

RECONSIDERING AN UNDERSTANDING OF DAMAGES AS A SURROGATE OF SPECIFIC PERFORMANCE IN SOUTH AFRICAN LAW OF CONTRACT

Steven Poynton Stuart-Steer

University of Cape Town

1 Introduction

The South African law of contract provides three broad types of remedies in the event of breach of contract:¹

- i. Remedies aimed at keeping the contract alive;
- ii. Remedies aimed at cancelling the agreement; and
- iii. Remedies aimed at compensating the innocent party for loss or harm caused by the breach.

The claim for contractual damages is a remedy in the third category serving a compensatory function in the law of contract as a matter of corrective justice. The jurisprudential underpinning and reason for its grant have been a prominent issue in contract law theory and have been explored and analysed in depth.² For instance Fuller and Perdue's seminal work *The Reliance Interest in Contract Damages* provides a distinctive purposive understanding of contract theory through its compensatory function in the form of contractual damages.³ But a topic often less explored or considered is the underpinning of an order of specific performance, being a remedy of the first category above in upholding and enforcing the contract. Specific performance, or giving it its Latin terminology, performance *in forma*

¹ See D Hutchison, C Pretorius, J du Plessis, S Eiselen, T Floyd, L Hawthorne, B Kuschke, C Maxwell & T Naude *The Law of Contract in South Africa* (2009) 310.

² However, the source of the obligation for compensation upon breach is another matter of far less clarity, being the subject of extensive debate; See further S van der Merwe, LF van Huyssteen, MFB Reinecke & GF Lubbe *Contract – General Principles* 4 ed (2012) 288-290; See also D Hutchison *Law of Contract* 326-327.

³ L Fuller & W Perdue Jr "The Reliance Interest in Contract Damages – 1" (1936) 46 *Yale Law Journal* 52; L Fuller & W Perdue Jr "The Reliance Interest in Contract Damages – 2" (1937) 46 *Yale Law Journal* 373.

specifica, is the enforcement of the performance as in the form the contractants agreed.⁴ However, J C de Wet and A H van Wyk's traditional construction described specific performance as also taking another form, namely as 'damages as a surrogate of performance'.⁵

Therefore on proper conception of De Wet's taxonomy the remedy of specific performance exists in two forms: as specific performance in the strict sense and as an objective monetary substitute as a surrogate for the agreed performance. This idea is authoritatively expressed by Van Heerden JA for the Appellate Division in *Deloitte Haskins & Sells Consultants (Pty) Ltd v Bowthorpe Hellerman Deutsch (Pty) Ltd*⁶ in finding that a plaintiff may 'claim performance, either *in forma specifica* ... or by way of damages in lieu of performance'. This traditional distinction by De Wet is further accepted and reinforced by the Supreme Court of Appeal in *ISEP Structural Engineering and Plating (Pty) Ltd v Inland Exploration Co (Pty) Ltd*⁷ which has controversially been considered a rejection of the availability of an independent claim for a monetary surrogate in lieu of performance.⁸

There is a terminological difficulty in this label of 'damages as a surrogate of performance' when one is proposing the concept as under the paradigm of specific performance, for two reasons. *First*, the award of the remedy is not one of performance as agreed between the parties, being in the form of a monetary substitute; or even compensation for the performance as then there would be no distinction in function with an award for contractual damages. And *secondly* it in fact seems to have led to a conceptual overlap with the notion of contractual damages and a failure to distinguish the remedy as a form of specific performance, and therefore as to what interest it protects as a monetary substitute for specific performance *in forma specifica*. Having noted these two issues the purpose of this paper is to reconsider this understanding of surrogate damages in the current South African law of contract, both theoretically and evaluatively, following Smalberger ADCJ's *dictum* on behalf of the Supreme Court of Appeal in *Mostert NO v Old*

⁴ Van der Merwe et al *Contract* 328-334.

⁵ As translated from "daadwerklike vervulling en skadevergoeding as surrogaat van die prestasie" in JC de Wet & AH van Wyk *Die Suid-Afrikaanse Kontraktereg en Handelsreg* 1 5 ed (1992) 208-214.

⁶ 1991 1 SA 525 (A) para 530.

⁷ 1981 4 SA 1 (A).

⁸ There is criticism concerning the identification of the *ratio* in *ISEP Structural Engineering and Plating (Pty) Ltd v Inland Exploration Co (Pty) Ltd* 1981 4 SA 1 (A) which will be considered further below in section 8; See also Van der Merwe et al *Contract* 329 who posit that Jansen JA's remarks on surrogate damages may have been *obiter* as his judgment construes the plea as being for contractual damages and so that there is no majority judgment on the availability of surrogate damages.

*Mutual Life Assurance Co (SA) Ltd*⁹ which calls for this area of the law to be reconsidered after numerous criticisms against the decision in *ISEP*.¹⁰

2 The remedy of damages as a surrogate of specific performance distinguished

‘Damages as a surrogate for performance’ has been described in the legal literature as being an award granted in lieu of specific performance for the creditor to claim the objective monetary value of the agreed performance which is not received, in its entirety or in part, as a result of the debtor’s breach.¹¹ This construction is theoretically problematic.

2.1 The award of contractual damages distinguished

This remedy is significantly different to the traditional remedy of contractual damages where the claimant must prove actual suffered loss as a result of a breach of contract. Given that the basis of contractual damages is underpinned by compensation for the loss in the performance, it therefore seems theoretically inconsistent to underpin surrogate damages also upon the interest in the performance. When granted as an objective or equivalent monetary surrogate it seems merely to bypass the loss enquiry of contractual damages and so avoids the rules of mitigation of loss and the contemplation principle.

This label of the remedy has as such perhaps led to a blurring of the conceptual distinction between this remedy and that of contractual damages. The remedy was proposed by De Wet as a concept under the paradigm of specific performance and as such it is not surprising that there has been significant confusion surrounding the concept and its application through failing to draw a distinction between the *id quod* interest damage and this unique damage as a substitute for specific performance.¹² This distinction is not even one of the ‘types of damages’¹³ but of the natures of the remedies themselves. If it were merely a substitute for the interest in the

⁹ 2001 4 SA 159 (SCA).

¹⁰ *Mostert NO v Old Mutual Life Assurance Co (SA) Ltd* 2001 4 SA 159 (SCA) 186 referring to Oelofse (1982) *THRHR* 61 63-65; *Van Immerzeel & Pohl and Another v Samancor Ltd* 2001 CLR 32 (SCA) 45-46; JC De Wet & AH Van Wyk *Kontraktereg* 212; HJ Erasmus, JJ Gauntlet & PJ Visser “Damages” in WA Joubert & JA Faris (eds) *LAWSA* 7 2 ed (2004) para 45.

¹¹ See Erasmus, Gauntlet & Visser “Damages” in *LAWSA* 7 para 45; D Hutchison & F du Bois “Contracts in General” in F du Bois (ed) *Wille’s Principles of South African Law* 9 ed (2007) 733 876; Van der Merwe et al *Contract* 328; Hutchison *Contract* 314; JM Potgieter, L Steynberg & TB Floyd Visser & Potgieter *Law of Damages* 3 ed (2012) 201.

¹² See Hutchison & Du Bois “Contracts” in *Wille’s Principles* 876-877.

¹³ 876.

performance as a type of damage then there would be no distinction in the purpose served by contractual damages and this particular remedy as both are then just compensating for the loss in the performance. The remedy as such has had an unfortunate terminological identification which has blurred its conceptual underpinning as a form of specific performance.¹⁴

2.2 The award of an objective monetary surrogate reconsidered

According to the classification as a form of specific performance one should theoretically be able to claim the surrogate remedy in conjunction to an award for compensation of provable loss.¹⁵ A failure to draw a conceptual distinction between the remedies is a failure to distinguish the purpose of these remedies. In other words it fails to consider the construction of available rights by presupposing the appropriate remedy.¹⁶ When described as a remedy for the objective monetary value of performance it cannot be explained by the rights and obligations flowing from the

¹⁴ See *Deloitte Haskins & Sells Consultants (Pty) Ltd v Bowthorpe Hellerman Deutsh (Pty) Ltd* 1991 1 SA 525 (A) where Van Heerden JA states in para 530 that a plaintiff 'may ... claim performance either *in forma specifica* ... or by way of damages in lieu of *performance*'; See also Erasmus, Gauntlet & Visser "Damages" in *LAWSA* 7 para 45 where described as an alternative claim for specific performance as "damages as a surrogate of the whole or missing part of the *performance* (that is damages as the objective financial *equivalent* of performance)" (emphasis added); See Van der Merwe et al *Contract* 328 as being labelled "damages as a surrogate of *performance*". This latter label is a direct translation of J C De Wet's traditional construction in *De Wet & Van Wyk Kontraktereg* 208; See also Hutchison & Du Bois "Contracts" in *Wille's Principles* 876-877 which states it as "damages as a substitute for the missing part *performance*, or as a complement of defective or incomplete *performance*"; Cf Jansen JA in *ISEP Structural Engineering and Plating (Pty) Ltd v Inland Exploration Co (Pty) Ltd* 1981 4 SA 1 (A) 7 who describes it as the 'objective value of the performance in lieu of *specific performance*' as quoted from *National Butchery Co v African Merchants Ltd* 1907 EDC 57; It is on this notable change of terminology that this paper will attempt to present a theory that can account for the difference in the purpose of remedies for damages for failed performance and damages as surrogate for specific performance.

¹⁵ Such a position of loss which is not covered by an equivalent monetary surrogate performance can be explained on Fuller and Perdue's *Reliance Interest* in that the surrogate performance may, but not always, account for the restitution interest. But this is not always so, for the reliance interest may be greater than a monetary substitute and so a claim for damages as compensation for the consequential *id quod* loss should still be available; See Fuller & Perdue (1936) *Yale Law Journal* 53-54. Note that Fuller and Perdue's theory is one for the explanation of damages, and given the distinction of surrogate damages as one of specific performance, there will not be an exact correlation in compensation as the interest protected in specific performance is not the same as those identified interests for damages. The parallel is drawn as a useful guide to reveal the value in demarcating set interests, but also to note its clear distinction to what will be developed as the '*specific performance interest*'; See also Hutchison & Du Bois "Contracts" in *Wille's Principles* 876 which acknowledges the distinction of surrogate damages and consequential damages and notes therefore that they are in theory both claimable where the plaintiff has not rescinded the contract.

¹⁶ A theory of contract needs to properly consider the correlation of rights and remedy; See the very informative and insightful article C Webb "Performance and Compensation: An Analysis of Contract Damages and Contractual Obligation" (2006) 26 *Oxford Journal of Legal Studies* 41 for an analysis of the rights being protected in contract. Webb which furthers the understanding and analysis of the '*performance interest*', an idea which is adopted in this paper, as more complete reconceptualization of Fuller and Perdue's *expectation interest* in accounting for the position of fulfilling performance rather than merely as damages therefor.

performance as shown above, but so too it cannot be explained by an order of specific performance. *First*, it is not the performance the contractants agreed, being a substitute damages award; and *secondly* it does not necessarily effect the same patrimonial result as a claim for specific performance as it does not account for what reciprocal obligations may rest on the party being awarded an order of specific performance.¹⁷

The theoretical problem underlying the description and label given to the remedy as an objective monetary surrogate in modern literature is therefore that it fails to consider what interest is served by its award. Contractual damages oblige to compensate as substitute for the agreed *performance*, so placing the plaintiff in the position as if performance were duly forthcoming per the contract; whereas compensation in lieu of *specific performance* would place the plaintiff in the financial position as if specific performance had been granted. As such a different explanation for the basis of surrogate damages in South African law will be considered by a theory which considers the interest which damages in lieu of specific performance would substitute. It will then be suggested that it is a mistake to describe it as an award for a monetary 'equivalent'¹⁸ to the promised performance or such similar construction for lack of theoretical consistency with the nature of the remedy as a form of specific performance.

3 A theory of specific performance interest damages

If one considers the remedy as damages in lieu of specific performance, as was accepted by all five judges in *ISEP*,¹⁹ then the interest that underlies the award is that which underlies a grant in specific performance and not that of the performance. The interest protected by this form of specific performance differs from that of a

¹⁷ This can be demonstrated by a breach to transfer property. If one were to award an objective monetary surrogate of the performance, it is not effecting the same position as specific performance, as this substitute performance does not account for possible incidental obligations on the transferee. In other words certain deductions from the monetary value of the performance could be needed to effect transfer of the property as would be the case with an order of specific performance; See the discussion of *Semelhago v Paramadevan* 1996 2 SCR 415; 136 DLR (4th) 1 (SCC) below in section 3.

¹⁸ As taken from the description in Erasmus, Gauntlet & Visser "Damages" in *LAWSA* 7 para 45; see also Van der Merwe et al *Contract* 328; Similar construction follows in the legal literature despite not using the epithet 'equivalent' as can be seen from the sources noted in n 11 above.

¹⁹ *ISEP Structural Engineering and Plating (Pty) Ltd v Inland Exploration Co (Pty) Ltd* 1981 4 SA 1 (A) where Jansen JA, Van Winsen AJA 16 (Kotzé JA concurring) and Hoexter AJA 17 (Viljoen JA concurring) all regarded the claim for the cost of performance as being one for specific performance in another form, and not damages consequent upon breach of contract.

compensatory interest in an award of damages, despite being effected in the form of a monetary substitute.²⁰ As such should surrogate damages be awardable in the event of breach, the plaintiff could although having a lower or even no compensatory interest in the performance upon breach, could still have a promissory interest in its performance by expectation of an award of specific performance. This idea is foreign when one tries to peg its understanding on the notion of traditional damages as this tends to associate the compensatory paradigm of damages for the *performance* within its notion. But when one considers it from this construction one is looking to compensate the interest underlying *specific performance*. To fail to distinguish these underlying interests is to hold a view with only one eye open.²¹

Therefore, in order to understand the interest a plaintiff can have in a grant of damages as a surrogate of specific performance one must understand the interest a plaintiff has in specific performance and the reason a court would grant this remedy, which has traditionally not received as detailed a treatment in legal literature as contractual damages.²² Fuller and Perdue's seminal work on the so-called 'interest analysis approach' of contractual damages provides a useful tool to understand the theoretical underpinning of damages.²³ But as noted by Daniel Friedmann,²⁴ a problem with Fuller and Perdue's work is that it does not give an account of the relevance of specific performance. *Reliance Interest* approaches an understanding of contractual rights through the lens of contractual damages, which are merely a substitute for performance to compensate for the loss suffered upon breach. But this is not the whole story. It is a trite principle in South African law that contractual damages are only a secondary remedy; and that specific performance is the primary remedy for breach.²⁵ In light of this understanding it would seem our hybrid legal tradition accords more prominent significance to the plaintiff's interest in specific performance. This also follows practical reasoning as surely the essence of a

²⁰ See *Bestaway Agencies (Pty) Ltd v Western Credit Bank Ltd* 1968 3 SA 400 (T) 404; *Uni-Erections v Continental Engineering Co Ltd* 1981 1 SA 240 (W) 248; *Masters v Thain t/a Inhaca Safaris* 2000 1 SA 467 (W) 474; also GF Lubbe and CM Murray *Farlam and Hathaway: Contract – Cases, Materials and Commentary* (1988) 593.

²¹ A phrase adopted from L Smith "Understanding Specific Performance" in N Cohen & E McKendrick (eds) *Comparative Remedies for Breach of Contract* (2005) 221 and for which I would give thanks.

²² See Smith "Understanding Specific Performance" in *Comparative Remedies for Breach of Contract* for an insightful excursus on the jurisprudential reasoning of providing an award of specific performance as remedy.

²³ Fuller & Perdue (1936) *Yale Law Journal* 52.

²⁴ D Friedmann "The Performance Interest in Damages" (1995) 111 *Quarterly Law Review* 628 629.

²⁵ See *Benson v SA Mutual Life Assurance Society* 1986 1 SA 776 (A); *ISEP Structural Engineering and Plating (Pty) Ltd v Inland Exploration Co (Pty) Ltd* 1981 4 SA 1 (A); *Unibank Savings and Loans Ltd (formerly Community Bank) v Absa Bank Ltd* 2000 4 SA 191 (W).

contract is its actual performance. Purposively considered a contract is not made for its *expectation interest*, but the actual fulfilment of its performance.²⁶

As such a proper theory of South African law of contract needs to consider and distinguish two distinct contractual interests of the plaintiff.²⁷ That is *first*, the interest in receiving the promised performance, the '*performance interest*'²⁸ – that is to be put in the position as according to the terms of the contract. Although this is a similar formulation to Fuller and Perdue's *expectation interest* which seeks to 'put the plaintiff in as good a position as he would have occupied had the defendant performed his promise',²⁹ it must be remembered that this latter formulation is one expressed through the lens of compensation.³⁰ And *secondly*, the interest a plaintiff has upon breach to a grant of an order of specific performance – the '*specific performance interest*'.³¹ Although a grant of specific performance can more fully realise and protect the performance interest of a plaintiff than would a compensatory substitute therefore, a grant of specific performance can actually go even further

²⁶ Such is intuitive in many service-based contracts. One is not at the time of contracting always concerned with changes in one's patrimonial position calculated in accordance with market values; but contracts on a different expectation, an expectation that actually the contract will be duly honoured and fulfilled. Such can be exemplified by a case where one contracts for the services of a plumber. One is not contracting to gain the expectation interest in the patrimonial losses engendered upon failure; one contracts to actually fulfil the promised service – the expectation interest merely serves as a corrective upon breach, a compensatory mechanism to serve to protect against the wrongful loss suffered on failed performance. It also acts as a guard to protect against breach – a preventative measure to avoid the breach. But what where the contract is one for a wedding photographer? Can one adequately compensate for breach of this service by the mere patrimonial loss suffered? And so does one effectively guard against the breach? See the Scottish case of *Diesen v Samson* 1971 SLT (Sh Ct) 49 which concerned this very scenario. Can one properly guard against the unilateral breach by the photographer in such an instance, bearing in mind the value of the photographer's service has no significant patrimonial gain, but is really only one of sentimental value that the promisee attaches to the performance? It would seem ordinary contractual damages would not accord much prevention to a choice by the photographer to breach the contract. As such it would seem South African law does not fully protect the performance interest of such a plaintiff by deterring the breach, nor provide appropriate compensation for the breach. There is an interest a plaintiff has in the actual performance, which holds a subjective element of value unaccounted for by an objectively calculated substitute. This idea is discussed in greater depth in the original version of this paper which considers the English approach to this award of damages according to *loss of amenity* damages.

²⁷ See in this regard Webb (2006) *Oxford Journal of Legal Studies* 41.

²⁸ A term that appears to have come into popular usage since being proposed in Friedmann (1995) *Law Quarterly Review* 628; See further Webb (2006) *Oxford Journal of Legal Studies* 41; B Coote "Contract Damages, Ruxley, and the Performance Interest" (1997) 56 *Cambridge Law Journal* 537.

²⁹ Fuller & Perdue (1936) *Yale Law Journal* 54.

³⁰ The performance interest is broader in that it captures the actual value the plaintiff holds in its performance, which appropriately caters for sentimental or subjectively considered value; See further Friedmann (1995) *Quarterly Law Review* 629-30 who notes further that it is for this reason that despite the seminal nature of Fuller & Perdue (1936) *Yale Law Journal* 52 invaluable in its capturing of the understanding of the compensatory role of remedies of breach of contract, it cannot fully explain a theory of contract as it does not account for the full *performance interest* which would be achieved by specific performance.

³¹ A term adopted from Smith "Understanding Specific Performance" in *Comparative Remedies for Breach of Contract* 229.

than the performance interest. This is demonstrable if one considers a grant of specific performance as a patrimonial entitlement:³² then when viewed through the lens of compensation, a monetary substitute in lieu of its award would be an award placing the plaintiff in a position as if specific performance were granted. This position would take no account for pre-trial changes in value of the performance, as would need to be accounted for in compensation for the performance interest. This means compensation for a grant of specific performance would be an award for a monetary substitute for the performance less any costs that would otherwise necessarily have been paid in order to effect specific performance.³³

This conception of the specific performance interest and its distinction from the performance interest can be demonstrated in the development of English jurisprudence of ‘damages in lieu of specific performance’ as a monetary award.³⁴ Jurisdiction for this award was granted under the English Chancery Amendment Act 1858. The Chancery Division famously in *Wroth v Tyler*³⁵ noted that ‘damages in lieu of specific performance’ could be higher than common law damages. Such became especially evident during a period experiencing a rapid appreciation in the value of land. The court found that common law damages had to be measured at the time of breach and so could not account for the pre-trial increase in value of the land. But

³² Such an idea is not exceedingly foreign in modern South African law. It is a growing trend with increasing value and reliance placed on securitisation (such as with securities trade, shares and cession law) and on the value of incorporeal property (such as intellectual property and trademark law) to conceptualise the personal right of performance in a contract as a patrimonial entitlement, which as such does not require any new leap in jurisprudence, merely only that proper consideration of the patrimonial consequences in the existing theory be considered.

³³ It can be noted even at this early stage of the theory put forward in this paper that this monetary substitute for a grant of specific performance is still, by the nature of being awarded by means of substitute for the actual agreed performance, a form of compensation. The word ‘surrogate’ in itself entails no more than this substitute form as can be seen from its meaning in the *Oxford English Dictionary*. It is the nature of the very remedy of damages to consider its substitute award comparatively in relation to the position that would otherwise have been occupied by the plaintiff. This position is often compared through the means of a standardised measurement of market value in relation to the position of the plaintiff that would otherwise stand. However, this proposed method of comparison is not the only method. One can simply compare the positions by means of equivalent monetary substitute as has been widely held in modern South African literature. Then one can consider the stated price or an objective determination of the performance as substitute for performance. The problem is that the basis of such remedy does not underlie any intention or interest of the parties under their contract. In other words it does not attach to either the *performance interest* or the *specific performance interest*. The above proposed compensatory comparison as such cannot be effected by way of an *equivalent monetary substitute*. Although such is usually the conception considered in South African law of surrogate damages, it is suggested that the proposed conception as being damages for the *specific performance interest* is not only more consonant with contract theory in general, but would effect a more fair result in accounting for costs incumbent upon the creditor for an award of specific performance. This idea of assessment will be considered more below.

³⁴ See Smith “Understanding Specific Performance” in *Comparative Remedies for Breach of Contract* 227-232 whose argument on pre-trial increases shall be used below and adapted here in the context of South African law.

³⁵ [1974] Ch 30; [1973] 1 All ER 897.

having denied the grant for specific performance Megarry J allowed a claim for damages in lieu thereof by which he meant that these damages were a substitute for specific performance to be assessed by reference to the time of trial and as such would include the pre-trial increase in value in the award for damages. Some subsequent English cases, however, brought doubt to this position.³⁶

This idea also became evident in Canadian jurisprudence which developed on this English rule in *Wroth*. The Ontario Court of Appeal practically accepted and applied *Wroth* despite doubts floating around in both the English law as well as in their own Canadian law.³⁷ In *Semelhago v Paramadevan*³⁸ there was a breach of contract to convey an estate in land. The plaintiff was to pay \$205 000 for the purchase of house under construction: \$75 000 which was to be paid in cash, and \$130 000 to be raised and paid through mortgaging and selling his current house over a 6-month closing period. However, the defendant reneged on the agreement 4 months in and then conveyed the land to a third party. At the time of trial the contracted property was valued at \$325 000. The Ontario Court of Justice (General Division) allowed the plaintiff an election between specific performance *in forma specifica* or to claim damages in lieu of specific performance.³⁹ Upon the plaintiff's election for damages in lieu of specific performance the court held in favour of the plaintiff and made a damages award of \$120 000: being the difference between the market value of the property at the time of trial and the purchase price agreed in the contract.⁴⁰

On appeal, however, the Ontario Court of Appeal found that certain amounts were deductible from the award; namely:

- i. The interest which the plaintiff had avoided paying on the mortgage which he would otherwise have needed to pay in order in order to buy the estate.
- ii. The interest earned on the money which would have otherwise been used for the down payment.
- iii. And the legal fees that the plaintiff would have otherwise paid in conveyance.⁴¹

³⁶ See for example *Johnston v Agnew* [1980] AC 367, 400 (HL).

³⁷ See for example *Ontario Ltd v Rimes* (1979) 25 OR (2d) 79, 100 DLR (3d) 350 (Ont CA).

³⁸ [1996] 2 SCR 415; 136 DLR (4th) 1 (SCC).

³⁹ It can be noted that the Canadian terminology specifically construes the damages claim as being 'in lieu of *specific performance*'.

⁴⁰ This is the position as if specific performance were to be awarded – the market value of the property less the cost to effect specific performance.

⁴¹ These are factors measured retrospectively at the time of breach and as such reflect the more traditional considerations of ordinary damages.

As such the damages award as substitute for specific performance was accordingly reduced to \$81 000.

The defendant again appealed this damages award in the Supreme Court of Canada on the argument that the plaintiff had by consequence of the breach held onto his own property which had also appreciated significantly during the period up until trial. As such the defendant wished to show that given that the plaintiff's own property had risen during this period, so too were his losses reduced; and accordingly pleaded that damages be reduced to \$5 000 – that is that the plaintiff would, if the performance were forthcoming, have lost out on the \$76 000 increase in his own retained property.

This argument by the defendant reflects the traditional conception of *id quod* interest in accounting for the actual performance interest; or upon Mommsen's difference theory,⁴² which is the basis of our courts calculation of traditional damages, requiring the hypothetical position of the plaintiff (where the breach had not occurred) to be offset by the actual standing patrimonial position of the plaintiff. The Supreme Court of Canada rejected this argument and affirmed the correctness (with reservation on the deductions) of the decision of the Ontario Appeal Court. La Forest J stated that:

"I would not deduct from this amount the increase in value of the respondent's residence which he retained when the deal did not close. *If the respondent had received a decree of specific performance, he would have had the property contracted for and retained the amount of the rise in value of his property. Damages are to be substituted for the decree of specific performance.* I see no basis for deductions that are not related to the value of the property which was the subject of the contract. To make such deductions would depart from *the principle that damages are to be a true equivalent of specific performance.*"⁴³

This conception of surrogate damages in *Semelhago* demonstrates the distinction between the *specific performance interest* and the *performance interest*. The former being compensation by a monetary substitute for the position should a decree of

⁴² Van der Merwe et al *Contract* 358 n 238 which refers to Friedrich Mommsen's 'Differenztheorie' as originally formulated in *Zur Lehre von dem Interesse* (1855); see further HJ Erasmus "Aspects of the History of the South African Law of Damages" (1975) 38 *THRHR* 104 113-114.

⁴³ *Semelhago v Paramadevan* 1996 2 SCR 415; 136 DLR (4th) 1 (SCC) para 19 (emphasis added).

specific performance be granted; and the latter as compensation for the position as if the performance was forthcoming according to the contract. It can be noted that the Ontario Appeal Court's accepted deductions do appear to take retrospective elements that are consequent upon an ordinary damages assessment of the performance interest into account in this award. These deductions were, however, criticised by La Forest J of the Supreme Court of Canada in saying he had 'reservations of the propriety of these deductions', but found that without cross-appeal by the respondents with respect to the award of damages the award was binding.⁴⁴ As such there appears strong *obiter* suggestion by La Forest J that these deductions are misplaced in the concept of surrogate damages in Canadian law, which accords with the proposed theory of specific performance interest damages.

An ordinary conception of damages aims to place the plaintiff in a position as if the contract had been performed. But damages as a substitute for specific performance upon this Canadian *Semelhago* conception does not seek to place the plaintiff in the position as if the contract had been properly carried out, but rather to put the plaintiff in the position as if an order of specific performance had been granted and effected. And *Semelhago* demonstrates how this remedy can compensate beyond the position of fulfilment of the contract – that is, beyond the performance interest. If fulfilment of the contract were the measure of the award, the defendant would have rightly been entitled to the deduction of the plaintiff's increase in retained property (assuming and as was the case herein, being part of the financing agreement that the defendant can prove that the plaintiff would have otherwise sold the property). As such *Semelhago* can be construed as providing some patrimonial entitlement in the grant of specific performance which can be awarded, at the election of the plaintiff, as either *in forma specifica* or by monetary compensation.⁴⁵ And this explains the reason why surrogate damages would not need to account for the value gained through retaining the old property – as such would not need to be deducted for a grant of specific performance *in forma specifica*.

This conception allows a theory of contract to account for the theoretical and purposive distinctions between the reason for a grant of specific performance and that of contractual damages. Damages protect the plaintiff's performance interest

⁴⁴ Para 24.

⁴⁵ This can be seen in the fact that if one looks back hypothetically on the facts of *Semelhago v Paramadevan* 1996 2 SCR 415 and were to suppose that the plaintiff elected specific performance *in forma specifica*, the resultant enforcement of transfer would still have placed the plaintiff in a position with the pre-trial increase in value in of his own retained property.

insofar as compensation in terms of money can do so in accordance with its rules on limitation of liability. However, the remedy of specific performance protects the specific performance interest as triggered upon breach. And when this remedy is awarded in the form of a monetary surrogate it functions as a compensatory substitute for this interest, which would avoid the traditional rules on limitation of liability as such are not accounted for in an award of specific performance.⁴⁶

This specific performance interest could also be explained as being the performance interest brought forward from the time of breach to be considered activated at the point of court enforcement.⁴⁷ Furthermore despite being expressed as a ‘true *equivalent* of specific performance’⁴⁸ this does not entail market value analysis is being precluded – in fact *Semelhago* expressly formulates the specific performance interest as the difference in market value to the price to be paid. This construction attaches as an equivalent value to specific performance and not of the performance – as is widely constructed in the South African literature. It is therefore submitted that alternative constructions which focus on ‘commensurate monetary value of the performance expected under the contract’ or such similar ideas focusing on the *equivalency* of the performance in monetary terms are mistaken in taking a view with only one eye open in failing to distinguish the role of the performance interest damages and specific performance interest damages.⁴⁹

⁴⁶ See Erasmus, Gauntlet & Visser “Damages” in *LAWSA* 7 para 56 for an alternative explanation in that a duty to mitigate damages arises only upon rescission since the contract is otherwise in full operation; See also JM Potgieter et al *Visser & Potgieter Law of Damages* 362 n 103. This distinction is reminiscent of the earlier discussed distinction between the remedy flowing from the contract itself as opposed to from its breach. It is submitted, as above, this distinction does not properly account for a theory of contract which provides for the availability of surrogate damages. However, such can be properly understood and explained upon distinguishing the interests to which compensation is being awarded: *id est* the *performance interest* and the *specific performance interest*.

⁴⁷ This idea appears to be captured by DJ Joubert *Contract: General Principles of the Law of Contract* (1987) 257 where he states that:

“Since the creditor can in cases where he does not in fact rescind the agreement claim specific performance, whether or not the court will grant the decree, and *damages as the surrogate of performance in the alternative*, it would appear that *the creditor can claim the value of the goods at the time of the action and is not restricted to the value at the time of delivery*. ... This means the creditor can claim either the value at the time fixed for delivery or the value at the time of the action, whichever is the higher.” (Emphasis added).

Joubert seems to therefore already offer in South African law a statement of this remedy which accounts for pre-trial increases – although the framing of the last sentence appears not to adequately reflect the separate conceptual bases of the remedies as discussed above. It is submitted that the last sentence should as such be considered and understood rather in light of the discussion above of the distinction of a claim for the *performance interest* as per the usual *id quod* interest damages and that of the *specific performance interest* by a monetary surrogate. One can then understand this last line to mean that a creditor can claim *id quod* interest damages in conjunction to *specific performance interest damages* and as such the claim could go beyond the specific performance value.

⁴⁸ 1996 2 SCR 415; 136 DLR (4th) 1 (SCC) para 19.

⁴⁹ See S Rowan *Remedies for Breach of Contract: A Comparative Analysis of the Protection of Performance* (2012) 138-139.

Upon this conception of a specific performance interest damages one can attempt to justify and explain J C de Wet's dual form construction of specific performance in South African law of contract. It is a form of compensation for specific performance enforcement in the sense of granting damages for the specific performance interest – as opposed to damages for the performance interest. As such it is proposed that a label as 'damages as a surrogate for (or in lieu of) *specific performance*', as opposed to 'damages as a surrogate of performance' and such similar widespread constructions in South African legal literature, would better reflect this remedy by tying it to the interest it compensates.⁵⁰

4 Some normative and evaluative considerations

An issue that has often been raised to the concept of surrogate damages is that it is 'overcompensatory'.⁵¹ But such would not be a unique criticism against the concept of surrogate damages.⁵² This is demonstrable by the above conception of a specific performance interest, in that to hold such view would be an argument against specific performance *in toto*.⁵³ This paper is very much limited in scope to the notion of surrogate performance and so cannot fully explore this topic of the justificatory basis for specific performance as a remedy, but will briefly mention two apparent failures of this criticism in relation to surrogate damages.

First, the acknowledgement of specific performance as the primary remedy for breach of contract in South African law demonstrates a normative failure of the criticism in our jurisdiction.⁵⁴ This is to say that from a normative perspective, built

⁵⁰ See for instance Hutchison & Du Bois "Contracts" in *Wille's Principles* 876; JM Potgieter et al *Visser & Potgieter Law of Damages* 201; Van der Merwe et al *Contract* 328, 355.

⁵¹ See Smith "Understanding Specific Performance" in *Comparative Remedies for Breach of Contract* 221, 230-232.

⁵² See for example *Haynes v Kingwilliamstown Municipality* 1951 2 SA 371 (A) 378H-379 where it is stated that "the cost to the defendant in being compelled to perform is out of all proportion to the corresponding benefit to the plaintiff and the latter can equally well be compensated by an award of damages".

⁵³ This indeed is an issue considered by E Yorio "In Defence of Money Damages for Breach of Contract" (1982) 82 *Columbia Law Review* 1365 1398-1402, especially nn 183 and 186. However Yorio also shows that there is a distinction in the award as the "strict rule" of specific performance (*in forma specifica*) and the 'modified rule' of specific performance (as a surrogate damage) entail different transaction costs. The 'liquidity cost' which results from damages can still be larger than the 'opportunity cost' and so transaction costs vary. As such the position may depend on low costs in negotiating specific performance as well as low transaction costs in line with Coase Theorem. Due to the limited scope of this paper these assumptions will be accepted for the sake of argument.

⁵⁴ See cases noted in n 28 above.

upon our foundational principles of contract,⁵⁵ a grant of specific performance upon claim by the plaintiff is subject only to the court's equitable discretion to refuse it, and so justifies the entitlement to the interest. As such these fundamental cornerstones of the theory of contract in South Africa would also serve as normative justification for specific performance interest damages – being only a compensatory surrogate thereto – as they protect the same interest.

Secondly, from an evaluative perspective it is a point of contention whether there is any definitive empirical evidence of justification that would either favour or preclude a grant of specific performance, and therefore its surrogate form. The availability of the remedy necessarily depends on the conception of 'rights' we adopt which inherently take some distribution of resources for granted. This as Robert Gordon⁵⁶ poignantly notes involves a presupposed or decided economic assumption as to the normative distributive consequences that we follow. This legal realist position is a nature of law argument which necessarily sees law as an instrument of domination in the sense of legitimating a particular social order and its inequalities and hierarchies.⁵⁷ Robert Hale⁵⁸ famously shows that acknowledging that law has coercive and distributive consequences is not a criticism in itself, as to shift the *status quo* necessarily involves further coercive and distributive choices, and so again relies on distributional assumptions or mandate. It is a consequence of the nature of law itself which Hale argues can only be justified by a reflection and awareness of these assumptions of distribution and coercion so as to rightly acknowledge them in legal reasoning. As such the criticism of overcompensation of specific performance cannot hold evaluative weight to sink the notion without a fuller and deeper understanding of these coercive and distributive arguments.⁵⁹ The

⁵⁵ The cornerstones of the law of contract are: (i) freedom of contract (which again presupposes a normative favour towards humanism and individualism as it developed and influenced the Roman-Dutch law in the 17th century); (ii) sanctity of contract, or its historical Latin maxim *pacta sunt servanda* (which again has historical presuppositions towards 'duty' conceptions of law as developed through canon law); (iii) good faith (as a historical development from Roman law of consensual contracts *bonae fidei* before the development of a generalised theory of contract law); and (iv) privity of contract (which again follows much of the philosophical developments of humanism and individualism).

⁵⁶ See RW Gordon "Unfreezing Legal Reality: Critical Approach to Law" (1987) 15 *Florida State University Law Review* 423.

⁵⁷ On this nature of law theory generally see AC Hutchinson "Mice Under a Chair: Democracy, Courts and the Administrative State" (1990) 40 *University of Toronto Law Journal* 374 403; See also the seminal work of legal realist RL Hale "Coercion and Distribution in a Supposedly Non-Coercive State" (1923) 38 *Political Science Quarterly* 470.

⁵⁸ R Hale (1923) *Political Science Quarterly* 470.

⁵⁹ As according to HLA Hart *The Concept of Law* 2 ed (1994) 96, Kelsen shows that many of the puzzles in the institution of contract or property are clarified by thinking of the operations of making contract or transferring property as the exercise of limited legislative power by individuals.

school of economic analysis of the law has for the past three decades or so attempted to specifically answer this evaluative question of the reason to grant specific performance, or rather a reason not to grant it. It attempts to do so through the concept of economic efficiency – that is whether there is a maximisation of utility in its award or not. But efficiency analysis it would seem can yet offer a definitive answer as to when and if specific performance should be granted given the absence of empirical evidence about ‘transaction costs’.⁶⁰ This is a point of contention and continued debate under economic analysis as to the efficiency of the availability or the non-availability of specific performance.⁶¹

So following Hale’s idea, given our particular choice of distribution which the law enforces, one cannot properly say that specific performance over-compensates without some comparator to an alternative choice of distribution. So necessarily by saying specific performance overcompensates assumes a comparator – namely it assumes damages as the correct position. And turning this idea on its head, if one is to assume for the sake of argument that specific performance were actually the primary remedy and the correct remedy, one could say unblushingly that rather damages undercompensates. One necessarily makes a normative choice in the relevant remedy with underlying assumptions of the conception of the right, which are based on legal reasoning and judicial policy as developed through value judgments in the development of the common law of contract in South African law. This is a topic for much fuller investigation, but what this argument seeks to demonstrate for the purpose of this paper is that on this explanation of specific performance interest damages one cannot claim on a theory of contract that surrogate damages would overcompensate where it is seen that specific performance would not do so as well, unless equitable factors are specifically raised to the enforcement being in the form of a monetary award. This would seem best resolved by the courts’ equitable discretion to refuse its award upon extension of the *Benson* rule.⁶²

⁶⁰ See for further depth E Posner “Economic Analysis of Contract Law after Three Decades: Success or Failure?” (2003) 112 *Yale Law Journal* 829; Smith “Understanding Specific Performance” in *Comparative Remedies for Breach of Contract* 225.

⁶¹ Smith “Understanding Specific Performance” in *Comparative Remedies for Breach of Contract* 225.

⁶² *Benson v SA Mutual Life Assurance Society* 1986 1 SA 776 (A); see the judgment of Van Winesen AJA in *ISEP Structural Engineering and Plating (Pty) Ltd v Inland Exploration Co (Pty) Ltd* 1981 4 SA 1 (A) 16A-F where he would acknowledge that surrogate damages as a form of specific performance would be equally subject to the court’s equitable discretion as with an award of specific performance.

However, effecting the specific performance interest, whether *in forma specifica* or by way of monetary surrogate, can cost the defendant more than what is gained after breach (that is that part or all of the pre-trial increase may not have gone to the benefit of the defendant) and so can be said to ‘over-disgorge’ as well.⁶³ As such disgorgement of profit theory is also not a full explanation for specific performance interest damages. Therefore, one cannot fully explain specific performance interest damages as placing the plaintiff in the position he or she would have been should the contract have been duly performed (the performance interest); nor either as placing the defendant in the position as if the contract had been duly performed (a disgorgement of profit interest).⁶⁴ Rather, as Lionel Smith puts it:

“When specific performance is granted, the court is denying the defendant has the ability to choose, unilaterally, to put an end to the contract and pay damages. Performance (not a right to be compensated for loss of the performance interest) belongs to the plaintiff. Anything else is making the best of a bad situation.”⁶⁵

As such where one is unable to claim specific performance *in forma specifica* by impossibility, or where it is refused by the court on principles of equity, the court could still uphold the integrity of a contract as far as is then possible by damages as a surrogate for specific performance.⁶⁶ This can be justified on the fundamental principles of *pacta sunt servanda* by preventing a promisor from unilaterally electing to breach upon an informed calculation of the expected contractual damages cost for such breach, as mitigated by the rules for contractual damages, against potential gain upon the breach. Therefore the evaluative justification that can be entailed from this approach of more fully protecting the specific performance interest with surrogate damages is that it more fully protects the integrity of the contract, making it an even more valuable and certain institution, and as such a more valuable

⁶³ Smith “Understanding Specific Performance” in *Comparative Remedies for Breach of Contract* 230. Such can be exemplified by illustration in *Semelhago*: if one were to find that the defendant had sold on the property to a third party for less than the value it was worth at the time of trial, then the specific performance interest and award of the court would be an amount exceeding the defendant’s gain upon breach.

⁶⁴ See further MA Eisenberg “The Disgorgement Interest in Contract Law” (2006) 105 *Michigan Law Review* 559.

⁶⁵ Smith “Understanding Specific Performance” in *Comparative Remedies for Breach of Contract* 231.

⁶⁶ Canadian law leaves this as an election to the plaintiff. However, the utility of damages in lieu of specific performance also raises other factors. Therefore one needs to also evaluatively consider surrogate damages in comparison to specific performance *in forma specifica* and so actually when the remedy should be available. Such questions were raised by Jansen JA in *ISEP* which will be discussed later below under section V.

commodity as a personal right. This benefits the promisee in being more certain of the remedial outcome;⁶⁷ and benefits the promisor in that again certainty avoids extraneous transaction costs upon breach (such as legal fees or arbitration expenses). So having an ‘over-compensatory’ remedy paradoxically improves the position of all contractants in that by upholding its credibility to a higher standard it becomes a more valuable *vinculum iuris*. As such a contractant could be more certain of the financial outcome of a contract and then ascertain a higher *ex ante* price given the higher level of security offered within contractual bonds.⁶⁸

5 The scope of specific performance interest damages

To simply equate the requirements and considerations for specific performance interest enforcement as a surrogate with those of its *in forma specifica* award, however, would be this time to hold a view with one eye closed. For effecting the specific performance interest as a monetised substitute implicates factors beyond enforcement *in forma specifica*. Jansen JA in *ISEP* is correct in considering the issue that granting surrogate damages raises the question of ancillary rules such as:⁶⁹

- i. Whether the plaintiff has a choice between specific performance *in forma specifica* or as damages in lieu thereof;⁷⁰
- ii. Whether such award rests only on considerations of the plaintiff’s choice, or in other words whether the defendant could still discharge the obligation by specific performance *in forma specifica* should the plaintiff elect for damages as a surrogate; and
- iii. If specific performance is refused on the court’s equitable discretion would this necessarily be a refusal of it in the form of a substitute, or could the court still grant it in the alternative form.⁷¹

⁶⁷ Smith “Understanding Specific Performance” in *Comparative Remedies for Breach of Contract* 232.

⁶⁸ This idea of a higher *ex ante* price and further merits of specific enforcement is discussed at length in S Thel & P Siegelman “You Do Have To Keep Promises: A Disgorgement Theory of Contract Remedies” (2011) 52 *William and Mary Law Review* 1181.

⁶⁹ 1981 4 SA 1 (A) para 7E-8A.

⁷⁰ As seen from *Semelhago*, Canadian law leaves it to the election of the plaintiff creditor. This seems to accord with the provided justifications of protecting the integrity of the promise in line with *pacta sunt servanda* as well as deterring breach on the explanation of disgorgement theory.

⁷¹ 1981 4 SA 1 (A) para 7G where Jansen JA remarks:

These are valid issues, but which are not insurmountable and perfectly catered to a common law system which can answer these casuistically on the circumstances of each case. It is submitted also that the framework for these answers is already present within the courts' considered requirements of specific performance. The two essential requirements in South African law for a grant of specific performance are authoritatively laid down in *Farmer's Co-Operative Society (Reg) v Berry*⁷² that:

- i. The plaintiff must have performed or be ready to carry out his or her own obligations as per the principle of reciprocity; and
- ii. The defendant must be in a position to perform – that is objective and subjective possibility of performance.

A third requirement in light of *Haynes*, as confirmed by *Benson*, must also be added hereto:

- iii. That the grant of specific performance must not be against public policy – or put differently, that the principles of equity do not militate for its refusal to be granted.

Propositions (i) would be accounted for in specific performance interest damages as demonstrated by *Semelhago*; however propositions (ii) and (iii) are implicated should the performance be altered to a monetary substitute.

5 1 Consideration of proposition (ii) – subjective and objective possibility, and Jansen JA's first and second questions

The possibility of performance raises a new consideration if one provides the availability of compensation in lieu of specific performance. Rules regarding the instances of surrogate performance would need to be considered by the court. It is submitted here that because supervening impossibility is said to ordinarily extinguish the obligation and release the debtor if the impossibility was due to *vis maior* or

"If specific performance were to be refused because it would operate "unreasonably hardly" on the defendant, would the plaintiff still be entitled to the objective value of the performance itself? It would seem not – otherwise the very hardship leading to refusal of the specific performance could still be inflicted upon the debtor by granting the objective value of the performance, as would be illustrated by the case of an obligation to reinstate in respect of a building destined for immediate demolition. In a case such as the present, the award of the objective value (reasonable costs of reinstatement) would be as unreasonable as an order for specific performance."

⁷² 1912 AD 343 350-351.

casus fortuitus, it would naturally follow that specific performance cannot be awarded being a remedy of the first category discussed above – namely one aimed at keeping the contract alive.⁷³ As such it naturally follows that surrogate damages as a form of specific performance would also in principle be unavailable.

This general rule on supervening objective impossibility is qualified in instances where either the debtor was in *mora* at the time (*mora* being said to perpetuate the obligation), or otherwise where he or she undertook the risk of performance becoming impossible (for example by express or tacit term in the contract).⁷⁴ In such cases, however, if the obligation is said to continue then specific performance in principle should be available. Enforcement *in forma specifica* would be impossible and so only a claim of damages in lieu of specific performance would be available.

Furthermore where one of the parties is responsible for the impossibility, such conduct would normally amount to breach of contract, generally called ‘prevention of performance’. Fault is an essential element for this form of breach, as judged according to the usual standard of the reasonable person.⁷⁵ If prevention makes performance subjectively or relatively impossible then the obligation in the literature is said to remain in force and the usual pattern of rules for remedy on breach follow, with exception that, by the very nature of the breach, specific performance *in forma specifica* cannot be granted.⁷⁶ However, the breach in principle still triggers the specific performance interest. And because of the fault of the breaching party this consequent impossibility should not validly vitiate this interest of the plaintiff. In principle it follows then that the obligation need not be said to have terminated and that specific performance is available to the debtor, but only in the form of damages in lieu thereof. This remedy seems accepted in the literature and would as such be better explained on this analysis as not terminating the obligation, but providing the specific performance interest in a surrogate damages form.⁷⁷

⁷³ Van der Merwe et al *Contract* 466; Hutchison *Contract* 205-206, 383-384; Hutchison & Du Bois “Contracts” in *Wille’s Principles* 871 n 1286.

⁷⁴ Hutchison *Contract* 383.

⁷⁵ Hutchison *Contract* 383; Hutchison & Du Bois “Contracts” in *Wille’s Principles* 871 n 1284.

⁷⁶ Van der Merwe et al *Contract* 467; Hutchison *Contract* 301-302. In such a case where the debtor is to blame for his or her inability to perform the creditor’s remedies are to: (i) cancel the contract, recover any performance already made as restitution, and claim damages in respect of any losses suffered as a result of the breach; or (ii) can abide the contract in performing the outstanding obligation and claim damages in lieu of performance. Such applies *mutatis mutandis* to the creditor who has rendered performance impossible to the debtor.

⁷⁷ For the position in the literature see for instance Hutchison *Contract* 302; Van der Merwe et al *Contract* 467 n 125; Hutchison & Du Bois “Contracts” in *Wille’s Principles* 871 nn 1287 and 1288; De Wet & Van Wyk *Kontraktereg* 175.

Where prevention of performance results in objective impossibility the debtor is again said to still remain liable;⁷⁸ but, being objectively impossible, this liability cannot exist for the original agreed performance. It would seem already the law recognised a monetary award must substitute liability in such an instance, but whether such remedy is by nature one of damages or of surrogate damages is a matter of contention.⁷⁹ It would follow on theory again that if this obligation is not said to terminate upon prevention of performance then in principle specific performance is available and would as such only be able to be enforced as compensation in lieu thereof. As such specific performance interest damages would provide a theoretically sound measure for such an award. The difference in this instance is that objective impossibility means that its measure is made purely in the hypothetical in that no objectively available comparison to the position the plaintiff would hold on enforcement of specific performance is available. If for example the house in *Semelhago* was destroyed, one could operate only within the hypothetical value of the property. This is not theoretically problematic as it follows from the very nature of compensation being a substitute. Furthermore given the consonance one would desire in prevention of performance remedies, being classified both as instances of fault-based breach rather than ones of the type of impossibility, the same remedy in the position of subjective impossibility should in principle be available. This also follows on the general principle of law that a party should not benefit from his or her own wrongdoing; as well as can be justified on the specific performance interest analysis in that specific performance interest damages should be awarded so that the breaching party cannot elect to terminate the obligation by breach and choosing to merely suffer contractual damages.

These considerations on the requirement of fault for prevention of performance, as well as this reasoning towards a specific performance interest award, apply *mutatis mutandis* to prevention by a creditor.⁸⁰

In *MV Snow Crystal Transnet Ltd t/a National Ports Authority v Owner of MV Snow Crysta*⁸¹ the appellant breached a contract to make available a dry dock at the Cape Town harbour for the docking of the respondent's vessel for a two-week period despite booking at least six months in advance and the availability of an alternative dry dock for the other vessel but not the respondent's. Scott JA finding on the facts

⁷⁸ See Van der Merwe et al *Contract* 467.

⁷⁹ 467 n 215.

⁸⁰ 324.

⁸¹ 2008 4 SA 111 (SCA).

that time was clearly of the essence the appellant was in *mora ex re* on interpretation of the time of performance per the contract.⁸² Scott JA was also not persuaded that supervening possibility occurred given the ability to move the other docked vessel, and as such was rather one of prevention of performance.⁸³ As such Scott JA confirmed the damages awards under all three heads of the court *a quo*: that (i) cost of cleaning the bottom of the vessel and the propeller while the vessel was afloat in Cape Town harbour as a temporary measure necessary to remove the accumulated underwater growth so as to enable the vessel to operate efficiently until such time as the work could be done properly in a dry dock;⁸⁴ (ii) certain costs for painting the vessel for display to charterers given that had the work been done at a dry dock it would have otherwise lasted another three years, but due to the breach would need to be redone;⁸⁵ (iii) loss of charter hire during the period the vessel was then subsequently dry docked at another dry dock due to the appellant's breach.⁸⁶ These damages follow as compensation for the *id quod* interest after the contract was validly cancelled upon breach, being a contract found to be where time was of the essence.⁸⁷ This case is noted to show that if the agreement were not cancelled and instead damages in lieu of specific performance were claimed, it would make available damages as the market value of the dry dock service less the agreed price, together with all the above listed *id quod* interest damages. Given that this booking was made six months in advance the claim for the market value of the dry dock service less its initial contract price can be of significant value. This damages award would also be equitable in that it either disgorges the defendant of any profitable benefit gained as result of the breach, or even if this benefit was not realised by the defendant (for example by having ceded his or her book debts *in anticipando* to a third party) it nevertheless operates as a deterrent against breach having had the possibility of the gain subsequent to breach which could act within the party's mind on considering whether to abide by his or her contractual obligation. As such this remedy can bring a party in two minds on performing his or her obligation closer to the *ad idem* consensus of its formation.

As such proposition (ii) of *Farmer's Co-op* would be extended by the availability of a surrogate damages remedy as both subjective and objective possibility of the *in*

⁸² Para 27.

⁸³ Paras 29-30.

⁸⁴ Para 31.

⁸⁵ Para 32.

⁸⁶ Para 33.

⁸⁷ Para 15.

forma specifica performance need not necessarily be available for the surrogate award, so extending further protection to the specific performance interest. This availability and extended protection can naturally be limited by a court's equitable discretion to refuse specific performance such as in instances of undue hardship.

On consideration of these factors one can perhaps reason some answers to Jansen JA's first and second questions. It is submitted that naturally performance *in forma specifica* is the primary mode of enforcement for specific performance. This is a natural normative consequence of the current law of South Africa which holds specific performance as the primary remedy.⁸⁸ That is to say these cases of enforcement of specific performance presuppose the primacy of specific performance *in forma specifica*. Surrogate damages would as such be a secondary mode of specific performance available at the court's equitable discretion. That is that in instances of the court's equitable discretion to refuse specific performance according to the *Benson rule* that it then, when finding it equitable to refuse specific performance *in forma specifica*, first consider surrogate damages as a monetary substitute before its complete refusal for specific performance. To put this in the form of a rule for the sake of clarity it could be constructed as follows: the court must in principle give effect to the plaintiff's specific performance interest, first and foremost in its terms *ex consensu*, otherwise as an equivalent monetary surrogate, subject only to the court's equitable discretion to refuse such specific performance in appropriate cases.⁸⁹

As such one could consider the extended proposition (ii), allowing surrogate damages even in instances of subjective and objective prevention of performance, to help answer Jansen JA's first and second question, in that its extension requires rules to limit liability on equitable considerations. Specific performance interest damages could not be entirely at the election of the plaintiff as in instances of prevention of performance there would be no election. And given the principles of *pacta sunt servanda*, freedom of contract and good faith it could follow that *in forma specifica* enforcement should be the primary-mode of the specific performance remedy as such would generally most accurately uphold and effect the intentions and expectations of the parties. The mode of enforcement could otherwise be seen to rest within the equitable discretion of the court in each case; however the integrity

⁸⁸ See cases as noted in n 25 above.

⁸⁹ Van Winsen JA's statement in *ISEP Structural Engineering and Plating (Pty) Ltd v Inland Exploration Co (Pty) Ltd* 1981 4 SA 1 (A) para 16A-F suggests that indeed surrogate damages would be subject to the court's equitable discretion to refuse specific performance; See below under section 5.

of contract rests in its value of certainty, and as such a general proposition of availability would be preferable. Therefore having *in forma specifica* as the primary mode and surrogate damages as a secondary mode seems better aligned with contract theory and practical commercial utility considerations. The availability this secondary-mode specific performance remedy could then act as a *via media* between specific performance *in forma specifica* and its refusal (leaving only *id quod* interest damages). The discussion of *MV Snow Crystal* shows this possible benefit.

In instances of what shall be called a ‘surrogate damages clause’, agreeing to provide for damages as term in the contract, such would merely be an instance of specific performance enforcement *in forma specifica* and so would fall under this primary mode of consideration.⁹⁰ Otherwise its enforcement would be in the secondary form of specific performance. This implicates proposition (iii) and Jansen JA’s third question.

5.2 Factors on proposition (iii) – undue hardship and equitable discretion, and Jansen JA’s third question

The court as such would need to consider in the circumstances whether there is equitable reason to refuse granting the specific performance interest *in forma specifica* or else as surrogate damages. The case of *Ruxley*⁹¹ demonstrates an instance where for reasons of undue hardship and on policy considerations against making an order which is economically inefficient, the court would find it has an equitable discretion to refuse specific performance. *Ruxley* is an English case concerning the building of a swimming pool at a specified diving depth. The performance was defective in building the pool only 6 feet in depth when the contract was for a pool of 7 feet and 6 inches. However, evidence was led to show this depth was suitable for diving purposes and that the deeper depth at 7 feet 6 inches would not affect the market value of the property. This case will be considered in greater detail below, but for present purposes this case is mentioned as an example where effecting specific performance would require digging up a pool, which is a costly and

⁹⁰ It is noteworthy that Van der Merwe et al *Contract* 329 suggests that “damages as a surrogate of performance should only be available if there is an appropriate term in the contract [to this effect]”. They accept this contention but make no reference to its source and so it is assumed to be accepted as there position. Such a position it is submitted is correct as an instance of specific performance *in forma specifica*, but also a view with one eye open as discussed above, for it fails to properly construe and give effect to the specific performance interest of the promisee in appropriate circumstances where specific performance *in forma specifica* is impossible or refused upon the equitable discretion of the court.

⁹¹ *Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344.

economically inefficient remedy which could arguably act ‘unreasonably hardly’⁹² on the defendant. This result of *in forma specifica* enforcement in South African law may be seen like in *Haynes* to operate as an unreasonable hardship which would preclude its specific enforcement. However, so too would damages as a surrogate of specific performance in the strict sense. Upon the specific performance interest analysis such damages would necessarily be the cost it would take to correct the defect, which would still be an onerous and economically inefficient enforcement.⁹³ This lends credence to Jansen JA’s observation in *ISEP* that the ‘very hardship leading to refusal of the specific performance could still be inflicted upon the debtor’ in a grant of surrogate damages, as was also his view in *ISEP* concerning the demolition of the building.⁹⁴

But this instance can be contrasted with *Haynes* where the respondent municipality had contracted to release 250 000 gallons of water per day to Haynes, but breached this obligation in a period of unprecedented severe drought. Haynes’s claim for specific performance was refused on the ground that it ‘would have worked very great hardship not only to the respondent but to the citizens of Kingwilliamstown to whom the respondent owed a public duty to render an adequate supply of water’.⁹⁵ In such a case involving a municipality, with the vast backing of government resources, an award of specific performance may indeed cause undue hardship and interfere with its public duty when concerning a resource such as water which was particularly scarce during that period; but where specific performance interest damages would not necessarily raise these same considerations. In such a case consequential loss would be of relevance; but with a shortage of water its market

⁹² A phrase used by Jansen JA in *ISEP Structural Engineering and Plating (Pty) Ltd v Inland Exploration Co (Pty) Ltd* 1981 4 SA 1 (A) 5, 7 as adopted from De Villiers AJA in *Haynes v Kingwilliamstown Municipality* 1951 2 SA 371 (A) 378H-379.

⁹³ *Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344 can be seen as an instance where not only specific performance interest enforcement, whether *in forma specifica* or by way of surrogate damages, but also where there the breach caused no diminution in the market value of the property, being built at a safe and suitable depth for diving, and so also could not be redressed by *id quod* interest damages. This lack of available remedy is resolved in English law by a theory of *loss of amenity* damages. The original of this paper considers this conception more fully and comparatively and offers that in South Africa such a position is better resolved upon some conception of disgorgement of profit theory; Schreiner JA in *Cardoza v Fletcher* 1943 WLD 94 follows a *reasonable cost of correction* approach where when the cost of correction would act unreasonably hardly or otherwise be inappropriate as an award, then a price “deduction” could be awarded. This *price deduction* is different to a *BK Tooling* price reduction (as such, as shown above, follows a specific performance interest award) as this deduction appears to be a measure disgorgement. In this case, without being able to prove a loss where the external walls of an outbuilding were built 9 inches instead of the contracted 11 inches, the court still awarded £20 damages to the plaintiff in considering that this breach had had some benefit for the defendant.

⁹⁴ 1981 4 SA 1 (A) para 7G.

⁹⁵ *Haynes v Kingwilliamstown Municipality* 1951 2 SA 371 (A) 381.

value may have rapidly appreciated, and as such an award of damages as a surrogate of performance could yield a stronger interest for the plaintiff in claiming this market value less the agreed price according to specific performance interest damages which account for pre-trial increase in value.

However, such a case may also evoke public policy issues militating against its award. For instance the potential chilling effect through extending liability and opening the door to claims for heavy and unanticipated increases in market value, which could stifle tender processes and public contracts. This, however, would be a matter for consideration on the facts of each case. It follows then that the recognised category of undue hardship as a basis for the refusal of specific performance could extend also as a refusal for an award of surrogate damages if it is to be considered an available remedy in South African law. Specific performance interest damages would therefore need to undergo the same equitable analysis as for specific performance *in forma specifica* in each case.

Another example of instance where specific performance interest damages would implicate different factors is illustrated in the case of insolvency. *Somchem (Pty) Ltd v Federated Insurance Co Ltd & another*⁹⁶ where Friedman J finds that the trustee of an insolvent can elect to repudiate the contract, upon which the promisee is denied the remedy of specific performance. In other words the contract survives and merely rests upon the decision of the trustee to uphold or cancel the contract – much as any contractant may repudiate the contract, but with the exception that in such case the other party could enforce specific performance. This rule against enforcement of specific performance is explained by the supervening *concursum* for which the trustee is meant to act in the benefit of all creditors.⁹⁷ An allowance of surrogate damages in such an instance could conceivably increase the damages claim. This factor implicates a unique consideration in the case of insolvency. Because the supervening election of the trustee is on policy grounds provided for the trustee to effectively manage the insolvent estate for the benefit of the creditors, it would seem that the policy grounds informing the *Somchem* rule of denying the grant of specific performance would extend to specific performance interest damages. As such the same underlying reason of the supervening *concursum* would seem to also apply to prevent surrogate damages on insolvency of the promisor.

⁹⁶ 1983 4 SA 609 (C) para 615-616

⁹⁷ Para 615-616

Insolvency after all is a situation where the integrity of a contract is already at stake for the reason of the ability of the promisor to actually be able to uphold his or her promise; and as such one can further explain the result in that the underlying justification of specific performance as upholding the integrity of the contract holds less weight as its integrity is already compromised by the promisor's insolvency, and so strict application of the specific performance interest would also hold less justificatory weight.

These instances demonstrate that proposition (iii) could be used to answer Jansen JA's third question of whether its refusal *in forma specifica* necessitates its refusal as surrogate. The instance of *Somchem* in insolvency and *Ruxley* and *ISEP* as undue hardship cases show instances where indeed that could be the case. However, as Hefer JA states in *Benson*, as quoting from De Villiers AJA in *Haynes*, 'the [court's] discretion is not circumscribed by rigid rules'.⁹⁸ There are no hard and fast rules in a court's equitable discretion to refuse specific performance; and this, it is submitted, would continue should an award of specific performance interest damages be available in South African law of contract. Van Winsen AJA's judgment in *ISEP* acknowledges this possibility.⁹⁹

6 BK Tooling's relaxation of the principle of reciprocity and its parallel to specific performance interest damages

The unanimous decision of Jansen JA in *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk*¹⁰⁰ in a grant of a 'reduced contract price' as remedy in a case of non-conformity of performance could be explained in terms of this specific performance interest analysis.¹⁰¹ In this case the respondent undertook a contractual obligation to hollow out two sets of steel moulds for the appellant according to the latter's strict specifications that they could be used to make rubber mountings for motor-vehicle engines, as against payment of R150 per a mould which were to be delivered in two separate batches of 16 moulds each with payment to be made after delivery of each batch. The first set of moulds was delivered, and although the appellant averred these as defective, both the trial court and the

⁹⁸ *Benson v SA Mutual Life Assurance Society* 1986 1 SA 776 (A) 78F-H.

⁹⁹ 16A-F.

¹⁰⁰ 1979 1 SA 391 (A).

¹⁰¹ See also Van der Merwe et al *Contract* 340 n 98 where the authors consider that this remedy could "serve as a partial surrogate for actual performance".

Appellate Division found that they were duly accepted by the appellant and so to be satisfactory. However, with the second set the appellant proved that upon delivery the moulds were not according to specification; but when the respondent requested the moulds to be returned in order for it to correct the defective performance, the appellant refused and had this correction done by a third party engineering firm.¹⁰² The respondent claimed payment of the whole contract price of R4 800 – that is two batches of 16 moulds at R150 each – but the appellant paid only R1 200, alleging the cost of correcting the defects had been R3 600.

The Appellate Division confirmed the trial court's order for the full amount to be paid in respect of the first set, construing the delivery of batches as divisible performance at R2 400 per a set. But with regard to the second set of moulds the court rejected a strict application of the *doctrine of substantial performance* in line with the appellant's argument so as to avail the appellant with the *exceptio non adimpleti contractus* even in instances where the performance rendered is substantially compliant with specification. But the court also relaxed the strict application of the *principle of reciprocity* by refusing a strict application of the *exceptio* in allowing in this case where (i) the appellant had utilised the performance and (ii) where the considerations of equity prevailed to relax the principle of reciprocity in line with the respondent's indication of willingness to rectify the defects, but was rendered impossible by the appellant's correction through another firm, that partial enforcement of the reciprocal obligation owing under the contract in the form of an award for a *reduced contract price* of R1 680 to be awarded – that is finding that R720 from the R2 400 would be taken from the reciprocal obligation as being the cost of the appellant to correct the defective second set of moulds.

The *BK Tooling rule* therefore provides that a court may allow a claim for a reduced contract price, based upon the cost of remedying the performance, where a party has made partial performance, but is unable or unwilling to render complete performance and the plaintiff can show:

- i. The contractant has not rescinded the contract;¹⁰³

¹⁰² Although the appellant did not allow the third party firm to complete the work, proceeding to do a part thereof itself.

¹⁰³ Otherwise if the contract were rescinded the application of the remedy would be limited to contractual damages; See further D Visser *Unjustified Enrichment* (2008) 553-554 who provides under his own proposed taxonomy, with apparent German law influence, that if the performance were so defective that the other party has a right to reject the performance and cancel the contract, the contractual nexus is not extinguished but transformed for restitution. But should the innocent party be

- ii. That the other party has utilised the incomplete or defective performance to his or her advantage;¹⁰⁴
- iii. That the circumstances are such that it would be equitable for the court to exercise its discretion in the plaintiff's for a reduced contract price;¹⁰⁵ and
- iv. That the performance is rectifiable and the amount it will cost to remedy the performance quantifiable.¹⁰⁶

This *BK Tooling* remedy of a reduced purchase price has requirements similar to those considered in the above section for a grant of surrogate damages. Requirements (i), (iii) and (iv) bear particular similarities to those considerations for an award of specific performance. And Jansen JA for the unanimous court in *BK Tooling* raises doubt as to requirement (ii) considering already that this requirement of utilisation may need to be abandoned.¹⁰⁷

It is submitted in light of these overlapping factors that this remedy in *BK Tooling* can be explained in terms of specific performance interest analysis. The appellant raised the *exceptio non adimpleti contractus* for payment on the second set of defective moulds. However, the court applying its equitable discretion allowed an award of enforcement of the contract through a partial surrogate damage which accordingly reduced the contract price. Upon this analysis one could explain the remedy as in effect being an enforcement of specific performance through an award of damages as a surrogate therefor. The cost of repairs in line with requirement (iv) would represent the deduction that would need to be made from the specific performance interest in the mould in order to correct the performance as would be

unable to return what was received in terms of the contract, the party rendering defective performance will be entitled to an enrichment action as an 'action for work and services rendered'.

¹⁰⁴ Note however that Jansen JA for the unanimous court in *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 1 SA 391 (A) 436 raises a certain level of doubt on this requirement acknowledging the possibility that this requirement of utilisation may have to be abandoned; See also Van der Merwe et al *Contract* 338 n 86.

¹⁰⁵ In this case it was the respondent's willingness to rectify the defects, but the appellants action of having corrected the defect through a third party firm making the carrying out of the respondent's promise impossible, that was used as a basis to justify the award on this basis of the principle of equity.

¹⁰⁶ The claim for this so-called 'reduced contract price' will usually be the amount it will cost to complete the performance, however, Jansen JA (423E) acknowledges again that the circumstances of a case may justify a different standard taking into account considerations of expedience, fairness and reasonableness; Cf *Thompson v Scholtz* 1999 1 SA 232 (SCA) where the court found in the instance of continuing obligations 'the breach, being... of a continuing nature, cannot be "cured" after the event, either in kind or in money' (243H), but rather took a "fairly robust approach" (249B) in modifying the *remissio mercedis* for the plaintiff's continuing occupation interest in the farm house as nevertheless being awardable despite lacking a calculation with any degree of accuracy (249D).

¹⁰⁷ See n 105 above.

required under an order of specific performance which accounts for the cost incurred by the order or other reciprocal obligations. As such specific performance interest damages can account for these reciprocal obligations or deductions in the award and so can provide a theoretical basis for the remedy in *BK Tooling* as giving effect to the specific performance interest of the respondent with the necessary deduction of the cost of correction.

7 Wading through the currently murky position in South African law of contract

The current position of the availability of an award of surrogate performance in South African law of contract is unclear. Even the widely considered rejection of surrogate damages as a remedy independent of ordinary damages in *ISEP* is a muddled by problems of actually identifying the *ratio* of the majority judgment. As much as all the judges made the same order of absolution from the instance, each had differing reasons. Four of the five judges construed the claim as one for surrogate damages. Hoexter AJA (with Viljoen JA concurring) took the view that such is not an independent remedy available in our law; while Van Winsen AJA (with Kotzé JA concurring) accepted its availability.¹⁰⁸ The fifth judge, Jansen JA, although agreeing that the law did not acknowledge a separate claim for damages as a surrogate of performance, found the claim was formulated as one for ordinary *id quod* interest damages. As such his judgment's view on surrogate damages is submitted to be *obiter*. Therefore according to the rules of *stare decisis* there was no *ratio* on the issue of the availability of surrogate damages as there was no majority rule there was a 2-2 split on the issue of the availability of surrogate damages – although the court's favour in this case leans towards its rejection.¹⁰⁹

It appears to be widely considered that the decision of *ISEP* has rejected the availability of a claim for surrogate damages in South African law of contract. But this is not clear as even Smalberger ADCJ for the Supreme Court of Appeal in *Mostert*

¹⁰⁸ *ISEP Structural Engineering and Plating (Pty) Ltd v Inland Exploration Co (Pty) Ltd* 1981 4 SA 1 (A) 16A-D with Van Winsen AJA after considering this to be the accepted position by modern textbook writers, as well by citing a list of old cases as authority that support the availability of the claim for an award of the cost of the performance of such obligation: *Verster v Fletcher* 21 Sc 660; *National Butchery Co v African Merchants* 1907 EDC 57; *Hertzog and Another v Sir Cornelis Wessels' Estate* 1925 OPD 141; *Sunjeevi v Wood* (1909) 30 NLR 76 78.

¹⁰⁹ See Van der Merwe et al *Contract* 329 which submits as well that Jansen JA's remarks may have been *obiter*.

seems to acknowledge it is unclear whether *ISEP* precludes the availability of the remedy. Smalberger ADCJ goes on to say that even if one accepts the majority decision as such a preclusion then he would consider the correctness of the decision open to doubt and so would consider this rule open to be found *per incuriam*.¹¹⁰ Smalberger ADCJ's view on the matter goes even further in that if one for the sake of argument were to accept *ISEP* as a rejection of the availability of surrogate damages and also that such rejection was correct, it could still be distinguishable as in a case like *Mostert*.

It would seem for the present time that at least the South Gauteng High Court has decided to completely ignore the possible implications of *ISEP* or the debate raised by *Mostert* entirely. In *Sandown Travel (Pty) Ltd v Cricket South Africa*¹¹¹ Wepener J makes no acknowledgment whatsoever to the decision of *ISEP* or even of *Mostert*, nor even the criticisms of writers or those of the Supreme Court of Appeal in *Deloitte Haskins*. Wepener J appears to simply accept that 'damages as a surrogate of performance' (although as was noted earlier this terminology is considered to confuse the protected interest and should rather be labelled 'damages as a surrogate of specific performance') is available in South African law and did not even consider a proposition to the contrary – as if this *ISEP* dilemma never existed. Wepener J's only source of authority to the proposition is from *Visser & Potgieter's Law of Damages*.¹¹² This a welcomed decision in its effect, however, it still reflects a lingering conceptual problem in the approach of South African law to this remedy.¹¹³ The *Sandown* decision could be more readily explained as on the *Semelhago* principle that the award, whether termed 'damages' or otherwise, be one for the compensation of the specific performance interest. Upon repudiation by the

¹¹⁰ *Mostert NO v Old Mutual Life Assurance Co (SA) Ltd* 2001 4 SA 159 (SCA) para 74 where Smalberger ADCJ finds this on the numerous criticism launched against *ISEP Structural Engineering and Plating (Pty) Ltd v Inland Exploration Co (Pty) Ltd* 1981 4 SA 1 (A); De Wet & Van Wyk *Kontraktereg* 212; Erasmus, Gauntlet & Visser "Damages" in *LAWSA* 7 para 45; Oelofse (1982) *THRHR* 63-65; *Van Immerzeel and Pohl v Samancor Ltd* 2001 CLR 32 (SCA) 45-46 (the relevant parts of which were left out of the published report of 2001 2 SA 90 (SCA) 96 F-G).

¹¹¹ 2013 2 SA 502 (GSJ).

¹¹² para 59.

¹¹³ *Sandown Travel (Pty) Ltd v Cricket South Africa* 2013 2 SA 502 (GSJ) paras 60, 61, 64 and 67; Such implication is made clear by Wepener J's approval of Van Winsen J's, as he was then called, decision in *Myers v Abrahamson* 1952 3 SA 121 (C) as precluding the availability of 'specific performance' in the context of employment contracts, but limiting the remedy to some form of damages. And this case also finds the court would have "exercised its discretion by *not* granting the plaintiff *specific performance* had it claimed it, but *rather* would have awarded damages as a surrogate of performance" (italicisation added to emphasise the implied terminological dissociation of a conception of surrogate performance as enforcement of the contract as a form of specific performance in monetary form).

defendant, the plaintiff travel agency was entitled to claim its full specific performance interest by way of damages in lieu thereof given that that the specific performance interest should be equitably refused *in forma specifica* (due to the defendant's employ of a different travel agency) but not so *in toto* so as to deny its monetary surrogate – a *via media* remedy between equitable refusal of specific performance and one leaving only *id quod* interest damages.

8 Concluding remarks

It is suggested that the decision in *ISEP* should be read as a rejection of the construction of surrogate damages that pervades the academic literature as being a claim for the objective value of performance. This is evident by the decision of all the judges in *ISEP*. As Van Winsen AJA says with Kotzé JA concurring:

“In my view therefore it was open to the plaintiff to pursue a claim for specific performance against the defendant to compel the performance of the obligation undertaken ... *in forma specifica*, or for an order to pay what it would cost to do so.... The claim, however, remains one for specific performance and not damages consequent upon a breach of contract and is subject to all the discretionary limitations with which the Courts approach claims for specific performance.”¹¹⁴

Rather this statement is consonant with a formulation of surrogate damages as according to specific performance interest analysis in line with the conception in the Canadian case of *Semelhago*. Van Winsen AJA's statement specifically acknowledges the distinction to *id quod* interest damages and that rather it is an order to pay what it would cost to effect specific performance. This statement affirms De Wet two-form construction of specific performance and acknowledges that surrogate damages as a form of specific performance. Furthermore, the statement acknowledges that surrogate damages would be subject to the same equitable discretion of a court to refuse specific performance as was discussed above. This statement it is submitted offers a theoretically sound construction for a claim in line with specific performance interest damages and so could offer a basis to argue for its acceptance and development in future decisions.

¹¹⁴ 1981 4 SA 1 (A) para 16A-F (emphasis added).

However, the position in South African law remains unclear. But given the Supreme Court of Appeal's inclination to keep the door of surrogate performance ajar it is hoped that Van Winsen AJA's statement indicates the path for recognition and development of this remedy in future decisions, and also to help bring clarity to its proper description and formulation. Wepener J's approach in the South Gauteng High Court indicates the very real possibility for this area of the law to be further considered and clarified in the future. Ultimately the law of contract most importantly requires certainty in order to effectively govern the contractual relations between parties. And certainty in respect of the nature and extent of remedies upon breach is perhaps even more important than the remedy itself – for even if a particular remedy enhances the integrity of a contract more so than another, the contract's integrity is most affected by having certainty with regard to the contractual relation and its forms of redress.¹¹⁵ After all, even if it were found that an independent remedy for surrogate performance were not available – as in the views of Jansen J, Hoexter AJA and Viljoen JA in *ISEP* – this would still not prohibit parties enacting a clause having similar effect as an award of surrogate damages. Such would effectively be a penalty clause and be subject to the Conventional Penalties Act 15 of 1962, but would nevertheless open some method of tightening the contractual relations between the parties to enhance the effectiveness and integrity of their contract. Such would be an instance of specific performance *in forma specifica* as a prescribed enforcement according to the terms of the contract, and so would be a method for the parties themselves provide for a value for their respective specific performance interest, subject to the limitations of the Conventional Penalties Act.

This paper has attempted to string legal data on surrogate damages in South African law of contract with insight from considerations in other jurisdictions so as to help illuminate that 'silent prologue' of jurisprudence which underlies the decisions concerning surrogate damages awards.¹¹⁶ This paper has adopted a purposive method of approaching the issues of specific performance generally, through a conception of a patrimonial entitlement in specific performance, described as a specific performance interest; as opposed to the usual performance interest to which contract is more commonly weighed and conceived in considering remedies upon breach. Despite employing a less common explanation as in terms of a specific

¹¹⁵ See Smith "Understanding Specific Performance" in *Comparative Remedies for Breach of Contract* 232-233.

¹¹⁶ In light of the approach of Ronald Dworkin's interpretative theory of law; see R Dworkin *Law's Empire* (1986) 90, 228.

performance interest, such issues have always existed in our law since allowing a grant of specific performance and this conception within the context of a patrimonial interest is merely an attempt to explain and further analyse the concept and the issues it raises with regard to surrogate damages.

Lord Steyn in *Farley v Skinner* says that it is the desire of any legal order to seek “simple and practical rules”.¹¹⁷ But as Kurt Lewin famously proclaimed “[t]here is nothing so practical as a good theory”.¹¹⁸ As such it is submitted that this specific performance interest theory in relation to the award of damages as a surrogate for specific performance is a simple and practical approach. It provides a more effective form of deterrence against breach so helping bring a party in two minds on performing his or her obligation closer to the *ad idem* consensus of its formation; and where a party does still breach, it offers a remedy fair to both parties by protecting the underlying integrity of the law of contract.

¹¹⁷ *Farley v Skinner* [2001] UKHL 49; [2001] WLR 899 para 1.

¹¹⁸ K Lewin in D Cartwright (ed) *Field Theory in Social Science: Selected Theoretical Papers* (1951) 169.