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**LEGAL SCHOLARSHIP NETWORK: LEGAL STUDIES RESEARCH PAPER SERIES
VICTORIA UNIVERSITY OF WELLINGTON LEGAL RESEARCH PAPERS**

"Form and Substance in Contract Damages"

(2019) 70 NILQ 221
Victoria University of Wellington Legal Research Paper No. 122/2019

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This article discusses the role of form and substance in the modern law of contract both generally and with specific reference to the law of damages for breach of contract and, in particular, the decisions of the United Kingdom Supreme Court in Swynson Ltd v Lowick Rose LLP [2017] UKSC 32 and Fulton Shipping Inc of Panama v Globalia Business Travel SAU (The New Flamenco) [2017] UKSC 43. Although it was probably true to say when Atiyah and Summers wrote in Form and Substance in Anglo-American Law over 30 years ago that 'the English law of contractual damages continues to be treated by judges and writers as governed by highly formal rules', it would be wrong to describe the reasoning

employed by judges in modern times when explaining, refining, and applying these rules as highly formal. Particularly in appellate decisions, judicial reasoning is usually an amalgam of what the authors would describe as formal and substantive considerations. Indeed, the formal reason for supporting a decision may be preferred precisely because it provides the just or most convenient solution to the dispute, as in Swynson v Lowick Rose. In that case the Supreme Court overturned the decision of the majority of the Court of Appeal that denial of the damages claimed 'would be a triumph of form over substance', preferring the view of the dissenting judge who said that 'the form here is the substance'. And, while the decision in The New Flamenco appears at first sight to rest on formal, arguably formalistic, reasoning, a closer reading reveals that substantive considerations influenced the outcome of the appeal.

"The Limitations on 'Reliance' Damages for Breach of Contract"

David Campbell and Roger Halson (eds) Research Handbook on Remedies in Private Law (Edward Elgar Publishing, 2019) 86
Victoria University of Wellington Legal Research Paper No. 123/2019

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This chapter discusses some contentious issues relating to the recovery of so-called 'reliance damages' in an action for breach of contract. Does the commonly expressed 'presumption of recoupment' relating to expenditure incurred by the claimant in performing, or preparing to perform, the contract impose the full legal burden or merely an evidential burden on the defendant of proving that the expenditure would not have been recovered? Assuming that the former is correct, should the ability of the defendant to rebut the presumption be affected by the existence of foreseeable consequential benefits that the claimant expected or hoped to gain from performance of the contract? Does the presumption extend to all types of expenditure incurred in reliance on the contract? Should account be taken of contingencies that, if they had eventuated, would have enabled the defendant to escape or reduce liability in damages? And are damages for both wasted expenditure and loss profits recoverable in a case where the claimant is able to establish that performance by the defendant would have resulted in a net gain.

"The Minimum Performance Rule in Contract Damages"

[2019] LMCLQ 75
Victoria University of Wellington Legal Research Paper No. 124/2019

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This article challenges the long-standing rule concerning the assessment of damages for breach of contract that, where the contract allows for alternative methods of performance by the promisor, damages are to be calculated by reference to the minimum level of performance provided for in the terms of the contract. It is argued that the rule is inconsistent with the compensatory principle and that, since it has been undermined by various qualifications or exceptions that severely curtail its operation, it would improve the coherence of the law of damages if it were abandoned.

"Mitigation and Causation of Benefits"

Forthcoming in Lloyd's Maritime and Commercial Law Quarterly. ISSN 0306-2945
Victoria University of Wellington Legal Research Paper No. 125/2019

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This article examines mitigation and the causation of benefits in the assessment of damages for breach of contract, following the UK Supreme Court's decision in The New Flamenco [2017] UKSC 43. It clarifies the meaning and scope of "speculation" reasoning, according to which a benefit (or harm) is said to be ignored in the assessment of damages where it derived from a "commercial risk" undertaken by the claimant. The authors argue that speculation reasoning properly applies where the claimant made a choice not to take steps that would have put it as nearly as possible in the same position as if the contract had been performed. They conclude that the correctness of the decision in The New Flamenco thus turns on whether the shipowners had such a choice, for example, to rehire the vessel under a series of shorter charters, instead of putting it up for sale.

"Repudiatory Breach, Prospective Inability, and the Golden Victory"

Journal of Business Law, Issue 7, 2015
Victoria University of Wellington Legal Research Paper No. 126/2019

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When a contract for the supply goods or services is terminated on account of the buyer's wrongful repudiation, the supplier is usually entitled to recover damages based on the difference between the contract price/rate and the market price/rate. However, what is the position if the evidence establishes that, had the contract remained on foot, the supplier would have been unable to provide the goods or services or that an event had occurred since acceptance of the repudiation that allowed the buyer to cancel the contract pursuant to an express termination clause and that he would have so cancelled? Does B have a valid defence in either of these scenarios? The view of some leading scholars is that the answer is no for the first scenario but yes for the second, but the distinction was rejected by Teare J in The Glory Wealth. This article discusses the competing views and suggests reasons why the latter view should be preferred.

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The Victoria University of Wellington was founded in 1899 to mark the Diamond Jubilee of the reign of Queen Victoria of Great Britain and of the then British Empire. Law teaching started in 1900. The Law Faculty was formally constituted in 1907. The first dean was Richard Maclaurin (1870-1920), an eminent scholar of both law and mathematics. Maclaurin went on to lead the Massachussetts Institute of Technology as President in its formative years. Early professors included Sir John Salmond (1862-1924), still one of the Common Law's leading scholars. His texts on jurisprudence and torts have gone through many editions and remain in print.

Alumni include Sir Robin Cooke (1926-2006), one of the leading judges of the British Commonwealth. As Baron Cooke of Thorndon, he sat on over 100 appeals to the Appellate Committee of the House of Lords, one of very few Commonwealth judges ever appointed to do so.

Since 1996 the Law School has occupied the Old Government Building in central Wellington. Designed by William Clayton and opened in 1876 to house New Zealand's then civil service, the building is a particularly fine example of Italianate neo-Renaissance style. Unusually among large colonial official buildings of the time it is constructed of wood, apart from chimneys and vaults.

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