

The Breakdown of Hierarchy: Damages at Law versus Damages in Equity

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I. INTRODUCTION

DAMAGE THEORY SEEKS TO PUT THE COMPLAINING PARTY in the position he or she would have been in had the contract been performed. Where damages are “inadequate” to do so, an award of specific relief¹ may be sought. Further, subject to a court’s discretion, damages in lieu of that specific relief may be awarded. From this process, a host of complications arise. One begins by asking: what is the inadequacy of the common law that led to specific relief? and, does the damage in lieu of specific relief remedy that inadequacy? This second question must follow if damages in substitution for specific performance are to provide the plaintiff an equivalent protection.

Early on one finds that the inquiry itself is tenuous. Firstly, what does “inadequate” mean? If there are varying notions of inadequacy, there may follow varying measures of the damage designed to repair those inadequacies. Secondly, why is an equitable remedy premised on the inadequacy of common law damages? Is this an accurate way to understand the role of equitable damages?

The question of whether specific relief, or damages in lieu thereof, repairs the inadequacies of the common law is based on an hierarchical approach to the available remedies. It presents specific relief as having been introduced only after common law damages have proven inadequate. However, this hierarchical approach may not underlie all the decisions on equitable damages. Rather, the courts may, in some cases, be applying a non-hierarchical evaluation of which damage award is most appropriate, without first considering whether common law damages are adequate. If this is the case, the question of whether equitable damages remedy the inadequacy of common law damages loses significance.

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¹ The terms “specific relief” and “specific performance” are used interchangeably.

The purpose of damages in lieu of specific relief will no longer be to repair inadequacies. The question instead will become, which damage is most appropriate?

II. WHEN AND WHY IS SPECIFIC RELIEF AWARDED?

SINCE DAMAGES IN EQUITY ARE AWARDED "in substitution"² of specific performance, it is supposed that they ought to protect the same interests as specific relief.³

A. The hierarchy of remedies

The function of equitable remedies was formulated as early as 1824, in *Adderly v. Dixon*,⁴ where Sir John Leach reasoned:

Courts of Equity decree the specific performance of contracts, not upon any distinction between realty and personalty, but because damages at law may not, in the particular case, afford a complete remedy.⁵

Equitable damages were awarded only when common law damages proved inadequate.

This structure essentially reflects a "remedial hierarchy" in which common law damages are preferred to specific relief.⁶ The latter is a second-tier remedy that operates where the first fails to return the complaining party to the position he or she would have been in had the contract been performed.

The reason for the hierarchy is largely historical. The Court of Equity was developed to handle the deficiencies of the common law system. During the medieval period, an injured party could only seek recovery at law and only if the complaint came within the scope of an existing writ. Even then there arose situations where the plaintiff could not recover, such as where the formality of the law prevented certain defences, such as fraud, from applying. A plaintiff could then petition the Chancellor to remedy the deficiencies in the common law rules. This would be done primarily through an award of specific performance. Originally, this jurisdiction was only supplementary and the Chancellor could not award remedies that were available at law, including damages. The

² 21 & 22 Vict. c. 27 [hereinafter *Lord Cairns' Act* or Act].

³ R. Sharpe & S. Waddams, "Damages for Lost Opportunity to Bargain" (1982) 2 Ox. J.L.S. 290 at 291 [hereinafter *Sharpe-Waddams*].

⁴ 57 E.R. 239.

⁵ *Ibid* at 240.

⁶ G. Hammond, "Rethinking Remedies: The Changing Conception of the Relationship Between Legal and Equitable Remedies" in J. Berryman, ed., *Remedies: Issues and Perspectives* (Ontario: Carswell, 1989) at 93 [hereinafter *Hammond*].

Chancery Amendment Act 1858, or *Lord Cairns Act*, expanded the power of the Court to award damages in lieu of or in addition to an injunction or specific performance. This process naturally gave rise to a notion of equity as subsidiary to the system it was designed to supplement.⁷

However, the history of the bifurcated systems of remedies explains the origin of the reluctance to award specific relief without justifying its persistence in the modern world. Since the merger of law and equity into one form of civil action under the *Judicature Act 1873*,⁸ “equity is now simply a set of rules instead of a subordinate, supplementary system of courts.”⁹ Surely this change in court structure should compel a re-evaluation of the hierarchy.

A second explanation for the primacy of common law remedies refers to the 19th century *laissez-faire* focus on the freedom to contract. Equity was given a subsidiary role insofar as it was viewed as interfering with the right of every person to make or break contracts in the commercial world as he or she sees fit.¹⁰ However, in the decline of the neo-classical paradigm, the belief in the values involved in individual choice and freedom to contract has weakened. Today,

the individual's freedom of decision is overridden, either in the direct interests of a majority, or to give effect to values which a majority believe to be of overriding importance.¹¹

As a consequence, any primacy of common law remedies premised on the individual's freedom to enter or leave a contract loses force. As courts move away from the neo-classical approach to contract law, so too should they move away from the assumed primacy of common law remedies. Here, then, lies a second justification for letting loose the grasp on a remedial hierarchy that has become largely anachronistic. One of four results could follow from a re-evaluation of the hierarchy.

First, the practice of giving primacy to common law relief may continue, despite its founding in antiquated principles, out of an “innate conservatism” of lawyers.¹² Since courts are limited to reasoning from the pleadings before them, so long as lawyers continue to offer primacy to the common law award in argu-

⁷ See E.A. Farnsworth, “Legal Remedies for Breach of Contract” (1970) 70 Col. L.R. 1145 at 1155.

⁸ *Supreme Court Judicature Act 1873*, s.16

⁹ D. Rendleman, “The Inadequate Remedy at Law Prerequisite for an Injunction” (1981) 33 U. Fla. L.R. 347 at 347 [hereinafter *Rendleman*].

¹⁰ J. Berryman, “The Specific Performance Damages Continuum: An Historical Perspective” (1985) 17 *Ottawa L. Rev.* 295 at 296 [hereinafter *Berryman*].

¹¹ P. Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford: Clarendon Press, 1979) at 726.

¹² Hammond, *supra* note 6 at 95.

mentation, so too will courts. Lawyers may persist in applying the hierarchical approach out of inertia or deference to judicial history. They may be driven to rely on the old primacy for the more sinister reason that fees chargeable are more "demonstrable" against a successful money claim than specific relief.¹³

A second result is that courts may find new justifications for maintaining the old structural division. Even if the origins of the hierarchy are no longer forceful, the primacy of common law remedies may have found new grounds of justification over the years.

Third, the hierarchy may remain, but the primacy may be reversed from common law remedies to equitable remedies.

Finally, and it is this possibility that will inform the following discussion, courts may indeed begin to let go of the division between equitable and legal remedies and the primacy of court awards. They may instead form context-specific evaluations as to which remedy is more appropriate.¹⁴ As will be seen herein, there are some suggestions that the law is presently doing just this.

B. Problems with the notion of "inadequacy"

The inadequacy prerequisite is a vague one that varies in meaning depending on the context. Under it, "a series of shadowy and overlapping economic, moral and administrative criteria compete for attention."¹⁵ As a result, it may be foreseen that equitable remedies designed to repair inadequacies in the common law awards will be as various as the inadequacies they address. Further, one will see that certain understandings of the inadequacy of common law damages raise problems for those courts that later award damages in lieu of specific relief. If common law damages are inadequate, is it any more adequate to award damages in equity? One way out of this circularity will be, as Robert J. Sharpe suggests, to understand the courts as defining "adequacy" at a level of broadness that makes an award of damages in equity adequate. Further, by articulating such a general principle underlying the notion of adequacy, the different measures of equitable remedy may cohere.

1. Economic inadequacy and its problems

The common law award of damages seeks to put the complaining party in the position he or she would have been in had the contract been performed. The damage theory "is predicated on a theory of economic inadequacy."¹⁶ The award

¹³ Hammond, *supra* note 6 at 95.

¹⁴ See the progressive example of New Zealand case law discussed in Hammond, *supra* note 6 at 96-100.

¹⁵ Rendleman, *supra* note 9 at 358.

¹⁶ *Ibid.* at 349.

is monetary, measured by the market value loss suffered by the plaintiff in being denied the benefits of the contractual performance. Compensation is fixed by the court rather than by the plaintiff. Such a monetary award is presumably adequate where the party is a profit-maximizing trader with only commercial interests in fungible property. However, the courts have recognized many areas, where the party does not match the above description, when a common law award would not put the party in the position he or she would have been in had the contract been performed. In such cases, equitable relief is sought. A defendant is enjoined to vindicate the losses that the damage theory could not compensate.

A first measure of the economic inadequacy refers to cases where the calculation of loss at common law does not take the actual loss into account. This arises where the property or chattel is "unique," including contracts for the sale of land.¹⁷ In such cases, the value of the loss is too difficult to assess either because there is no ready substitute available in the market or because there is an additional personal value attached to the item over and above its market value. The argument proceeds that a plaintiff would be under-compensated by an award of the market value of the property not delivered or an award of the decrease in market value of not having had the contract performed. This rationale for an award of specific relief is primarily found in contracts for the sale of land, family heirlooms or rare artifacts.

However, this notion of adequacy presents some difficulties. Clearly, there is some price a person would accept in exchange for giving up the "unique" property. The difficulty is in determining what that amount is. Moreover, the fact that a given piece of property is sought at a specific time, in a given market, with limited funds, detracts from the idea of the unique suitability of *that* property. In commercial reality, "choice of property is usually determined by the availability of funds and the need to satisfy certain requirements."¹⁸ Furthermore, the presumption of the uniqueness of land may capture too many plaintiffs, allowing purely commercial actors with no personal interest in land to benefit from specific relief designed to protect non-commercial actors.¹⁹

In any event, the idea that a monetary sum can be awarded to compensate for intangible or personal losses from unique or personal items is receiving increased support. Depending on how far courts extend the application of cases

¹⁷ See *e.g.*, *Falcke v. Gray* (1859), 62 E.R. 250 (Ch.).

¹⁸ *Berryman*, *supra* note 10 at 312.

¹⁹ See J. Swan & B. Reiter, eds., *Contracts: Cases, Notes and Materials* (Toronto: Emond Montgomery Publications, 1991) at 103.

like *Jarvis v. Swans Tours*,²⁰ the common law may be an adequate forum in which to compensate such losses.²¹

A second measure of economic inadequacy focuses on cases where the monetary loss is too far removed to be protected under a common law remedy limited by notions of foreseeability and remoteness. Specific relief has been granted to protect against future loss through such measures as *quia timet*²² injunctions. In *Hooper v. Rogers*, the plaintiff's house was in danger of collapse after the defendant's bulldozing removed the soil support. No award at law could be made for future physical damage and specific relief was sought.²³ Common law damages are inadequate here in that they only award for past injuries that have occurred. Any recovery for a continuous or future wrong would need to be sought after each and every injury.

As a second example, prior to legislation like the *Courts of Justice Act*,²⁴ the courts did not know how to, or simply did not, measure pre-judgment interest in awarding damages. Parties recovering for a loss measured as at the date of breach would not be compensated for their actual loss. Where the strict application of common law rules denied such recovery, specific performance remedied the inadequacy. Equity permitted an award of pre-judgment interest through specific relief as of the date of judgment.

Finally, a third measure of economic inadequacy arises where there is no claim at all under common law. Cases of restrictive covenants and partial performance are examples. In these cases, a plaintiff has no cause of action at law, let alone one that leads to under-compensation. It is thus inexact to speak of equitable relief as remedying the inadequacies of common law damages, since often relief is sought where no remedy existed at law. In *Wrotham Park Estate v. Parkside Homes*,²⁵ the defendant built homes in excess of the number permitted by a restrictive covenant. Since the breach of the restrictive covenant did not

²⁰ [1973] Q.B. 233 (C.A.).

²¹ As a note, the special treatment of unique property and land may have its justification in historical antecedents that are now anachronistic. If the priority for specific relief in contracts regarding land can be explained by reference to the 18–19th century attachment of political, legal and social rights to the ownership of land, then any change in the modern conceptions of ownership should influence that priority. See D. Cohen, "The Relationship of Contractual Remedies to Political and Social Status: A Preliminary Inquiry" (1982) 32 U.T.L.J. 31.

²² A mandatory injunction, or damages, awarded when it is apparent that future damage is a realistic probability.

²³ *Hooper v. Rogers*, [1975] Ch. 43 (C.A.) [hereinafter *Hooper*].

²⁴ R.S.O. 1990, c. C.43.

²⁵ [1974] 1 W.L.R. 798 (Ch.) [hereinafter *Wrotham*].

give rise to a cause of action in common law, the plaintiff could not seek an award of common law damages. However, equity could enter to grant equitable relief.

This application of equity is an important one to keep in mind during the discussion that follows. Even if the hierarchy between common law and equity were collapsed, thus removing the primacy of “adequate” common law damages, this would not cover cases where the use of equity does not turn on the inadequacy of the common law. What follows, at a minimum, is that if law and equity collapse it cannot be that the common law will subsume equity. Even if common law damages are expanded to consider equitable principles—making adequate what once was inadequate—there will still remain categories of cases that the common law cannot address as they never fall within the scope of the common law.

There are problems common to all these notions of economic inadequacy. How does it make sense to return to an award of damages in lieu of specific relief when specific relief resulted from the inadequacy of damages in the first place?

In answer, it must be clarified that in saying damages are inadequate, one is not saying that monetary awards are inadequate *per se*. It is the monetary award offered by common law rules that is inadequate. This explains, at a minimum, such cases as *Hooper* where damages at law are inadequate because they fail to take future loss into account. For such cases, there is no contradiction in awarding damages in equity after finding damages *at law* inadequate. However, in uniqueness cases, there may be something contradictory in finding *monetary* awards inadequate and then awarding a monetary award of damages in lieu of specific performance.

One response is that even in those cases where a monetary award is found “inadequate,” there is no suggestion that some things cannot be valued in monetary terms. The common law award is inadequate insofar as it will not make efforts to determine what that price is. An adequate award would be one that gives the plaintiff what they would have been willing to take in exchange for accepting the breach. Thus, a remedy of the inadequacy need only involve recognising the monetary amount that would leave the breached party satisfied in giving up their unique property.

Another problem with the notion of economic inadequacy is that it cannot be the only criteria for an award of equitable relief. Courts award specific relief where there has been no loss to the plaintiff. The explanation of such cases as involving a separate idea of “moral inadequacies” presents its own difficulties.

2. Moral inadequacy and its problems

In addition to being inadequate for its failure to fully compensate the monetary loss of the plaintiff, common law damages are inadequate because they fail to

protect the plaintiff's substantive interests.²⁶ In *Woollerton and Wilson v. Richard Costain*,²⁷ the crane that swung over the plaintiff's factory caused no damage, no fear of damage, no nuisance, and no inconvenience. Yet, the plaintiffs sought an injunction to protect against the invasion of their air space. The Court found that the absence of any damage was no reason to deny equitable relief. Thus, why should equity interfere where there is no loss to the plaintiff and thus no inadequacy in the common law award?

Here, the notion of adequacy assumes a separate meaning. The common law award is "inadequate" because "monetary compensation tolerates the wrong and allows the perpetrator to buy injustice."²⁸ These cases point clearly to a measure of inadequacy distinct from economic inadequacy since, in most cases, there is no loss to the plaintiff, only the invasion of a property right.²⁹

In these cases, specific relief remedies the inadequacy by not allowing the defendant to inflict harm on an interest in exchange for paying a court awarded amount. However, there are limitations to this understanding of inadequacy. As will be seen, it does not prevent parties from bargaining away the right to specific relief. This puts a conceptual cap on the notion that substantial rights are beyond monetary valuation. More importantly, the idea that damages can be awarded in lieu of specific relief in these cases detracts from the idea that these rights are sacrosanct in equitable protection. If one finds monetary compensation morally inadequate to protect these substantive rights, how can a return to a monetary award in lieu of specific relief be morally adequate?

C. A solution to the problem of "inadequacy"

Both measures of inadequacy discussed are limited and problematic. If the purpose of contract remedies is to place the plaintiff in the position he or she would have been in had the contract been performed, why award damages for nominal losses? Further, if the "position" includes the protection of substantial rights, how can an award of damages in lieu of specific performance ever be adequate? One way to reconcile the various difficulties raised is to define the notion of "adequacy" more broadly. Where this is done the effect is to break down the hierarchy of remedies and shift away from the adequacy test.

In *Beswick v. Beswick*,³⁰ the Court specifically distinguished the principle of adequacy as in relation to the justice and not the quantum of the loss:

²⁶ Rendleman, *supra* note 9 at 352.

²⁷ [1970] 1 W.L.R. 411 (Ch.) [hereinafter *Woollerton*].

²⁸ Rendleman, *supra* note 9 at 352.

²⁹ See e.g., *Woollerton*, *supra* note 27 and *Goodson v. Richardson* (1874), 9 L.R. 221 (Ch. App.) [hereinafter *Goodson*].

³⁰ [1968] A.C. 58 (H.L.) [hereinafter *Beswick*].

At all events let me assume that damages are nominal. So it is said nominal damages are adequate and the remedy of specific performance ought not to be granted. That is, with all respect, wholly to misunderstand that principle. Equity will grant specific performance when damages are inadequate *to meet the justice of the case*.³¹

The effect of this approach is to shift the understanding of adequacy from questions of the quantum of loss. Rather, adequacy is linked to notions of what is just. Even where the loss to the plaintiff is minimal and so not inadequately compensated at law in the usual sense, specific relief may follow from the inadequacy of the justice of the case.

Furthermore, the "justice of the case" requires a balance of benefits and burdens to each party. Sharpe argues that the goals of contract remedies are not captured by the principle of putting the plaintiff in the position he or she would have been in had the contract been performed. Rather,

[t]he basic goal is to protect the plaintiff's expectation interest and to put him in the position he would have been in, but at the same time to avoid remedial measures which are unduly burdensome to the defendant.³²

The notion of adequacy reflects that aim, and seeks to limit the burden of the breach to the defendant in a manner consistent with the protection of the plaintiff's expectations. The plaintiff's economic and moral positions are not absolutes protected by equity. They are treated in relation to the burdens that may arise to the defendant from their protection.

This view of the law of remedies shifts away from the adequacy test to the non-hierarchical approach earlier outlined. The court assesses the benefits and burdens of various awards and determines which damage is most just. No longer does the court first need to be satisfied that without an award the plaintiff would not be in as good a position as if the wrong had not occurred. There is no step that precedes the discussion of what is just and equitable in the circumstances. The question of "inadequacy" has ceased to be a determinative element in awarding equitable remedies and the ultimate question facing the court is which award meets the justice of the case.

III. WHEN AND WHY SHOULD DAMAGES IN LIEU OF SPECIFIC RELIEF BE AWARDED?

HAVING DISCUSSED THE MEANING OF "INADEQUACY" and the purpose underlying specific relief, one can now turn to damages in lieu of specific relief. Do damages in equity, like the specific relief they substitute, remedy the inadequacies of the common law award? Can this question even be asked in light of the

³¹ *Beswick*, *supra* note 30 at 102 [emphasis added].

³² R. J. Sharpe, *Injunctions and Specific Performance* (Toronto: Canada Law Books, 1983) at 532 [hereinafter *Sharpe*].

benefit/burden understanding of adequacy and the breakdown of the remedial hierarchy?

A court awards damages in lieu of specific relief where, in its discretion, it would be unjust or unreasonable, for "social and economic reasons,"³³ to award specific relief. The award of damages in lieu arises where

such matters as the relative triviality of any impending injury may, according to the balance of justice and injustice, lead to the substitution of damages for the specific relief that is sought.³⁴

As well, the plaintiff may be disentitled to specific relief but allowed damages in lieu thereof if there would be undue hardship to the defendant or where there has been laches or acquiescence.

If specific relief was designed to remedy the inadequacies of the common law award of damages, does an award of damages in lieu of specific relief contradict this?

A. The Court's jurisdiction and discretion

The limitation on the grant of specific relief is that common law damages must be inadequate. Otherwise, the claim does not come under the jurisdiction of equitable relief. This same hierarchical approach to remedies has applied to damages in lieu of specific relief. Indeed, since damages in lieu are "in substitution" of specific performance, it is perhaps only logical that the conditions for the one are conditions for the other. Section 2 of the *Lord Cairns' Act* states:

In all cases in which the Court of Chancery has jurisdiction to entertain an application for an injunction against a breach of any covenant, contract, or agreement ... it shall be lawful for the same Court, if it shall think fit, to award damages to the party injured, either in addition or in substitution for such injunction or specific performance, and such damages may be assessed in such manner as the Court shall direct.³⁵

A court will thus award damages in lieu of specific relief where, under its discretion, it will not award specific relief but where, under its jurisdiction, it can award specific relief. The distinction between the equity court's jurisdiction and discretion to award specific relief has been called "difficult."³⁶ However, appreciating the distinction will be relevant to understanding the changes that are taking place in how modern courts approach damages in lieu of specific relief.

³³ *Wrotham*, *supra* note 25 at 812.

³⁴ I.C.F. Spry, *The Principles of Equitable Remedies*, 4th ed. (Toronto: Carswell, 1990) at 614 [hereinafter *Spry*].

³⁵ *Lord Cairns' Act*, *supra* note 2.

³⁶ S.M. Waddams, *The Law of Damages*, 3rd ed. (Toronto: Canada Law Books, 1997) at 45 [hereinafter *Waddams*].

In *Price v. Stranger*, Buckley L.J. argues that there are some cases where the court has no jurisdiction to consider awarding specific performance. He refers to the case of contracts for the sale of fungibles available at an ascertainable market price.³⁷ Waddams responds that "it is surely through the exercise of the court's *discretion* that specific performance is generally refused in such cases."³⁸ The equitable court always has jurisdiction to grant equitable remedies and simply elects not to.

This position is even more difficult.³⁹ The wording of the Act clearly speaks to a distinction between jurisdiction and discretion, especially since the power to award damages in equity only arises when the court "has jurisdiction to entertain an application for an injunction." Waddams argues that were it the case that the court does not always have jurisdiction to award specific performance and specific performance is sometimes "refused," then damages in equity would have no scope at all. Thus, whenever a substitution is questioned, it is where specific performance has been refused.⁴⁰ However, Waddams is not distinguishing between the refusal that takes place at the jurisdictional stage and the refusal that takes place at the discretionary stage. The court is refused jurisdiction over specific performance *where the common law remedy is adequate*. Only when the common law is found inadequate does the court have jurisdiction to award specific relief. In its discretion, it may refuse to do so and awards damages as a substitution *where awarding specific relief is inappropriate*.

Thus, using Buckley L.J.'s example, where a contract is for the sale of a commodity readily available at an ascertainable market price, the common law award will be adequate to return the breached party to the position he or she would have been in had the contract been performed. The court of equity has no jurisdiction. No issue of exercising discretion is at play, where the court of equity does not have an opportunity to intercede.

In effect, Buckley L.J.'s and Waddams' positions represent the hierarchical and non-hierarchical approaches to remedies. Buckley L.J. points to cases where there is a market price substitute available as those situations where there is no jurisdiction for specific relief. Specific performance is a second-tier remedy whose jurisdiction is awakened upon the failure of the common law to act. In contrast, Waddams views the jurisdiction of the courts as always permitting an award of specific performance. When specific performance is denied, it is because the court has exercised its discretion, but it is always within its jurisdic-

³⁷ [1978] Ch. 337 (C.A.) [hereinafter *Price*].

³⁸ Waddams, *supra* note 36 at 45.

³⁹ See T. Ingman & J. Wakefield, "Equitable Damages Under Lord Cairns' Act" (1981) 45 *The Conveyancer* 286 at 293.

⁴⁰ Waddams, *supra* note 36 at 45.

tion to do otherwise. This perspective attempts to let go of any "anachronistic distinction between equity and common law sides of the modern court" by viewing them non-hierarchically.⁴¹ The one court, its equity and common law sides acting concurrently, entertains the question of damages and has jurisdiction to award either type of damage.

B. The limits of the *Shelfer* test

There are cases where a court will not award specific relief, even though it has deemed it within its jurisdiction to do so. What is the basis upon which the courts will find in its discretion that the award of specific relief is not appropriate?⁴² *Shelfer v. City of London*⁴³ is the leading case outlining the "good working rule" for when damages should be awarded in lieu of specific performance. Under this rule, damages may be substituted for an award of specific relief, where:

- (i) the injury to the plaintiff's legal rights is small,
- (ii) and is one which is capable of being estimated in money,
- (iii) and is one which can be adequately compensated by a small money payment,
- (iv) and the case is one in which it would be oppressive to the defendant to grant an injunction.⁴⁴

On the facts of *Shelfer*, the defendant's operation of an electricity plant caused a nuisance to the plaintiff. As there was no ascertainable loss to the plaintiff, and there would be an enormous loss to the defendant in shutting down the operation, the trial court awarded damages in lieu of the injunction. The Court of Appeal reversed this decision, arguing that the plaintiff's discomfort was not a small injury nor one that could be estimated in money.

The *Shelfer* test offers restrictive conditions for the award of damages in lieu of specific relief.⁴⁵ Part of the reason why this is so is that the rule was formulated in a case where the plaintiff had a *prima facie* right to an injunction, notwithstanding the general discretionary nature of the award. Smith L.J. notes that where the plaintiff's legal right has been invaded, he is "*prima facie* entitled

⁴¹ Waddams, *supra* note 36 at 47.

⁴² This is aside from cases of laches or acquiescence where a party is no longer entitled to specific relief, or where the property is unavailable for specific relief.

⁴³ [1895] 1 Ch. 287 (C.A.) [hereinafter *Shelfer*].

⁴⁴ *Ibid.* at 322.

⁴⁵ J.A. Jolowicz, "Damages in Equity—A Study of Lord Cairns' Act" (1975) 34:2 Cambridge L.J. 224 at 246 [hereinafter *Jolowicz*].

to an injunction.⁴⁶ Where the plaintiff has established the invasion of a common law right in the absence of special circumstances, he or she is entitled to an injunction to avoid future violations of his legal rights.⁴⁷

In part, the idea is based on the sanctity of property rights.⁴⁸ In cases where property rights are concerned, the courts are much more willing to award specific relief, even where the common law remedy is not first found inadequate. As Sharpe argues: "it is the very essence of the concept of property that the owner should not be deprived without his consent."⁴⁹ Compensatory damages would offer only a limited protection, since, in effect, they sanction an invasive use of another's property without their consent.

In effect, in the area of interference with property rights, the conventional primacy of common law damages over equitable relief is reversed. Damages are presumed inadequate *prima facie*. Here the courts do not collapse the hierarchy of common law remedies over equitable remedies—they reverse it.

There are several problems with this understanding. First, the *Shelfer* test is formulated on the presumption that the plaintiff is entitled to an injunction and that the remaining question is solely whether or not to grant one. *Shelfer* is in this way constrained in its application to cases where property rights have been invaded. Jolowicz argues as much when he writes:

if the "good working rule" is treated as a complete statement of the conditions for an award of damages under the Act rather than a statement applicable to one class of case alone, then a valuable instrument for achieving justice between the parties will be lost.⁵⁰

The *Shelfer* test only applies where there is a presumption in favour of equitable relief.

However, as Jolowicz argues, *Lord Cairns' Act* applies to a much wider range of cases. The award of damages in lieu of specific relief cannot be limited by a test that is restrictive in nature because it applies to situations where there is a presumption of equitable relief from the onset. Yet, if this is the case, what test does exhaust the application of *Lord Cairns' Act*?

A better test is one that departs from the hierarchy of any one remedy over another. The court would be faced with a situation in which it must determine what damages are appropriate, in which no primacy of the adequacy of one remedy is presumed. The court would apply Sharpe's balance of benefits and

⁴⁶ *Shelfer*, *supra* note 43 at 322.

⁴⁷ See *Pride of Derby and Derbyshire Angling Association v. British Celanese*, [1953] 1 Ch. 149 (C.A.).

⁴⁸ *Spry*, *supra* note 34 at 376.

⁴⁹ *Ibid.* at 369.

⁵⁰ Jolowicz, *supra* note 45 at 247.

burdens and ask, is it more just to grant specific performance or an award of damages in lieu thereof? This test would capture a broader range of cases than the *Shelfer* test—one that is limited to cases where an injunction is *prima facie* awarded.

This leads to a second problem with the application of the *Shelfer* test. If indeed the inadequacy of common law damages is presupposed in cases where the test applies,⁵¹ then how could an award of damages ever be adequate? So long as the *prima facie* right to an injunction is based on fundamental property rights, it would seem that no substitute of an award of damages could succeed. In *Goodson*, Lord Selborne writes: “I cannot look upon this case otherwise than as a deliberate and unlawful invasion by one man of another man’s land for the purpose of a continuing trespass.”⁵² The courts were concerned that the defendant may buy his way, with only a small money award where damages are nominal, to a continued interference with plaintiff rights.

If there is something in the nature of a property right that makes it worthy of protection over and above other considerations, then the substitution of an award in money would be contradictory. The *Shelfer* test seems to bring the courts full circle. The injunction was initially sought because the damages at law were deemed inadequate. However, the courts will allow for a monetary award in substitution for injunctions where damages are adequate. How can this be consistent?

An answer to this requires a more accurate definition of the presumed “inadequacy” of the common law damages in cases of invasion of property rights. In *Goodson*, the inadequacy of common law damages was premised not on the mere fact that a property right had been invaded, but on the fact that “no interference of this kind can lawfully take place without [the plaintiff’s] consent, and without a bargain with him.”⁵³ As Sharpe and Waddams argue, the *prima facie* right to an injunction in the trespass and nuisance cases covered by *Shelfer* results from the inadequacy of common law damages in denying the plaintiff the right to sell his interest.⁵⁴ No right should be bought out at any price.⁵⁵ The question is whether the plaintiff has been given the chance to determine that price or whether the invasion has been forced upon him. The real source of the

⁵¹ J.E. Martin, *Modern Equity* (London: Sweet & Maxwell, 1997) at 777 [hereinafter *Martin*].

⁵² *Goodson*, *supra* note 29 at 224.

⁵³ *Ibid.*

⁵⁴ Sharpe-Waddams, *supra* note 3 at 291.

⁵⁵ An example of this is the award of the lost opportunity to bargain in cases like *Bracewell v. Appleby*, [1975] 1 Ch. 408 (Ch.D.) [hereinafter *Bracewell*]. The court awards what a reasonable plaintiff would have accepted for compromising the right to specific performance, thereby assuming that the reasonable plaintiff would be willing to compromise the right.

loss consists not in the abstract invasion of a right to property so much as in the loss of the opportunity to consensually bargain away that right.

Viewing the presumed inadequacy in this way, the return to damages after applying the *Shelfer* test is less circular. So long as a damage award can somehow consider this lost opportunity to bargain, the damages will be “adequate.”

IV. WHAT IS THE MEASURE OF DAMAGES IN LIEU OF SPECIFIC RELIEF?

THE COURTS USE VARIOUS MEASURES OF EQUITABLE DAMAGES to substitute specific relief, and the question in each case will be whether the given measure of damage does in fact remedy the “inadequacy” that led to specific relief. As already suggested, there is something limited about this investigation. It is premised on the hierarchy of remedies and on the assumption that the damages in lieu of specific relief enter once the inadequacy of common law damages has been demonstrated. It may be that several of the measures of equitable damages were arrived at by a non-hierarchical approach to remedies in which the most appropriate “damage” is sought. In this case, equitable damages will not be a remedy for the “inadequacy” of the common law damages, but simply the more “just” award.

A. Cost of reinstatement

In an award of the cost of performance, the plaintiff is given the amount that it would cost to carry out specific performance. To that extent, this award would appear to best meet the *Lord Cairns’ Act* principle of awarding damages “in substitution” for specific relief. Since the damage award can then purchase specific relief, it is essentially no different from an award of specific relief. As a result, there would not likely be a question as to whether the award of damages in lieu of specific relief deviates from the function of specific relief to remedy the inadequacies of the common law award. In that case, why not always award the cost of specific relief as damages in lieu of specific relief?

In *Radford v. De Froberville*,⁵⁶ the defendant failed to erect a boundary wall on his property, thus breaching his contract with the plaintiff. The failure caused no inconvenience to the plaintiff and did not diminish the value of his property. The court awarded the plaintiff the cost of erecting the wall. The principle underlying the award was that the plaintiff ought to be put in the same position—not financially—that he would have been in had the contract been performed. In cases where the decrease in market value estimation cannot do this, the cost of performance may.

⁵⁶ [1977] 1 W.L.R. 1262 (Ch. D.) [hereinafter *Radford*].

The court was concerned with whether the costs would in fact be used to erect a wall. However, this was only one of several considerations. The court was also concerned with the reasonableness of the award. In fact, in *Ruxley Electronics v. Forsyth*,⁵⁷ Lord Berwick suggests that the focus on the plaintiff's intention is to determine the reasonableness of the award. In granting the award in *Radford*, Oliver J. found there were three questions that had to be answered:

First, am I satisfied on the evidence that the plaintiff has a genuine and serious intention of doing the work? Secondly, is the carrying out of the work on his own land a reasonable thing for the plaintiff to do? Thirdly, does it make any difference that the plaintiff is not personally in occupation of the land but desires to do the work for the benefit of his tenants?⁵⁸

In this case, the notion of reasonableness largely considered the question of mitigation. The court was concerned with whether awarding the cost of erecting a wall with the contracted material and not a cheaper material was an unreasonable failure to mitigate losses. In *Ruxley*, Lord Lloyd Berwick gives expression to the wider application of the notion of unreasonableness: "I cannot accept that reasonableness is confined to the doctrine of mitigation."⁵⁹ Thus, the question turned, not only on whether or not the plaintiff would use the monetary award to rebuild the pool, but on whether doing so would be unreasonable. Unreasonableness results where the cost of reinstatement would be "wholly disproportionate to the non-monetary loss suffered."⁶⁰

What is seen here is that while the cost of performance is indeed the best substitute for actual performance, and while a court may be convinced that the plaintiff will use the award to carry out the work, the award may still be inappropriate. The court resorts to "general equitable principles" when it considers awarding damages in substitution for specific relief.⁶¹ In applying a benefit/burden analysis, the court compares "the hardships" of the result to one party with "the inconveniences" of the result to the other, and prefers whichever result is less "unreasonable."⁶²

Such a benefit/burden analysis is explicit in *Ruxley* and is applied, though in a restricted manner, in *Radford*. An award that involves an expense to the defendant that far outweighs the benefit to the plaintiff will not be awarded. In the end, courts cannot always grant the cost of performance as damages in lieu

⁵⁷ [1995] 3 All E.R. 268 (H.L.) [hereinafter *Ruxley*].

⁵⁸ *Radford*, *supra* note 56 at 1283.

⁵⁹ *Ruxley*, *supra* note 57 at 285.

⁶⁰ *Ibid.* at 277.

⁶¹ *Spry*, *supra* note 34 at 625.

⁶² *Ibid.*

of specific relief, even if it is the most accurate substitute, as it is not always reasonable to do so. The notion of an adequate award refers to this balance of interests, and does not begin and end with that award that best reflects the plaintiff's loss. Rather the further question of how that loss weighs in relation to the burden on the defendant affects the judgment of whether the award is "adequate."

B. Bargain amount

A separate measure of damages in lieu of specific relief is the award of a reasonable sum that the plaintiff would have settled for if bargaining had taken place. The "bargaining power" of the plaintiff is often spoken of in the context of an award of specific relief. Sharpe and Waddams argue that "injunctive relief is the most effective method of protecting the right to bargain" ⁶³ Where a court awards an injunction or specific performance, the plaintiff may go to the defendant and offer to settle for a monetary sum in exchange for waiving the right to specific relief.

However, in such cases, the monetary award may reflect not what the plaintiff is willing to settle for so much as what the defendant is willing to pay. ⁶⁴ The bargained amount does not reflect the plaintiff's estimation of his or her loss but the defendant's estimation of his gain in being freed of the burden to perform. This power in the plaintiff's hands can lead to situations where the defendant would be "bound hand and foot, in order to be made subject to any extortionate demand that [the plaintiff] may by possibility make." ⁶⁵ The defendant would submit to negotiations and be willing to pay up to the cost of performance. The plaintiff would recover far more than compensation, for the diminution in the value of his property. ⁶⁶

However, if the *Shelfer* test is kept in mind, this would not necessarily follow. As seen, specific performance under this test is not awarded to begin with where the burden to the defendant far outweighs the gain to the plaintiff. The only situations in which specific relief is awarded is where it is shown that the detriment of that relief is not overly burdensome to the defendant. As a result, the bargaining positions of the two parties will not begin on such an unequal footing. Where the plaintiff has the decree of specific relief, the defendant is presumably not bound "hand and foot" to negotiate out of an overly-constraining obligation.

⁶³ Sharpe-Waddams, *supra* note 3 at 290.

⁶⁴ Sharpe, *supra* note 32 at 17.

⁶⁵ *Isenberg v. The East India House Estate Co. Ltd.* (1863), 3 De G.J. & S. 263 at 273.

⁶⁶ Waddams, *supra* note 36 at 122.

At the least, specific relief protects the plaintiff's bargaining right and permits the plaintiff to put the price tag on his or her own loss. In *Dent v. Auction Mart Co.*,⁶⁷ the court states that the award of specific relief avoids taking the plaintiff's interest away "not at his own estimate, but at the value which a jury might put on it."⁶⁸ Where equity does suspect an inequality in the bargaining process, it will shy away from awarding specific relief in the first place.

There are two problems that arise with the measure of damages in lieu of specific performance. First, does the award of damages in equity offer the plaintiff the same protection? In *Wrotham*, the defendants built houses in violation of a restrictive covenant. The court was not willing to award a mandatory injunction requiring the defendant to dismantle the buildings. Instead, it awarded, as a "just substitute," the amount of money that "might reasonably have been demanded by the plaintiffs" in exchange for giving up their right to an injunction.⁶⁹ In *Bracewell*, the amount that the plaintiff's were deemed willing to accept was a "fair price."⁷⁰

The award of damages in equity is determined on the basis of what a 'reasonable person' would have asked for in exchange for giving up the right to specific relief. While giving the plaintiff the actual right of specific relief puts him or her in the position to determine at what price to sell that right, awarding damages in lieu does not. The court imposes a measure of loss according to what a reasonable person, not the particular plaintiff, would have accepted as a bargained substitute. The inadequacy of this is apparent in *Waddams' Law of Damages*:

... when damage assessment is in question, it is too late to protect the plaintiff's actual interest in the specific property ... The plaintiff's own evidence, therefore, of what price would have been demanded cannot be conclusive ... because the plaintiff's formerly absolute right to refuse to sell except on his own terms cannot now be protected. It may be proved as an incontrovertible fact that the plaintiff would only have sold the property for fabulous wealth but this cannot determine the measure of damages.⁷¹

Rather, the measure of damages is calculated on the basis of a percentage of profit the defendant would be willing to compromise to be freed from completing performance. In *Bracewell*, for example, Graham J. awarded, in substitution for specific relief, the price that would be reasonable for the defendants to pay to extend their use of the private road.

⁶⁷ (1866), 2 L.R. 238 (P.C.).

⁶⁸ *Ibid.* at 247.

⁶⁹ *Wrotham*, *supra* note 25 at 815.

⁷⁰ *Bracewell*, *supra* note 55 at 419.

⁷¹ *Waddams*, *supra* note 36 at 10.

A court will not suppose that the defendant would only have bought the right at a low price as a result of good bargaining nor that the plaintiff would only have sold the right at an enormous sum.⁷² Furthermore, a court will presume that the reasonable plaintiff would be willing in every case to enter such negotiations. It may be that the result favours the plaintiff by awarding on the presumption that the defendant would have been asked to pay up to the full value of the profit resulting from the non-performance. In reality, the plaintiff may have settled for less in negotiation. However, reality also suggests that the plaintiff may have remained unwilling to bargain the right away at the court awarded price.

What one sees in this measure of damages in lieu is that the notion of “adequate” damages for the plaintiff in equity does not simply turn on what the particular plaintiff would have accepted as a monetary *quid pro quo* for the violation of his or her rights. The award reflects what an objectively reasonable person would exchange for the waiver of that right.

The notion of “adequacy” does not begin and end with the plaintiff’s estimation of his or her loss. Just as in the cost of performance cases, the courts are defining adequacy as a balance between what the plaintiff’s loss is and what the defendant’s loss will be. *Bracewell v. Appleby* illustrates this in stating that the reasonable-bargain award reflects the amount that the plaintiffs

would accept as compensating them for loss of amenity and increased user, and which at the same time, whilst making the ... land a viable building plot would not be so high as to deter the defendant from building at all.⁷³

The court is balancing plaintiff and defendant interests in determining the “adequacy” of bargain-measure equitable damages.

A second problem that arises in measuring the award of damages in equity as the reasonable-bargain price is that the *Lord Cairns’ Act* is being used to compel people to sell rights to their property, without their consent, at an objective valuation. Perhaps this plaintiff would not have been willing to negotiate the right away at a reasonable price, yet the courts force the plaintiff not only to accept a bargain price that does not reflect the valuation of the loss, but to compromise property rights without consent.

What one can gather from this is that if, in these cases, the protection guaranteed by specific relief is the owner’s right to freely bargain away property interests based on his or her own estimation, damages in lieu of specific relief fail to be a proper substitute for specific relief. The property right is compromised and interfered with, often without consent, in exchange for a sum the plaintiff did not determine.

⁷² Sharpe-Waddams, *supra* note 3 at 296.

⁷³ *Bracewell*, *supra* note 51 at 420.

However, a way of reconciling the damages in lieu of specific relief cases with the purposes of specific relief is to define that purpose differently. If specific relief is protecting the plaintiff's right to bargain away property interests, then damages in lieu thereof fail to achieve the purposes of the principle it "substitutes." If specific relief is about maintaining a broader balance of interests between benefits to the plaintiff and burdens to the defendant, then the bargain-measure of equitable damages indeed acts in keeping with the principles of the award of specific relief. An award of the lost opportunity to bargain, based on what the reasonable plaintiff could expect and demand from such negotiations, is an award that remedies the inadequacies of the common law awards. It reflects the basic aim of limiting the burden of breach while protecting reasonable expectations.⁷⁴

C. A form of damages at law

A third measure of equitable damage has lent a degree of confusion to the area by awarding what amounts to a form of damages at law. This class of cases has led certain courts to reject any division between damages at common law and damages in equity.⁷⁵ It is these cases that may prove the most helpful in understanding what the courts are doing in awarding damages in lieu of specific relief. Usually, common law damages are limited to the difference between the contract and market price at the date of the breach. However, in *Wroth v. Tyler*,⁷⁶ the Court was able to circumvent this rule through an award of damages in equity. The vendor was unable to make good on a promise to sell a bungalow after his wife registered her interests in the home under the *Matrimonial Home Act*. The Court found that it would be against public policy to make an order that requires a husband to take legal proceedings against his wife and awarded damages in lieu of specific performance. By the date of the judgment, the value of the house had risen significantly from the time of the breach. To purchase a substitute at the time of breach, the plaintiffs would have needed an additional L1,500. They did not have financial resources of any substance and could not have bought a house at the date of breach.⁷⁷ Awarding L1,500 now, when the equivalent house is worth an additional L5,500, would not put the plaintiff in the same position as if the contract had been performed. They would be unable to buy a comparative home.

In awarding equitable damages the court was not bound by the breach-date rule, and was free to value the loss as of the date of judgment. The result seems

⁷⁴ Sharpe, *supra* note 32 at 532.

⁷⁵ See *Johnson v. Agnew* [1980] A.C. 367 (H.L.) [hereinafter *Johnson*].

⁷⁶ [1973] 1 All E.R. 897 (Ch. D.) [hereinafter *Wroth*].

⁷⁷ *Ibid* at 921:

desirable here where the plaintiffs had invested life savings in the purchase and would have lost the chance to own a house.⁷⁸ Yet, what if a purchaser had a purely commercial interest and could be expected to buy a substitute within a reasonable time after breach? Can they apply for damages in lieu of specific relief to avoid the breach-date rule? Waddams argues that both the Wroths and a typical commercial merchant can apply for damages under *Lord Cairns' Act* since the court always has the jurisdiction to award equitable damages. He provides the example of a disappointed buyer of gold bars who

would be encouraged to frame the action for non-delivery as a claim for specific performance (even knowing that it would inevitably be refused) in order to obtain the benefit of judgment date assessment on a rising market.⁷⁹

To avoid such results, he further argues, the courts have held that there is no difference in the measure of damages at law and under *Lord Cairns' Act*.

It has been demonstrated that an hierarchical analysis would not lead to this result. It permits a different measure of damages for the Wroths than for disinterested commercial speculators. The Wroths would be separated in their equitable claim from the commercial speculator without an equitable claim. Only the Wroths fall under the jurisdiction of *Lord Cairns' Act*, in that only for them, and not for the commercial merchant, would damages at law be inadequate. The corporate speculator could be expected to purchase a substitute within a reasonable time after breach and damages would be adequate if assessed at the date when such a reasonable purchase could be made.

This view is supported by the language of the case. Megarry J. writes:

this case, in which there is a proper claim for specific performance, falls within the *Chancery Amendment Act 1858* (better known as *Lord Cairns' Act*), and that damages assessed under that Act are to be ascertained in accordance with that Act on the basis which is not identical with that of the common law.⁸⁰

The power to award damages "in substitution" imports a power to give a true substitute, an equivalent for what was lost by refusal of specific performance.

Waddams' analysis breaks down the distinction between the court's jurisdiction and the court's discretion in its non-hierarchical approach to the law of remedies. This analysis relies on the subsequent decision of *Johnson*. There, the Court unequivocally states that damages at law are assessed on the same basis as damages in equity. Megarry J. argued that there is no inflexible common law rule for assessing damages as of the date of breach. Rather, where doing so would produce an "injustice," a court may award damages on the date of as-

⁷⁸ Waddams, *supra* note 36 at 42.

⁷⁹ Waddams, *supra* note 36 at 46.

⁸⁰ *Wroth*, *supra* note 76 at 919.

assessment. However, the injustice in *Johnson* is met by the common law damages, and not by turning to an equitable remedy for a different measure of damages.

Where the common law award is inadequate, the common law adapts by taking considerations of what is "just" into account. No separate reference to an equitable award is required to resolve common law inadequacies. This analysis follows from collapsing the distinction between the jurisdiction and discretion of the court to award equitable relief. The court is deemed to always have jurisdiction to award equitable relief, so its discretion in doing so or not must be guided by something else. That something else, Waddams and Megarry J. argue, lies in the equitable "exception" to the common law breach-date rule where "reasons of justice [require] a departure from the general rule in the particular case."⁸¹

Johnson is a better support for this non-hierarchical analysis than *Wroth*. In *Wroth*, Megarry J. specifically states that he does not need to decide if such an award would be made at common law, because it is made here under *Lord Cairns' Act*. What *Wroth* does do is lay out, in *obiter*, the possibility of awarding the date of assessment in common law damages:

[T]he rule requiring damages to be ascertained as at the date of breach does not seem to be inflexible, and in any case the rule may be one which, though normally carrying out the principle, does on occasion fail to do so; and on those occasions the rule may have to be modified so as to accord with the principle. However, as I have said, I do not think I need explore that.⁸²

Johnson, on the other hand, does explore that possibility.

These two cases are doing two different things with damages in lieu of specific relief and with the notion of adequacy. *Wroth* maintains the hierarchy of applying a separate award of damages where common law damages are inadequate. *Johnson* breaks down the hierarchy and applies the same award of damages *at common law* as would be awarded in equity. Megarry J. applies equitable relief where common law relief is inadequate. Wilberforce J. in effect expands the common law using equitable principles to make the common law relief adequate.

In the final section, the implications of *Johnson* on the notion of damages in lieu of specific relief are discussed. The question that needs to be asked following *Johnson* and the move towards a non-hierarchical approach to remedies is: does there remain any importance to a distinction between common law and equitable remedies?

⁸¹ Waddams, *supra* note 36 at 48.

⁸² *Wroth*, *supra* note 76 at 919.

D. Is there a difference between common law damages and equitable damages?

If the common law can remedy its own inadequacies, why refer to equitable remedies at all? Furthermore, if the courts are applying this non-hierarchical benefit/detrimental evaluation of the adequacy of the “damage,” why maintain the distinction between equitable and common law damages?

By viewing each case in its context, a court may award damages at law with equitable principles in mind. The common law award of damages can be made “adequate” as it will incorporate those equitable concerns that remedy the inadequacy. If this is so, is there really a distinct “common law” damage remaining? Or has the barrier been broken between common law and equitable remedies to permit for a process of awarding appropriate “damages” at large?

Jolowicz and Megarry JJ. in *Wroth* argue that damages in equity necessarily extend beyond damages at law since they are “in substitution” for an equitable relief that is not available at law.⁸³ In *Johnson*, Wilberforce J. concedes that the Act should continue to award a separate measure of damages for actions not available at law. However, for all other damages, he argues that the Act does not provide for the assessment of damages on any new basis.

All this concession means is that a removal of the remedial hierarchy cannot permit common law to subsume equity. Equitable relief applies to a broader class of cases than the inadequacy of common law awards. As in cases of restrictive covenants and *quia timet* relief, there is a need for applying *Lord Cairns’ Act* as a separate award where no common law action could be taken.

However, the gap between the jurisdiction of the common law and equity is narrowing. Megarry J. argued in *Johnson* that the court always has the jurisdiction to award equitable damages, but he did not go so far as to argue that the court always has jurisdiction to award common law damages. However, if the principle in *Johnson* is taken further, there is reason to suggest that it could. Megarry J. interpreted the “common law” remedy as flexible to equitable considerations. To some extent, the question of the award of common law damages and equitable damages are merging into the single notion of an award of appropriate “damages.”

In the cases offering new bases of assessment for damages not awarded at common law—such as the cost of performance and the reasonable-bargain in trespass and nuisance cases—it has been seen that the notion of “adequacy” has taken on a broad meaning. It referred to the balancing of benefits and detriments and does not begin on the presumption of the inadequacy of the common law remedy. When damages in equity are awarded, it is because the court considered the overall “justice” of the case. This same process guides the court in *Johnson*. *Johnson* has been interpreted as suggesting that “in general equity fol-

⁸³ Jolowicz, *supra* note 45 at 230.

lows the law, and it may generally be expected that if only nominal damages would be available at law, then no more will be awarded in equity."⁸⁴ Yet, *Johnson*, in fact, shows that the law follows equity. The court abandoned the breach-date rule as not "absolute," arguing that "if it would give rise to injustice," the court has the power to award other damages.⁸⁵

This context-based assessment of the most just remedy does indeed apply "the same measure" for common law and equitable damages, and for damages at large. Both are measured by what is the most just and a rule or measure that would "give rise to injustice" is flexed to be just. Thus, there is reason to think that a move towards a complete breakdown in the jurisdictional division can be made. The principles under *Lord Cairns' Act*, are preserved in one cohesive process that meets, on the balance of benefits and burdens, the justice of the case. In that case, the notion of separate "equitable" and "common law" damages may be abandoned. Even those causes of action that do not fall to the common law, such as restrictive covenants and *quia timet*, may be included in this single treatment of the adequate "damage." No reference to a common law that bars them and an equitable law that protects them would be necessary.

V. CONCLUSION

THROUGHOUT THIS DISCUSSION, one has seen that the various measures of equitable damages do protect the "adequacy" of specific relief, so long as that adequacy is given the broad meaning of a non-hierarchical benefit/burden analysis. The damage award in *Johnson* and the measures of damage in *Radford* and *Wrotham* are consistent under the non-hierarchical approach. The court, in a case by case assessment, seeks to provide the most adequate—that is, the most just—award. It takes equitable principles into consideration from the outset in determining the measure of "damages" that is the most adequate.

A breakdown in the primacy of common law damages over equitable damages is taking place. In its stead, the courts are approaching each case by asking, what award is most just? In the end, and as seen in cases like *Johnson*,

awarding damages measured by the principles of equity allows the spirit of equity's recognition of special interests to prevail over the obstacles in the way of specific relief.⁸⁶

⁸⁴ Martin, *supra* note 51 at 780.

⁸⁵ *Johnson*, *supra* note 75 at 401.

⁸⁶ R. Sharpe, "Study 5: Specific Relief for Contract Breach" in J. Swan & B. Reiter, eds., *Studies in Contract Law* (Toronto: Butterworth, 1980) at 149–150.