	entitle the other party to be relieved from further performance of his own primary obligations' [848] The secondary obligations arise by implication of law, but they 'too can be modified by agreement between the parties', though they cannot be totally excluded [849] Specific performance = **actual enforcement** of the right Damages = **monetary substitute** for enjoyment of the right Generally, every failure to perform a primary obligation gives rise to damages, with two exceptions 1. Where the event resulting from the failure by one party to perform a primary obligation has the effect of depriving the other party of substantially the whole benefit which it was the intention of the parties that he should obtain from the contract, the party not in default may elect to put an end to all primary obligations of both parties remaining unperformed 2. Where the parties agree that any failure by one party to perform a particular primary obligation…irrespective of the gravity of the event that has in fact resulted from the breach; shall entitle the other party to elect to put an end to all primary obligations of both parties remaining unperformed.
Takeaway	Use of the primary/secondary framework

Monism and dualism

Basics

Monist view: the remedy is a mirror of P's cause of action and is set by the law as appropriate to the specific primary right in question [1.18]

- 'complete congruence of right and remedy' [90]
- E.g. there is no right to reputation, but only a form of relief if a person's name is unjustifiably impugned

Dualist view: once liability has been determined, the court can exercise its discretion to choose the most appropriate remedy

- there is a valid distinction between a right and a relief/remedy

Moderate approach: compromise of the monist and dualist positions [1.20]

Dualism examples

Berry: Applied 'but for', considered all factors to assess likelihood of lawful termination

- B could have become hostile and undermine CCL's interests
- B could have become an agent for another company
- Explains why CCL continued to act like B was their agent

- 3rd party agency agreements were argued in favour of CCL but Court considers them to be a sham

Discretionary nature of LCA damages

- Jolowicz: 'a discretionary power to substitute damages for a remedy which is itself discretionary is a logical monstrosity'
- Lord Neuberger *Fen Tigers*:
    - 'The court's power to award damages in lieu of an injunction involves a classic exercise of discretion, which should not, as a matter of principle, be fettered…'
    - 'as a matter of practical fairness, each case is likely to be so fact-sensitive that any firm guidance is likely to do more harm than good'
- Rejects 'exceptional case' *Shelfer* approach
- Favours more open-minded approach that takes into account parties' conduct in deciding whether to award damages in lieu of an injunction
- Critique of ^
    - Neutral starting point and balancing: seems to be much closer to a balance of convenience test
    - No longer meaningfully conduct legal reasoning, because courts engage in micro-economic analysis and have a very broad/vaguely defined scope of discretion
        - Cf a narrow conception of judicial role

Discretionary nature of AoP: *Warman*: only first two years of profits because:

- W and B's relationship was going to terminate soon anyway
- D's business wasn't only built off fiduciary breach, but also B's goodwill which always stayed with B
- After 2 years, D's business was running on own merits
- 'The liability of the fiduciary should not be transformed into a vehicle for the unjust enrichment of P' (*Warman*)

Partial rescission in *Vadasz*

Facts	V was director of company that owed $200,000 to P. V personally guaranteed company's past and future debts to P so P could continue supplying to company. **P misrepresented to V the guarantee only pertained to future, not past, debts.** After that contract, V incurred a further almost $180,000 of debt. On orthodox rescission: • V return concrete or market value of concrete • P relieve V of debt liabilities under personal guarantee Court affirmed trial judge: partial rescission of V's guarantee re future indebtedness.
Reasoning	Deane, Dawson, Toohey, Gaudron and McHugh JJ: In realm of equity [110] • Contract did not remain completely executory • Complete rescission not possible [111] V obtained benefit of subsequent supply from P on credit

	• Practical restoration of status quo would involve:
	  ○ Cancellation of V's obligations under guarantee; and
	  ○ Return of goods subsequently supplied by P; or
	  ○ Payment to P of amount equivalent to value of goods subsequently supplied
	• But V does not offer to pay for goods or return them
	  ○ 'seeks to be relived **completely and unconditionally** from all liability under the guarantee, leaving [P] without either its subsequently supplied goods or any payment for them'
	Cf *Amadio*, where A would not have entered into the transaction at all if they knew of their son's position [115]
	• V would have still entered the future guarantee portion of the contract even if he knew the full truth, because it is the only way to secure future supplies from P
	V suggested setting aside only past indebtedness guarantee would invite others to misrepresent contractual terms because they would be no worse off than if they had revealed true position
	• But if it appears the other party would not have entered the contract at all if true position was known, the contract may be set aside in entirely like *Amadio*
	'to enforce the guarantee to the extent of future indebtedness is to do no more than hold [V] to what he was prepared to undertake independently of any misrepresentation'

Discuss	Not mutual, cf *Alati* Considered limited to **fraudulent misrepresentation** cases • BUT compare to torts measure for deceit: • Damages for deceit aim to put P in the position as if the statement had not been made (*Toteff* damages = [what T paid]-[DMV]; [TB 6.50]); NOT as if the statement was true Counterfactual analysis • How can the Court confidently declare that V would have signed up to the contract anyway? What if V would have cut their losses if they knew they had to be personally liable for previous debts? Infringe autonomy, rewriting contracts on behalf of parties • Maybe indirect influence of *ACL*, which allows court to remake contract -> very flexible, fluid statutory jurisdiction colours courts' approach to administering remedies in the court of equity • 'I cannot make a new bargain for the parties; or force them into a new agreement upon those things, which are matter of absolute will, and depending totally upon the consent and temper of the parties … No judge is competent to such an act … This Court, if it was to go farther, and to substitute other terms, would make itself the *moderator* of the private affairs of all the families in England' (Longborough LC *Myddleton v Lord Keynon*)

Monist examples

Lord Reed *Morris-Garner*

- In cases where difficult to measure common law damages for breach, courts **cannot simply 'abandon any attempt to measure loss' and measure damages by reference to the benefit gained by the wrongdoer** [73]
- 'inconsistent with the logic of contractual damages'
- Given common law and LCA damages 'are available on a different basis, in different circumstances, and in respect of different types of wrong', the two are not measured in the same way.

Exemplary damages available in tort because (Spiegelman J *Harris*)

- **Tort's development 'was closely connected with the development of the criminal law**. Many torts constituted crimes'
- 'In such a context it was entirely appropriate that considerations of punishment and deterrence arose in the context of actions in tort'
- Windeyer J in *Uren*: '**Compensation is the dominant remedy if not the purpose of the law of torts** today… And **the roots of tort and crime in the law of England are greatly intermingled**'
- 'there was no such historical intermingling between crime and either contract or equity'

HCA on AoP for fiduciary

- Liability of a fiduciary to account of profits **does not** depend on detriment to P (Gibbs J *Consul Development*), D's dishonesty or D's lack of bona fides (*Regal (Hastings); Boardman*) (*Warman*)
- BUT dishonest character of breach can affect 'the intensity of the equitable remedies available against the defaulting fiduciary' (Gageler J *Lifeplan*)

Heydon JA *Harris* refusing exemplary damages for breach of fiduciary duty

- Equitable remedies are deterrent but not 'penal'/'punitive'
- 'The height and strictness of [fiduciary] standards protect the principles of fiduciaries by nullifying temptation. In that sense they deter fiduciaries from drifting into a position of conflict, or worse' [407]
- 'In like fashion [equitable remedies] can have a deterrent effect, because it tends to make the unlawful conduct in question futile'
    - In that sense, equitable remedies may be seen as penal, 'but **they are not penal or punitive in the sense of exacting any money sanction <u>greater than that which is needed either to give full compensation for loss or full disgorgement of gain</u>**'
- The rule that P does not need to show damage/gains P otherwise would have made is **prophylactic**: 'prevent the disease of temptation in the fiduciary'
    - **Emphasis is deterrence rather than punishment**
        - *Is this a superficial distinction?*
        - *Exemplary damages are not just punitive, they are also concerned with deterrence!*

Mason P (dissenting in *Harris*), upheld award of exemplary damages

- Certain equitable doctrines are punitive/deterrent
    - *Brickenden* rule: lack of causation BECAUSE fiduciary needs to be held up to their duties
    - Therefore, deterrence is a function of equitable remedies
    - Therefore, exemplary damages are not so anomalous in equity

Why is negligence not actionable per se?

- Negligence's rationale is allocation of responsibility for suffering of setbacks to material wellbeing (ie loss). Consequently, damages are typically limited to damages for factual/material loss

Causation in equity

- But for in due care and skill, no causation for failure to disclose

BC **non-disclosure has a 'stench of dishonesty'**, an abuse of position; care and skill is failure to meet expectations (*Wheeler*)

Brickenden rule: lack of causation BECAUSE fiduciary needs to be held up to their duties (Mason P *Harris*)

No contrib neg

- it is the trustee or fiduciary who is charged with caring for the beneficiary's interests. If trustee or fiduciary breaches their obligations, they have no scope to apportion blame to the beneficiary (*Pilmer*)

	Tort	Contract
Remoteness Test	Reasonable foreseeability **at time of wrong**	Reasonable contemplation of parties **at time contract was agreed**-> knowledge-centric (*Hadley*)
Rationale	Only foreseeable harm is compensable, far-fetched consequences are not	If one knows certain facts, they can take that knowledge into account in negotiating the contractual terms
Central concern (*Morris-Garner*)	'civil wrongs…breaches of duties imposed by the law' Wrongs 'protect the interest of others in respect of such matters as their bodily integrity, their liberty, their property, their privacy and their reputation.'	Contract 'gives effect to consensual agreements entered into by particular individuals in their own interests.' 'remedies granted … are designed to give effect to what was voluntarily undertaken by the parties'
Purpose of damages	Backward: place party in position if wrong had not occurred	Forward: place party in position if contract performed