176 (Lord Diplock):

'in assessing damages which depend upon its view as to what . . . would have happened in the future if something had not happened in the past, the court must make an estimate as to what are the chances that a particular thing will or would have happened and reflect those chances, whether they are more or less than even, in the amount of damages it awards.'

I am grateful to the anonymous referee for raising this point.

minimum performance may represent a sensible default measure, the only irrebuttable presumption should be that the defendant would have chosen to perform lawfully.

It remains to add one important rider. As a general principle, the parties to a contract are free to modify the secondary obligation which would otherwise arise by operation of law.⁵⁶ Generally this is achieved by means of an express clause but there is no reason in principle why the limitation may not be implicit. In some cases the application of the minimum performance rule obscures that this is what the parties have in fact sought to do. An example is a notice clause in an employment contract. The minimum performance rule is currently routinely applied in wrongful dismissal claims, meaning that the court must assume 'that the employer would have chosen to have terminated the contract lawfully at the very moment that he had brought the contract to an end unlawfully in breach of contract'.⁵⁷ While, it is suggested, the courts are right to restrict the employer's liability, the basis for the restriction has nothing to do with a perverse assumption that the employer did what he plainly did not do. Rather, liability should be limited because this is what the parties agreed. An action for wrongful dismissal arises where the employer, in the absence of good cause, fails to give proper notice of his intention to terminate the employment relationship.⁵⁸ It follows that recoverable loss is limited to the loss of salary and other contractual entitlements for the proper period of notice.⁵⁹ In this way, a notice clause may be seen to serve a dual function. It gives the employer a degree of control over performance of the contract, giving him the ability to bring the employment relationship to an end lawfully. But it also serves to limit the liability which might

⁵⁶ See, eg, *Photo Production* (n 54) 849 (Lord Diplock).

⁵⁷ *Jancuick v Winerite Ltd* [1998] IRLR 63 (EAT) 64 (Morison P).

⁵⁸ Or fails to make the agreed payment in lieu of notice. See, eg, *Wallace v United Grain Growers Ltd* (1997) 152 DLR (4th) 1 (SCC) 39 (McLachlin J).

⁵⁹ *Johnson v Unisys Ltd* [2001] UKHL 13, [2003] 1 AC 518.

otherwise arise on a wrongful termination because the parties have expressly agreed the period for which the employer is to be liable in damages for loss of salary and other entitlements. So while, when assessing damages in wrongful dismissal cases, the courts are wrong to assume that the defendant somehow chose to terminate the contract lawfully, they are right to limit the claimant's damages to the extent they do, for the simple reason that the parties agreed that the damages should be so limited.⁶⁰

C. Discussion

The principal refrain of those who support the application of the minimum performance rule to cases where the defendant would have had a choice as to how to perform a promise is that the rule ensures that damages accurately reflect the claimant's contractual entitlement:

The rationale for giving no damages beyond the defendant's minimum contractual obligation is that that is all the claimant is legally entitled to. Had the contract been on foot, the claimant could not have complained if the defendant had merely performed its bare contractual obligation. Had it wanted a greater legal entitlement, the claimant could have contracted for it (presumably at an increased price). But it did not do so.⁶¹

It is undoubtedly correct that the defendant who has promised to do x or y and who then performs the less onerous alternative, say, x , will have no liability for breach of contract. The claimant cannot complain that the defendant should have done y instead. But that misses the point. In the minimum performance cases damages are not being claimed because the defendant has done x . Damages are being claimed because the defendant has done nothing: he has failed to do x and he has failed to do y . Had the defendant done x , he would have no liability because he would have kept

⁶⁰ Of course, not all contractual power-rights share this dual function. For example, in *Withers* (n 23) the power to transfer the engagement to a provincial theatre was intended to give the employer control as to the manner in which the contract was to be performed; likewise the cancellation clause in *The Mihalis Angelos* (n 24). In neither case was there anything to indicate that the parties also intended the provision to function so as to limit liability for breach.

⁶¹ *Burrows* (n 11) 151.

his promise. But just because no liability arises where the defendant does *x* does not mean that the claimant never had *any* entitlement to *y*. Had the defendant done *x*, the claimant would have had no claim because his conditional entitlement, his contingent claim-right, to *y* would have been extinguished when the defendant chose to do *x*.⁶² The rationale for the minimum performance rule is flawed because it treats as having occurred that which has not occurred.⁶³ Equally, to say the claimant could have bargained for a greater entitlement also misses the point. What the claimant bargains for is performance: 'contracts are made to be performed'.⁶⁴ Where the contract gives the defendant a choice as to how to perform his promise, the claimant takes the risk that the defendant may choose to perform in the way least beneficial to the claimant. But he also takes the chance that the defendant may choose an alternative of greater benefit to the claimant.

Awarding damages based on the non-performance of the more onerous of two alternatives will not confer a windfall on the claimant where this reflects the choice which the defendant would probably have made. For such damages merely reflect the 'actual consequences'⁶⁵ of the defendant's repudiation and give effect to the claimant's claim-right by placing him in the same position as if the contract had been performed. There is nothing intrinsically heterodox in the principle that the content of the secondary obligation to compensate may reflect a level of performance greater than that which would have been sufficient to discharge the primary obligation to perform.

⁶² It may be that the contingent claim-right to *y* is only extinguished when the defendant does *x*, rather than when he chooses to do *x*. The parties' intentions in this regard may turn on factors such as whether the defendant is required to communicate his choice and the extent to, and time at, which the claimant may have to rely on the choice made.

⁶³ It is helpful to compare the position where the claimant elects *not* to treat the defendant's repudiation as bringing performance of the contract to an end but instead seeks specific enforcement of the defendant's outstanding promises. Were a mandatory injunction to be granted compelling performance of the defendant's unperformed promise to do *x* or *y*, the order would require the defendant to do *x* or *y*. The court would not order the defendant to do *x* and *x* alone notwithstanding that it would be less onerous for him to do *x*.

⁶⁴ *The Golden Victory* (n 1) [22] (Lord Bingham).

⁶⁵ *Robbins v London Borough of Bexley* [2013] EWCA Civ 1233 [69] Moore-Bick LJ.

What would constitute the floor as regards discharge of the primary obligation need not represent the ceiling for the secondary obligation. This is clear from examples both within and outwith the law of contract damages. Thus in the tort of negligence where the defendant is under a positive duty to act and does nothing, damages are based on the measures which the defendant would in fact have taken to avoid causing harm to the claimant notwithstanding that less onerous measures would have been sufficient to discharge the duty of care.⁶⁶ In contract, damages for the non-performance of a so-called single obligation which is 'expressed in an indefinite way'⁶⁷ will be assessed according to how the defendant would, not could, have performed his promise.⁶⁸ Thus an employer's liability for damages for loss of a discretionary bonus will reflect the amount it would have paid the employee had the contract been performed, notwithstanding that it could have paid a lesser sum without being in breach of contract.⁶⁹

3. *The Loss Comprises Consequential Loss*

The second category of claims identified in the Introduction provides another situation where the application of the minimum performance rule may lead to an award of compensation inconsistent with the overriding purpose of damages. For a further, but separate, criticism of the rule is that it fails to distinguish between claims for the loss of contractual and extra-contractual benefits which the defendant might have chosen to confer, that is between claims for immediate and consequential loss. An extra-contractual benefit is a benefit as to which the contract makes no provision and hence as to the conferral of which the defendant makes no promise, express or

⁶⁶ *ibid.*

⁶⁷ *Paula Lee* (n 43) 394 (Mustill J).

⁶⁸ *Abrahams* (n 13); *Durham Tees* (n 13). But cf *Paula Lee* (n 43).

⁶⁹ See Perrins (gen ed), *Harvey on Industrial Relations and Employment Law* (Div B1/1/B/(4)/(c) at [35]): 'the court's approach to the questions of liability and remedy are radically different'.

implied, in the contract. Confusion arises where it is claimed that the defendant's non-performance has deprived the claimant of an extra-contractual benefit which the defendant might have chosen to confer on the claimant, most commonly through some post-contractual dealings between the parties. For example, the claimant may assert that, had the contract not been repudiated, the parties would, on its expiry, have entered into a follow-on contract, the repudiated contract making no provision for renewal. A claim for the lost benefit which the follow-on contract would have yielded will be barred by the minimum performance rule on the ground that the claimant had no entitlement to a renewal of the contract.⁷⁰ But it is clear that the absence of an entitlement should not of itself preclude recovery here for the simple reason that the loss comprises consequential loss. Put another way, liability for consequential loss should not be subject to the minimum performance rule.⁷¹

Identifying consequential loss in contractual claims involves asking: apart from not getting what he was actually promised, to what extent, if any, is the claimant worse off as a result of the non-performance of the defendant's promises? Consequential loss may comprise benefits foregone as well as positive losses and it is clear law that recovery of consequential loss which consists of a lost benefit is not

⁷⁰ See, eg, *Lavarack* (n 3) 297 (Diplock LJ). But cf *Commonwealth of Australia v Amann Aviation Pty Ltd* (1991) 174 CLR 64 (HCA) where, in the context of a claim to recover reliance losses, a majority of the High Court of Australia held that damages for wrongful termination could include compensation for the loss of the chance of the contract being renewed had it run its course, notwithstanding that the defendant had had no obligation to renew. For criticism of *Amann* see: GH Treitel, 'Damages for Breach of Contract in the High Court of Australia' (1992) 108 LQR 226; Andrew Tettenborn, '*Hadley v Baxendale* Foreseeability: a Principle Beyond its Sell-by Date?' (2007) 23 JCL 120, 136.

⁷¹ According to Waller LJ (*Mulvenna* (n 8) [13]), the *Withers* case (n 23) shows that the minimum performance rule 'does apply to consequences said to flow from the breach of contract'. With respect, the loss in *Withers* is better viewed as immediate loss: it was the loss of that publicity which the defendants had promised to procure for the claimant. Further, while it was held in *Jones v Ricoh UK Ltd* [2010] EWHC 1743 (Ch) that the minimum performance rule has no application to a claim for damages for breach of a negative contractual obligation, the better reason for this, it is submitted, is the more fundamental one that the rule has no application to consequential loss, loss caused by breach of a negative obligation invariably being consequential.

precluded by the absence of an entitlement to that benefit.⁷² Thus the claimant who suffers personal injury as a result of the defendant's negligence and is unable to work again may, in principle, recover damages for loss of future earnings up to normal retirement age, notwithstanding that at the time of the tort the claimant had no right to be employed until normal retirement age. Such loss must be recoverable irrespective of whether the defendant is a stranger whose negligent driving causes the injury or the claimant's employer and the injury occurs in the workplace due to the defendant employer's breach of contract. In neither case does the absence of an entitlement to 'life-time' employment bar the recovery of damages for loss of 'life-time' earnings. In the same way, a claim for loss arising from the non-renewal of a contract should not fail simply because of the absence of a promise as to renewal. Instead, the principal means for limiting the defendant's liability for the loss of an extra-contractual benefit is provided by the doctrine of remoteness.

In this context it is helpful to highlight the relevance of the principle that the defendant will not be liable where he cannot reasonably be regarded, taking account of the commercial background and general expectations in the particular market, as having assumed liability for a given kind of loss.⁷³ A helpful example is provided by *Mulvenna v Royal Bank of Scotland plc*.⁷⁴ In that case the claimant sought damages from his bank for loss of the profit he would have made from a loan which the bank would have granted him had it not, in breach of contract, failed to credit various sums to his account. While the Court of Appeal held that the claim was precluded by the

⁷² See, eg, Ogus (n 5) 183 citing *Mitchell v Mulholland (No 2)* [1972] 1 QB 65 (CA) and Tony Weir, *A Casebook on Tort* (10th edn, Sweet & Maxwell 2004) 646.

⁷³ See, eg, *Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas)* [2008] UKHL 48, [2009] 1 AC 61 [11] (Lord Hoffmann); *Siemens Building Technologies FE Ltd v Supershield Ltd* [2010] EWCA Civ 7, (2010) 129 Con LR 52 [43] (Toulson LJ) and *John Grimes Partnership Ltd v Gubbins* [2013] EWCA Civ 37, (2013) 146 Con LR 26 [24] (Sir David Keene).

⁷⁴ [2003] EWCA Civ 1112.

minimum performance rule,⁷⁵ the alternative ground for their decision, that of assumption of liability, is more coherent. For while the bank might well, but for its alleged breach, have chosen to make a loan, having previously indicated its agreement in principle to do so, and while loss of profit on the claimant's part might have been a readily foreseeable consequence of the breach, the argument that the bank had never assumed responsibility for this type of loss at the time the parties contracted is difficult to resist.⁷⁶ Thus while recoverability of an extra-contractual benefit which the defendant might have chosen to confer on the claimant should not be subject to the minimum performance rule, recovery may in practice nonetheless be precluded because the defendant cannot reasonably be regarded as having assumed liability for the loss of that benefit.⁷⁷

4. *A Residual Role for the Rule?*

On the basis that the minimum performance rule should not be applied where the defendant would have had a choice under the contract as to how to perform a promise nor where the loss comprises consequential loss, does it have a continuing role in the law of contract damages? The prospect of such a role is, at first sight, held out by the third category of minimum performance case identified above: where the defendant might have chosen to confer a contractual benefit on the claimant, the defendant

⁷⁵ With respect, this is hard to accept. Even on the assumption that the rule may be applied to consequential loss, it is clear that it does not apply where the choice comprises an external contingency within the defendant's control (see, eg, *Bold v Brough, Nicholson and Hall* [1964] 1 WLR 201 (QB)). It seems plain here that the choice which the bank enjoyed between making, and not making, a loan did not comprise a right conferred by the refinancing agreement, but comprised the right which the bank enjoyed regardless of its contract with the claimant.

⁷⁶ See also on this point Andrew Robertson ('The Basis of the Remoteness Rule in Contract' (2008) 28 LS 172, 183) who noted that it might be thought 'inconsistent with commercial practice for a bank to accept such a risk in a transaction of this type' and *The Achilleas* (n 73) [20].

⁷⁷ With respect, this would seem to offer a more plausible basis for Diplock LJ's rejection of an employer's liability in a wrongful dismissal claim for the lost chance of renewal of the contract: see *Lavarack* (n 3) 297.

having no obligation to do so.⁷⁸ In his dissenting judgment in *Lavarack v Woods of Colchester Ltd* Lord Denning MR held that damages were recoverable for the lost chance of receiving bonuses notwithstanding that Mr Lavarack 'had no legal right' to them.⁷⁹ According to Lord Denning, Mr Lavarack's dismissal had deprived him of the chance of receiving future bonuses, and following *Chaplin v Hicks*⁸⁰ and *Manubens v Leon*,⁸¹ 'he is entitled to compensation for the loss of this chance'.⁸² But, with respect, neither case provides support for Lord Denning's approach. For in both *Chaplin* and *Manubens* the defendant had *promised* to give the claimant the chance of obtaining the benefit.⁸³ By contrast, on Lord Denning's findings, the company in *Lavarack* had not made any promise as regards payment of a bonus. While the contract made provision for the benefit, it did so in terms which made clear that the claimant had no claim-right, contingent or otherwise, to it. A defendant will not be liable to compensate for the loss of a contractual benefit as to the conferral of which he made no promise at all.

But it does not follow that the minimum performance rule has a distinctive role to play. For it is important to recognize that claims falling within this category are not minimum performance cases at all. The absence of liability does not turn on any presumption as to what the defendant would or would not have done. The claim is barred simply because the benefit which the claimant claims to have lost was not the subject of a promise which the defendant had a primary obligation to perform. In the same way, where the defendant promises on 1st June to paint the claimant's house for

⁷⁸ In other words, the defendant did not have a choice as to how to perform a promise, but simply a bilateral liberty-right to confer or refrain from conferring the benefit. As noted above (n 10), such situations are likely to be relatively infrequent in practice.

⁷⁹ *Lavarack* (n 3) 287.

⁸⁰ [1911] 2 KB 786 (CA).

⁸¹ [1919] 1 KB 208 (DC).

⁸² *Lavarack* (n 3) 289.

⁸³ For *Chaplin v Hicks* see [1911] 2 KB 786 (CA) 791 (Vaughan Williams LJ) and 796 (Fletcher Moulton LJ) and [1911-13] All ER Rep 224 (CA) 230 (Farwell LJ). For *Manubens v Leon* see Bailhache J's interruption of counsel: [1919] 1 KB 208 (DC) 210.

free starting on 1st August but retracts his promise on 1st July, the absence of liability on the defendant's part to pay damages has nothing to do with any presumption as to what he would or would not have done come 1st August. There is no liability to compensate, because there was no promise which the defendant had a primary obligation to perform in the first place. It follows that those cases in which the contractual provision for a benefit amounts only to a bilateral liberty-right on the defendant's part are not minimum performance cases at all. The reason why the claim fails is because it is a claim for the loss of a contractual benefit to which the claimant can assert no claim-right, contingent or otherwise.⁸⁴

5. Conclusion

In those cases in which the defendant would have had a choice under the contract as to how to perform a promise which, at the time of repudiation he had an outstanding primary obligation to keep, the courts are wrong to treat the claimant as having no right to anything beyond minimum performance. While a presumption that the defendant would have performed the promise in the least onerous manner may represent a helpful and natural starting point for the assessment of damages, its elevation into an irrebuttable presumption operates so as to deprive the claimant of potentially valuable contingent claim-rights. For it is not correct as a matter of conceptual analysis to say that the claimant never had any greater entitlement.⁸⁵

Where the defendant repudiates the contract before choosing how to perform, the

⁸⁴ In other words, by providing that the defendant had a liberty-right as regards the benefit, the contract makes clear that the defendant has no duty to confer the benefit. To award damages for the loss of the benefit would be inconsistent with what the parties had agreed.

⁸⁵ Where the choice comprises the right to do more of the same (ie a promise to do not less than x), it may be correct to construe the provision as giving the claimant no more than a right to the minimum, although, as noted above, this would not strictly be a case where the defendant has a choice as to how to perform his promise. In any event, for the reasons discussed above (see text accompanying n 48), it is suggested that in most cases a construction more likely to reflect the parties' intentions is that the claimant has contingent claim-rights to each of the possible alternatives.

claimant will have had, at the time of the repudiation, potentially valuable contingent claim-rights to each lawful alternative means of performance. The overriding compensatory purpose of contract damages requires the court to value those rights. This should be treated as a question of fact, 'a matter of evidence',⁸⁶ and not a question of law to be determined by the application of an irrebuttable presumption. Damages based on how the defendant would, rather than could, have chosen to perform the promise neither penalize the defendant nor confer a windfall on the claimant. Equally the minimum performance rule should have no application to claims for the loss of an extra-contractual benefit which the defendant might have chosen to confer. While recovery for the loss of such a benefit may be precluded on the ground that the defendant cannot reasonably be regarded as having assumed liability for such a loss, the absence of any entitlement on the claimant's part to the benefit should not of itself be a bar. And while the courts are right to refuse claims for the loss of a contractual benefit as to the conferral of which the defendant made no promise, these cases have nothing to do with the principle of minimum performance. Recovery is barred simply because the defendant had no relative primary obligation: there is no need for any presumption as to how the defendant would have chosen to act.

The conclusion to which this discussion therefore inevitably leads is that the minimum performance rule has no role in contract damages. It can, and should, be abandoned.

⁸⁶ *Giedo Van Der Garde BV v Force India Formula One Team Ltd* [2010] EWHC 2373 (QB) [487] (Stadlen J).