

‘The Right to Perform After Repudiation and Recover the Contract Price in Anglo-American Law’—a reply to Mark Gergen

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Professor Gergen’s account of the UK and US case laws of the weight, if any, that a claimant must give to mitigation when electing to affirm after repudiation—the issue identified in the Commonwealth with *White and Carter (Councils) Ltd v McGregor*¹—is so rich that it is impossible to do it justice in the space I have available. I shall instead discuss this issue in an abstract, theoretical manner, making little reference to the case laws. The first thing that must be said is that I am therefore ignoring what Gergen tells us would likely be the outcome of a *White and Carter* case in the US in light of a special rule about advertising unknown (I think) in the UK. But my aim is not, in truth, to state the positive law so much as to say something about the contractual norm that gives rise to mitigation, in a *White and Carter* situation and generally.

Though the rules that give a claimant an incentive to mitigate are of more restricted applicability than many accounts of the law of remedies for breach of contract would lead one to think,² let us accept that mitigation is central to the quantification of damages and that

¹ [1962] AC 413 (HL (Sc)).

² My own chapter in this volume (see ch 000) argues that this incentive is only unevenly generated by ‘market damages’ in the UK and by the combination of ‘cover’ and ‘market damages’ in the US, even though these are the most important of mitigation rules.

it is right that it is. The majority in the House of Lords reached their conclusion in *White and Carter* only because the dispute was about an election to affirm rather than the quantification of damages. But, of course, the significance of the affirmation in *White and Carter* was its impact on quantification, and all their Lordships³ regarded a strong distinction between affirmation and quantification as to various degrees questionable. What is more, though the majority's decision must imply that mitigation can be disregarded, a point to which we shall return, one would have said that the majority's disparate speeches cannot be read as providing coherent explicit authority for doing so, were it not that this is just how they have been read in much subsequent commentary. However this is, the same policy considerations that apply to quantification surely must apply to election.⁴

But Gergen very instructively tells us that this does not necessarily mean that the pursuer's election in *White and Carter* was unjustifiable. Although the US law after *Clark v Marsiglia*⁵ requires mitigation to be taken into account and so, let us allow for a moment, is the opposite to *White and Carter*, a *White and Carter* case could have had the same result in the US on general principles, putting aside the special advertising rule. This is because the US law allows an argument that mitigation would be inappropriate in any particular case. Gergen shows that a similar possibility arises in cases such as *The Alaskan Trader*⁶ which, subsequent to *White and Carter*, have turned on Lord Reid's requirement of a 'legitimate

³ Lord Tucker merely signalled agreement with the speech of Lord Hodson.

⁴ This is the theme of the discussion of the various forms of literal enforcement, including debt, in Donald Harris, David Campbell and Roger Halson, *Remedies in Contract and Tort*, (2nd edn, CUP 2005) pt 3.

⁵ 1 Denio 317, 43 Am Dec 670 (Sup Ct of NY, 1845).

⁶ *Clea Shipping Corporation v Bulk Oil International Ltd (The Alaskan Trader) (No 2)* [1984] 1 All ER 129 (QBD).

interest'.⁷ In my opinion, in a disputed case of election heard under the laws of the UK, a claimant which cannot demonstrate a legitimate interest will not be able to affirm, and the famous dictum of Asquith LJ that a repudiation which is not accepted is 'a thing writ in water and of no value to anybody' does not state the law after *White and Carter*.⁸ When writing a textbook treatment of the issue which endeavoured to state the English law as of mid-2001, I believe I read every relevant case from the principal Commonwealth jurisdictions, and did not find one which did not take *The Alaskan Trader* position.⁹ I make no claim to similar knowledge of the position since 2001,¹⁰ but I would impressionistically say it has not changed, though I am aware of, in particular, a recent New Zealand case that poses interesting questions.¹¹

What I have said is not a claim that, rather than being opposed, the UK and the US laws are entirely the same. Gergen tells us how in the US, starting from a default requiring mitigation, a claimant wishing to perform has to argue to oust the default, and gives a 'brilliant example' of how this happened in *Bomberger v McKelvey*.¹² I am unsure to what

⁷ *White and Carter* (HL (Sc) (n 1) 431.

⁸ *Howard v Pickford Tool Co Ltd* [1951] 1 KB 417, 421 (CA). I do not think this stated the law prior to *White and Carter*, but put this to one side.

⁹ Harris, Campbell, and Halson (n 4) 160-165. I say this fully aware that it is in contradiction of a number of the most distinguished authorities, including H McGregor, *McGregor on Damages* (19th edn, Sweet and Maxwell, 2014) paras 9.023-9.032.

¹⁰ Professor Bigwood has recently most comprehensively reviewed the position: R Bigwood, 'Fine-tuning Affirmation of Contract by Election' [2010] *New Zealand Law Review* 37 (pt 1) and 617 (pt 2) and RA Bigwood, 'Circumscribing Election' (2011) 32 *University of Queensland Law Journal* 235.

¹¹ *Ingram v Patcroft Properties Ltd* [2011] 3 NZLR 433 (Sup Ct of NZ).

¹² 35 Cal 2d 607, 220 P 2d 729 (Calif Sup Ct, 1950).

extent one can, on the case law, actually say what I am about to say, but it is arguable that the UK position is a default of performance, which a defendant can oust by showing that the claimant had no legitimate interest in performance. The very interesting point of comparative law that would arise if this is the law in the UK is how the choice between these default rules would affect commercial parties' negotiations after repudiation.

This is not how it is normally seen in the Commonwealth. The bulk of discussion of *White and Carter* treats the issue as one of choice between mitigation or performance as alternative mandated outcomes, rather in the way that the award of specific performance is generally discussed as if the defendant necessarily would perform its primary obligation after such an award.¹³ But for competent commercial parties the important point is the change in their respective negotiating powers consequent on whether compensatory damages or specific performance is the default, even in those cases where negotiations after breach do not result in the award being bought off and commanded performance does take place.¹⁴ Gergen insightfully discusses *The Puerto Buitrago*¹⁵ in this context, a case in which it is

¹³ The links between *White and Carter* and an action for specific implement were explored by both the Court of Session and the House of Lords and in subsequent commentary: *White and Carter (Councils) Ltd v McGregor* (1960) SC 276 (IH 2nd Div) and *White and Carter* (HL (Sc)) (n 1).

¹⁴ Roger Halson and I have attempted to show this for the most important English and Scots specific performance cases of at all recent vintage: David Campbell and Roger Halson, 'The Irrelevance of the Performance Interest: A Comparative Study of Keep Open Covenants in Scotland and England', in Larry DiMatteo, Qi Zhou, Séverine Saintier, and Keith Rowley (eds), *Commercial Contract Law: Transatlantic Perspectives* (CUP 2013).

¹⁵ *Attica Sea Carriers Corporation v Ferrostaal Poseidon Bulk Reederi GMBH (The Puerto Buitrago)* [1976] 1 Lloyd's Rep 250 (CA).

inconceivable that the vessel would ever be repaired and to which settlement negotiations will have been central but which nevertheless is commonly cited as evidence of the inadequate protection of ‘the performance interest’.¹⁶

Gergen’s main contribution is to go some considerable way to clarifying why the UK laws on legitimate **interest** are in such a state that I am unsure what they actually are. By comparison to the relatively clear argument whether the reasons for applying the mitigation default obtains or whether, ‘If these reasons are not present, the rule is not applied’ in US cases such as *Bomberger v McKelvey*,¹⁷ *White and Carter* avoids the basic point, and subsequent cases, though they have reached the right outcome, have not really remedied the position. Gergen concludes by telling us precisely what is wrong with *White and Carter*. The pursuer might well have had a legitimate interest, but proceeding on the basis that it could ignore mitigation when making its election, it did not plead one. To a lesser degree, one might say that the defender, not knowing the possible significance of the issue, did not plead that the pursuer didn’t have a legitimate interest, and this is the basis on which Lord Reid seems to have decided the case.¹⁸ This would put a default of performance which a defendant can argue against at the heart of the UK laws. But who can really say what those laws are?

Comment [MH1]: The sense of this sentence is a little hard to follow – are any words missing?

It is unarguable that, given the result in *White and Carter*, the legitimate interest requirement is completely *obiter*, but it is also almost unarguable (I was sure it was completely unarguable as the law stood in mid-2001) that in a disputed case a claimant without a legitimate interest could not affirm. That the later case law has no foundation in the

¹⁶ This is despite Lord Denning MR realising in *The Puerto Buitrago* (n 15) 255 that the result in *White and Carter* was possible only because the case avoided the tests for specific performance.

¹⁷ *Bomberger* (n 12), Cal 2d 614, P 2d 733.

¹⁸ *White and Carter* (HL (Sc)) (n 1) 431.

ratio (whatever it is) of *White and Carter* obviously is unsatisfactory, and allows 'thing writ in water' thinking to linger when such thinking really has no place in the law of contract. Contract legally institutionalises an economic—ie social—relationship, and legitimate self-interest is normative action pursued within a fundamentally co-operative structure, of which mitigation is a fundamental pillar.¹⁹ This is denied by 'thing writ in water' thinking, the implausibility of the solipsistic, amoral conception of self-interest underlying which is exposed by the shortcomings of *White and Carter*.

Interpreting *White and Carter* should not be a matter of seeking to supplant self-interest but of facilitating it by channelling it into legitimate courses. In the context of examining the implications of *White and Carter* for the arguments of his important paper on self-help,²⁰ Gergen asks the fundamental unanswered question posed by *White and Carter*: what on earth did the pursuer think it was doing?²¹ Its actions in respect of mitigation are, on the reported facts, inexplicable in terms of its own self-interest. Had it terminated, it would have received its full expectation three years earlier than the contract provided and it would not have had to account for any further profit it earned from redeploying its resources. One thinks it must actually have had what was to be called a legitimate interest in order to act as it did. But if it did, why didn't it say so in order to have its expectation protected by performance? As the

¹⁹ David Campbell, 'The Relational Constitution of Remedy: Co-operation as the Implicit Second Principle of Remedies for Breach of Contract' (2005) 11 Texas Wesleyan LR 455.

²⁰ Mark P Gergen, 'A Theory of Self-Help Remedies in Contract' (2009) 89 Boston Univ LR 1397.

²¹ *White and Carter* cries out for 'legal archaeological' explanation after the fashion of the late Professor Simpson.

huge amount of criticism to which *White and Carter* was immediately subjected shows,²² the line the pursuer took in legal argument was an extremely hazardous flaunting of good sense. It lost twice in Scotland²³ and was lucky to win in London.²⁴

This makes me suspect that the accelerated payment clause was the key to the case, and, with respect, I for once disagree with Gergen because I do not think this clause raises a penalty issue²⁵ so much as the possibility of the indefensible manipulation of a term, a problem identified in the Commonwealth with *Arcos Ltd v EA Ronaasen and Son*.²⁶ Had the defender known the response it would get from the pursuer, it would never have repudiated. It would have guardedly canvassed such a possibility, and negotiations in pursuit of discharge on agreed terms would have taken place. By repudiating in good faith with a full acknowledgement of liability for lost expectation, the defender might well, it would seem, have put itself at the mercy of an opportunistic pursuer. One cannot be certain, but I strongly

²² In the case itself, Lord Keith had described the appellant's argument as 'startling': *White and Carter* (HL (Sc)), n 1 above, 442, and in *The Puerto Buitrago*, n 15, 255, Lord Denning MR, quoting GCH Cheshire, CHS Fifoot and MP Furmston, *Law of Contract*, 8th edn (London: Butterworths, 1972) 600, described its result as 'grotesque'.

²³ Prior to failing in the Court of Session, the pursuer had failed in the Sheriff Court, which handed down its judgment on 15 March 1960.

²⁴ As it was not awarded costs in the Lords, and as it would seem—but one cannot be certain—that it was not awarded costs in the Court of Session, hazardous may not be the right word. Disastrous might be the right word.

²⁵ I do not, of course, dispute that this issue was regarded as very important by the Court of Session and received consideration in the House of Lords.

²⁶ [1933] AC 470 (HL). As a case in which the claimant exploited an opportunistic possibility of termination, *Arcos* is, as it were, the mirror image of *White and Carter*.

suspect the clause was not drafted with repudiation, as opposed to a failure to perform, in mind, and so its use will have come as a surprise to the defender. Even ‘thing writ in water’ thinkers prepared to endorse the solipsistic pressing of a claim surely cannot endorse good faith repudiation actually giving rise to the problem economists call moral hazard.

Despite the outcomes in the Scots Courts, Scottish contract scholarship has long displayed considerable embarrassment about *White and Carter*,²⁷ and the Scottish Law Commission has recommended legislation to require that an election be ‘reasonable’,²⁸ the same technique that has, of course, been used to deal with the *Arcos* problem in the Sale of Goods Act as it applies to England and Wales and Northern Ireland.²⁹ This would, in an important sense, ‘reverse’ *White and Carter*,³⁰ but the greatest service which Gergen renders his UK readers is to make them see that, without the clarity of argument about default rules and their ouster displayed in US cases such as *Bomberger v McKelvey*, the gain from such a reversal will be limited.³¹

²⁷ Laura Macgregor, ‘Specific Implement in Scots Law’ in Jan Smits, Daniel Hass, and Geerte Heslen (eds), *Specific Performance in Contract Law: National and Other Perspectives* (Intersentia 2008) 88-90.

²⁸ Scottish Law Commission, *Remedies for Breach of Contract* (SLC Report No 174, 1999) paras 2.1–2.10.

²⁹ Sale of Goods Act 1979 (c 54), s 15A. I put to one side the Scots law under s 15B, which produces effectively the same result.

³⁰ John N Adams and Hector L MacQueen, *Atiyah’s Sale of Goods* (12th edn, Longman 2010) 534 fn 13.

³¹ I have tried to show this in respect of *Arcos* and s 15A in David Campbell, ‘*Arcos v Ronaasen* as a Relational Contract’ in David Campbell, Linda Mulcahy, and Sally Wheeler

(eds), *Changing Concepts of Contract: Essays in Honour of Ian Macneil* (Palgrave Macmillan 2013).