The White & Carter Legitimate Interest Qualification On The Elective Theory Of Contractual Repudiations: A Reformulation Proposal

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1. Introduction

UNDER ENGLISH CONTRACT Law, a party to a contract faced with a repudiation by the other can choose whether to accept the repudiation and treat the contract as terminated, or reject it and treat the contract as subsisting.[2] This is sometimes referred to as the 'Elective Theory'.[3] In *White & Carter v McGregor*,[4] Lord Reid, speaking in the House of Lords, introduced two qualifications on this ability to choose, the 'cooperation qualification' and the requirement that the rejecting party have a 'legitimate interest' in actual performance.[5] However, in enunciating the latter qualification, Lord Reid failed to provide a sufficiently clear definition of 'legitimate'. Lord Reid held that a purely financial interest can be legitimate without sufficiently clarifying what was meant by 'financial'. This ambiguity has resulted in uncertain judgments, and, most recently, an unnecessary invocation of the 'good faith' doctrine in *MSC Mediterranean v Cottonex Anstalt*[6] to resolve the ambiguity and find the financial interest claimed to be illegitimate.

This article seeks to demonstrate that the 'legitimate interest' qualification requires clarification. This article will first examine the state of the 'legitimate

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[2] *Howard v Pickford Tool Co Ltd* [1951] 1 KB 417, 421.

[3] *London Transport Executive v Clarke* [1981] ICR 355, 367, per Templeman LJ.

[4] *White & Carter (Councils) Ltd v McGregor* [1962] AC 413.

[5] ibid 431.

[6] [2015] 2 All ER (Comm) 614.

interest' qualification prior to the *MSC Mediterranean* decision. I will then analyse what changes, if any, Legatt J's judgment introduces into the current definition of 'legitimate interest'. Finally, I will then suggest a more appropriate construction of the 'legitimate interest' qualification and consider it against the 'reasonableness' alternative offered by some judgments.[7]

2. Development of the Law on the 'Legitimate Interest' Qualification

In *White & Carter*,[8] a garage and an advertising company had a three-year contract for advertising the former on the latter's dustbins. Near the end of the three-year contract, a manager at the garage agreed to renew it, though he had no authority to do so. The garage quickly informed the advertiser that it was an unauthorised renewal and that they did not intend to honour the new contract. The advertiser decided to proceed with performance of the contract, hence rejecting the repudiation. The contract included an accelerated payment clause for the entire three years, which was triggered when the garage failed to pay the monthly installments due under the renewed contract. The House of Lords affirmed that the innocent party has a right to elect to reject or accept a repudiation, even though it may lead to harsh results. The advertisers were awarded the entire three years' worth of installments owed under the payment acceleration clause. In handing down the leading judgement, Lord Reid held that this right of the innocent party may be qualified in two ways. The first of which is:

> …if it can be shown that a person has no legitimate interest, financial or otherwise, in performing the contract rather than claiming damages, he ought not to be allowed to saddle the other party with an additional burden with no benefit to himself. If a party has no interest to enforce a stipulation, he cannot in general enforce it: so it might be said that, if a party has no interest to insist on a particular remedy, he ought not to be allowed to insist on it.[9]

Lord Reid's formulation seems to indicate that a lack of legitimate interest will be found when two circumstances are met; firstly, where damages are an appropriate financial remedy for the rejecting party's losses, and secondly, where the rejecting party gains no additional benefit from the performance of the contract to the financial one securable by damages.

The characterisation of Lord Reid's judgment as placing qualifications on the innocent party's ability to choose was strongly rejected by Professor

[7] *Stocznia Gdanska SA v Latvian Shipping Co* [1998] 1 WLR. 574.
[8] *White & Carter* (n 4) 413.
[9] ibid 431.

Andrew Burrows[10] in his case note on *Société Générale London Branch v Geys*,[11] in which he criticises Lord Sumption's dissent due to its deployment of Lord Reid's qualifications in support of the 'automatic' termination theory.[12] In *Geys*, Lord Sumption stressed that the orthodox interpretation of the *White & Carter* decision places two qualifications on the innocent party's right to reject a repudiation. Lord Sumption relied on the 'co-operation' qualification to hold that an employee cannot be considered to have meaningfully rejected a repudiation when the contract is so reliant on the mutual relationship inherent in contracts of employment:

> If Lord Reid's qualifications to this proposition are ignored, this unattractive consequence will be gratuitously extended, at least in the context of contracts of employment, to cases where there can be no contractual performance, because the relationship is dead and all that survives is the husk or shell of a contract devoid of practical content.[13]

Lord Sumption goes on to hold that in such circumstances, the contract must be considered to have terminated, irrespective of the employee's rejection of the repudiation, by operation of Lord Reid's second qualification.

Burrows rejects Lord Sumption's dissent as he views it as a 'novel' interpretation of Lord Reid's judgment.[14] Burrows also points out that, for the specific employment law context, Lord Sumption placed too much weight on the disputed notion that unpaid wages cannot be claimed as debt.[15] Though a strong critique, it nevertheless misses the mark. Characterising the *White & Carter* decision as placing qualifications on the innocent party's ability to accept or reject a repudiation is the proper analysis for two principal reasons. Firstly, when discussing the 'legitimate interest' question, Lord Reid clearly phrases himself so to place a limitation on the otherwise uninhibited right to accept or reject a repudiation or a repudiatory breach. Lord Reid holds that lack of legitimate interest 'can be shown' and if this burden of proof is managed, the other party 'ought not to be allowed to insist on [the illegitimate interest].'[16] This was later applied in *The Alaskan Trader* to preven the rejecting party from doing so due to the burden of proving illegitimacy of the interest being met.[17] This naturally qualifies the previously unrestricted ability to elect. Secondly, the courts' subsequent usage of those limitations has clearly cemented their status as 'qualifications'. The manner in which the claims and

[10] Andrew Burrows, '*What is the effect of a repudiatory breach of a contract of employment*' (2013) 42(3) ILJ.
[11] [2013] 1 AC 523.
[12] ibid at [111].
[13] *Geys,* (n 11), 578.
[14] Burrows, (n 10), 287.
[15] ibid.
[16] *White & Carter* (n 4) 431.
[17] [1984] 1 All E.R. 129.

defences are presented to the court requires them to consider these as limitations to be proven or disproven.[18] In addition, the courts refer to Lord Reid's dictum as placing limitations on the right to elect. Most notably, in *The Odenfield* case, Kerr J referred to Lord Reid's dictum as placing 'fetters' on the unfettered right of the innocent party to elect whether or not to accept the repudiation.[19]

Burrows' main issue with Lord Sumption's analysis is that it treats the second qualification as advancing an automatic theory of termination in the specific case. To resolve this, it must be understood that the two qualifications are different in nature. The 'legitimate interest' one is a *legal* qualification assessed and inquired into by the courts. The 'cooperation' qualification, on the other hand, is an economic reality limitation which is *factual* in nature; it is either present or it is not. The latter simply dismisses sterile rejections which have no effect as the rejecting party cannot perform in any case. In the employment context, making oneself available and willing to work is sufficient to amount to performance. In this way, the worry of the automatic theory re-emerging via acceptance of Lord Sumption's logical analysis is clearly dispelled. Accepting the qualification analysis does not require acceptance of the automatic theory.

Lord Reid's 'legitimate interest' qualification was held to have been correctly deployed by the arbitrator in *The Alaskan Trader.*[20] The case concerned a two-year charter-party contract, twelve months into which the vessel required major repair work. A month into the repair work, the charterers communicated repudiation of the contract to the ship-owners, which the latter rejected. The repair work took eight months, at the end of which the ship-owner kept the vessel docked and fully staffed for the repudiating charterers for the remaining five months under the contract. The arbitrator found that the ship-owners' financial interest could have been properly met by way of damages and that it had no *additional* interest (on top of the financial one) in the performance of the contract. The arbitrator then held that the ship-owner, owing to its lack of legitimate interest to keep the contract alive, had to accept the repudiation when made, and could not claim in debt for the 5 months in which he kept the ship at the ready. Bingham J affirmed this finding as he found no flaw in the logic of the experienced commercial arbitrator.

This is a very sensible formulation. The damages measure, though not extensive under English law due to the requirement on the harmed party to mitigate its losses,[21] should in theory put a party in the position it would have been at had the contract been performed.[22] There is therefore no incentive to perform the contract for the sake of financial gain. If advertisers or ship-owners secure the full measure of damages they are compensated to the level of an equally

[18] Reichman and another v Beveridge and another [2007] Bus. L.R. 412, [15].
[19] *Gator Shipping Corporation v Trans-Asiatic Oil Ltd SA (The Odenfeld)* [1978] 2 Lloyd's Rep 357, 374.
[20] *The Alaskan Trader (No.2)* [1984] 1 All E.R. 129.
[21] *British Westinghouse Electric Co Ltd v Underground Electric Railways Co of London* [1912] AC 673.
[22] *Robinson v Harman (1848)* 1 Exch. 850, 855 per Parke B.

financially beneficial contract.[23] If losses are mitigated only halfway, or a reasonable failed attempt to mitigate is made, the damages measure rounds up their losses. Furthermore, losing parties should receive financial compensation to account for their efforts in attempting to locate a new contract to replace it (the mitigation). Thus, if the innocent party cannot enter alternative ventures of equal duration or benefit, the damages it will receive for the repudiated contract will cover that gap of lucrativeness. The original contract is therefore 'performed' financially in any case.

However, this interpretation was not exactly shared by the other cases on this topic. In *The Puerto Buitrago*,[24] a chartered ship required extensive and highly expensive repairs. The charterers repudiated the contract. The ship-owners rejected the repudiation and claimed that the charterers owed them the charter fee for the the time it would have taken to repair the ship. The standard imposed by the court of appeal for an interest being illegitimate was that of reasonableness. Lord Denning held that:

> ...the plaintiff ought, in all reason, to accept the repudiation and sue for damages—provided that damages would provide an adequate remedy for any loss suffered by him. The reason is because, by suing for the money, the plaintiff is seeking to enforce specific performance of the contract—and he should not be allowed to do so when damages would be an adequate remedy.[25]

Lord Denning's ruling indicates that if the party should 'in all reason' accept the repudiation it has no legitimate interest. The reasonableness language was subsequently tightened in *The Odenfield*.[26] Mr Justice Kerr held that a 'wholly unreasonable' standard applied to evaluate the legitimacy of the rejecting party's interest:

> any fetter on the innocent party's right of election whether or not to accept a repudiation will only be applied... where damage would be an adequate remedy and where an election to keep the contract alive would be wholly unreasonable.

The language used by Kerr J is akin to '*Wednesbury unreasonableness*'.[27] In other words, the party will not have a 'legitimate interest' if no reasonable contractual party in its position would elect to reject the repudiation. Kerr J used the language of 'wholly unreasonable, quite unrealistic, unreasonable and untenable'.[28] In

[23] ibid.
[24] *The Puerto Buitrago* [1976] 1 Lloyd's Rep. 250.
[25] ibid 259.
[26] *The Odenfeld* (n 19).
[27] *Associated Provincial Picture Houses Ltd. v Wednesbury Corporation* [1948] 1 KB 223.
[28] *The Odenfeld* (n 19).

Stocznia Gdanska SA v Latvian Shipping Co & Ors,[29] Clarke J found that the varying standards for the 'legitimate interest' qualification all pointed towards a general 'unreasonableness' test:

> Thus, on the footing that the principle exists, it is that an innocent party is entitled to continue to perform a commercial contract which has been repudiated by the other party unless he has 'no legitimate interest, financial or otherwise, in performing the contract' (per Lord Reid) or he should 'in all reason' accept the repudiation (per Lord Denning), B or where it would be 'wholly unreasonable' to keep the contract alive (per Kerr J) ... I do not think that there is any real difference between these differing ways of putting the principle. The question is therefore whether the buyer has an arguable case that the builder's decision... was wholly unreasonable.[30]

In *The Aquafaith,*[31] the most recent authority on the interpretation of the 'legitimate interest' qualification, Cooke J stated that the party rejecting a repudiation has a legitimate interest unless it is 'wholly unreasonable' or 'perverse', for it to complete performance.[32] This cements that the current interpretation of a 'legitimate interest' is virtually any interest that is not 'perverse', 'wholly unreasonable', or 'beyond all reason'; including a purely financial one.[33] In *The Aquafaith* Cooke J preferred the previously established standard of 'wholly unreasonable' conduct[34] for assessing legitimacy and found that, although mitigation and damages would secure an economically-equivalent result, a purely financial legitimate interest arose.[35]

3. *MSC Meditteranean v. Cottonex Anstalt:* the Need to Reformulate the Legitimate Interest Qualification

MSC Mediterranean v. Cottonex Anstalt concerned a carriage contract between company A, which provided containers for company B to transport its goods to be sold to company C in Bangladesh.[36] The sale of goods contract between B and C provided that title to the goods did not pass until full payment was made. C paid by way of letter of credit issued through its bank to B. However, once the

[29] [1995] CLC 956.
[30] ibid 968.
[31] [2012] EWHC 1077 (Comm).
[32] *Stocznia Gdanska* (n 25) 968.
[33] ibid 915.
[34] *The Puerto Buitrago* (n 24); *(The Odenfeld)* (n 19).
[35] *The Aquafaith* (n 31) 909–910.
[36] [2015] EWHC 283 (Comm).

containers arrived at Bangladesh, there was a sharp fall in the price of cotton. C refused to continue paying for the goods via the letter of credit and brought action in the courts of Bangladesh against its bank for issuing and approving the letter of credit. In addition, due to the outstanding proceedings, the Bangladeshi customs authorities refused to unload the goods or release the containers from the port without a court order.[37]

While the containers were grounded in Bangladesh, A made several communications to B in order to inquire as to their whereabouts and request their return. The carriage contract between A and B included a standard demurrage clause that provided that B must pay a fixed daily sum for possession of the containers beyond a given fourteen-day 'grace period' at the port of destination. B communicated to A that it was unable to release the containers. A made several inquiries since, including an offer to B to purchase the containers from A once the accumulated demurrage costs exceeded the containers' actual worth. B refused payment and withheld payment of the demurrage costs, thus committing a repudiatory breach.[38] A's continuous requests of payment since were thus interpreted as a rejection of the repudiation.[39]

At trial, Leggatt J held that the 'legitimate interest' qualification applied to quantify the actual amount of debt owed by B to A. In attempting to maintain this conclusion alongside his ruling that the clause is penal,[40] a startling novelty in itself,[41] Leggatt J injected two novel concepts into the discussion. Firstly, Leggatt J opined that:

> the Carrier had a legitimate interest in keeping the contracts of carriage in force for as long as there was a realistic prospect that the Shipper would perform its remaining primary obligations under the contracts by procuring the collection of the goods and the redelivery of the containers. Once it was quite clear, however, that the Shipper was in repudiatory breach of these obligations and that there was no such prospect, the Carrier no longer had any reason to keep the contracts open in the hope of future performance.[42]

[37] ibid at [2]–[10].
[38] ibid at [34], [102].
[39] ibid at [102].
[40] ibid [116]. Note that Leggatt J's review of the law on penalties was in light of the Court of Appeal decision in *Makdessi v Cavendish Square Holdings BV* [2013] EWCA Civ 1539, which has since been overturned by the House of Lords in *Cavendish Square Holdings BV v Makdessi* [2015] UKSC 67.
[41] Jonathan Morgan, '*Smuggling Mitigation into the White & Carter v McGregor: Time to Come Clean?*', (2015) LMCLQ 575, 590.
[42] *MSC Mediterranean* (n 36) [104].

In doing so, Leggatt J essentially suggested a divergent test for the existence of a legitimate interest than what was deployed beforehand. This passage indicates that a legitimate interest would be the existence of a 'realistic prospect' that the repudiating party perform its remaining primary obligations under the contract. Though the operation of this concept of 'realistic prospect' is unapparent from prior appellate court authorities and cannot be seriously considered as a novel alternative formulation of the qualification, it can plausibly be subsumed into the existing definition of 'legitimate interest' without much difficulty if limited to the specific fact patterns in which it is clear when the 'realistic prospect' in performance terminates. More importantly, since Leggatt J held that the demurrage clause was penal, A's decision to keep the contract alive was held not in 'good faith' and thus not a legitimate interest in performance.[43] The invocation of 'good faith' as a corollary to 'legitimate interest' is an unexpected and unnecessary turn, and contributes nothing but more uncertainty to the law on repudiations.

Leggatt J analogised the election of an innocent party facing a repudiation with that of the holder of a discretion under contract. He concluded that the principles requiring 'good faith' and against capricious or arbitrary usage developed to apply to the latter ought apply to the former. His argument is inspired by the decision of the Supreme Court of Canada in *Bhasin v Heynew*.[44] In *Bhashin,* the Supreme Court of Canada held that a minimum standard of honesty is required of contractual parties, which entails '[having] appropriate regard to the legitimate contractual interest of the contracting partner.'[45]

However, this analogy is unsustainable for two main reasons. Firstly, the right of the innocent party to choose whether or not to accept a repudiation does not come about by virtue of any form of agreement, but rather by operation of law in response to a unilateral breach of one. The cases relating to contractual discretion all concern an agreement between the parties to grant the discretion.[46] Therefore, expectations may be a somewhat relevant factor. However, when a contract is repudiated there is no agreed discretion and the innocent party's ability to elect to reject the repudiation is better viewed as a form of remedy offered by the law which gives serious and adequate weight to the binding nature of contracts. This form of discretion is one-sided, where one party has a level of unregulated ability to independently alter the terms of the agreement in a way to which the other party gives its consent in advance. If we analogise scenarios of repudiations to discretion, it is apparent that both parties have the 'discretion' to repudiate.

[43] ibid [97], [98], [118].

[44] [2014] 3 SCR 494.

[45] ibid 499.

[46] *The 'Product Star' (No 2)* [1993] 1 Lloyd's Rep 397*; Paragon Finance Plc v Nash* [2002] 1 WLR 685; *Socimer International Bank Ltd v Standard Bank London Ltd* [2008] 1 Lloyd's Rep 558*; British Telecommunications Plc v Telefónica O2 UK Ltd* [2014] UKSC 42.

However, 'discretion' of whether to keep the contract alive or not is in response to a wrong done by the other party. It is a consequence of the other party's choice to repudiate. In repudiating, the first party triggers the right of the second party to choose whether to accept or reject the repudiation. This right was not exercised by free choice; it is therefore not truly a 'discretion'. Professor Janet O'Sullivan accurately points out that the repudiating party knows its repudiation can either be accepted, requiring it to pay damages, or rejected, and the contract will subsist.[47] In either case, it is awarded a degree of certainty as any liability it may incur will be framed by the contractual agreement while any discretion under a contract can create an inability of the other party to predict the extent of its obligations.

Second, the gist of the dictum in *BT v Telefonica O2*,[48] one of the decisions relied upon by Leggatt J in his analogy, effectively goes against any such analogising. In *BT v Telefonica O2,* Lord Sumption's argument in favour of the requirement of good faith in exercise of contractual discretion was rooted in the view that the parties must act consistently with the contractual purpose.[49] This is fatal to the analogy since repudiation is, in itself, clearly inconsistent with the contractual purpose. Therefore, it would be illogical and unduly onerous to require the innocent party to act consistently with a contractual purpose that has been blatantly disregarded by the repudiating party. Furthermore, in rejecting a repudiation, the innocent party can be seen as acting in a manner consistent with the main underlying purpose of the contract, which is performance.

Leggatt J's resort to the concept of good faith is thus simply untenable. However, it is not entirely incongruous. The usage of terms such as 'wholly unreasonable' or 'perverse' in the case law can be seen as semantic substitutes for 'in *mala fide*'. The consistent affirmation of a purely financial interest as 'legitimate' makes it a herculean task to differentiate between parties who seek performance of the repudiated contract out of genuine financial need and parties that seek performance out of 'malice' or cynically. It seems as though Leggatt J's usage of 'good faith' was necessary in his view so to avoid sterilisation of the qualification. However, 'good faith' is strikingly unmerited if we look to the source of the confusion; that, financially speaking, opting to accept the repudiation and mitigating the losses is the soundest route to take. A purely financial interest is, in fact, not a legitimate interest at all.

4. A Financial Interest Is Not a Legitimate Interest

The murkiness of the 'legitimate interest' terminology results from the courts' consistent adherence to the proposition that a legitimate interest may be a purely financial one. This conflation of a purely financial interest with a 'legitimate

[47] Janet O'Sullivan, '*Keeping the Contract Alive: Unaccepted Repudiation and the Protection of the Performance Interest*' (2016).

[48] *BT v Telefónica O2* (n 46).

[49] ibid [37].

interest' is unsound. The analysis below demonstrates that a purely financial interest is not a 'legitimate' interest.

In *White & Carter*, Lord Reid insinuated that a legitimate interest should be weighed against claiming damages.[50] Under English law, damages are assessed with reference to principles of remoteness, causation, and whether or not the innocent party attempted to mitigate the losses it sustained. Sometimes referred to as the 'duty' to mitigate, it arises upon a termination of the contract due to a breach composed of three propositions.[51] Firstly, the claimant cannot recover for losses it could have taken reasonable steps to avoid. Second, the claimant can recover any losses incurred in taking such reasonable steps to avoid the loss. Third, the claimant cannot recover for losses it has successfully avoided by virtue of those steps.[52] However, once an innocent party rejects a repudiation, the contract subsists and is not terminated by the breach. Therefore, no duty to mitigate losses accrues. Yet, practically speaking, if the 'legitimate interest' is purely financial, the rejecting party would be conspicuously financially better off had it taken the route of mitigation and damages by accepting the repudiation for several reasons.

First, mitigating the loss is the commercially sound thing to do. By mitigating, the innocent party is prevented from solely relying on the uncertain justice system in order to retrieve its money or on the slim chance that the repudiating party will turn around and perform its obligations. Legal proceedings are lengthy, during which time the rejecting party operates with increasing deficit. In *The Alaskan Trader*, for example, the ship-owners lost time in which they could have chartered the ship and incurred substantial legal costs.[53] It is in a commercial party's best interest to limit its financial losses for the sake of its own operations and its other business endeavours. This is also the downfall of Leggatt J's concept of 'realistic prospect' of performance in *MSC Mediterranean*.[54] It is financially unsound to rely on an expectation that a repudiating party will nonetheless perform. It is equally financially unsound to expect a company facing a repudiation to hold an assessment of whether there is a 'realistic prospect' of performance on part of such a party whose conduct or communication indicate that it does not plan to perform at all. The loss potential when mitigation is pursued is always smaller than the loss potential when mitigation is not pursued.[55] Damages are meant to put a party in the position it would have been at had the contract been performed.[56] This would mean that the mitigating party receives money for its endeavours in attempting

[50] *White & Carter* (n 4) 437.
[51] O'Sullivan & Hilliard, *The Law of Contract*, (6th edn OUP 2014) 411–412.
[52] *Hussey v Eels* [1990] 2 QB 277.
[53] *The Alaskan Trader* (n 20).
[54] *MSC Mediterranean* (n 36) [104].
[55] Bridge (1989) 105 LQR 398, 399–410.
[56] *Robinson v Harman* (1848) 1 Exchequer Reports (Welsby, Hurlstone and Gordon) 850, 855.

to mitigate the loss even if unsuccessful.[57] The difference in value, which in the worst case would be full performance, covers what would have been obtained by unilateral performance.

Second, failing to mitigate is especially financially insensible if the repudiating party did so due to lack of financial means to perform the contract. Such a party is likely to go insolvent, which would result in the rejecting party only being able to recover a much reduced amount out of the repudiating company's remaining assets. If the former does not attempt to mitigate, its losses would not only be significantly larger, but also partially, and potentially wholly, unrecoverable.

Third, there is great advantage to be had in quick retrieval of some of the losses sustained. In fact, the value of the availability of money has been recognised in *Sempra Metals v IRC*,[58] a restitution claim, as an 'enrichment' which can be claimed for. Lord Hope of Craighead held that:

> ...the enrichment consists, not of the payment of a sum of money as such, but of its payment prematurely… It was the opportunity to turn the money to account during the period of the enrichment that passed from Sempra to the revenue. This is the benefit which the defendant is presumed to have derived from money in its hands.[59]

This value is equally inherent in instances where a party to a contract faces a repudiation. In *The Alaskan Trader*, the main catalyst to finding no legitimate interest was that the arbitrator so ruled and the court could not find an error in the arbitrator's logic.[60] It remains that there is no error of logic to be found. The fact that, after undertaking repairs at a considerable cost of £800K, the ship-owner then fully staffed the ship and kept it waiting for the repudiating charterers for several months is innocuous to say the least. After sustaining such a financial deficit, a reasonable ship-owner would attempt to try and 'make a quick buck' to start covering for the hefty losses sustained. This would help avoid operating with a large budgetary hole and the availability of money can be used to support an expensive and lengthy process of litigation.

In addition, including 'financial interest' as a legitimate interest undermines the rationale to allowing unilateral repudiations of a contract at all. Repudiation serves an important economical role; it allows the repudiating party to mitigate its future losses arising from the performance of the contract. Professors Oren Bar Gill and Omri Ben-Shahar provided an elegant economic analysis of the

[57] *Gebruder Metelmann GmbH & Co v NBR (London) Ltd* [1984] 1 Lloyd's Rep 614.
[58] *Sempra Metals Ltd. v IRC* [2008] 1 AC 561.
[59] ibid 586.
[60] *The Alaskan Trader* (n 20).

credibility of threats to breach contracts, which in a simplified form holds that if the cost of damages is lower than the cost of performance a party ought breach and therefore any antecedent threats to breach are more credible.[61] This analysis operates smoothly in this area of law as well. If the cost of performance exceeds the amount of damages the company would have to pay, it should repudiate. The ability to repudiate gives expression to economic reality (financial hardships, competition, etc.). Indeed, the charterers in *Alaskan Trader* and *The Aquafaith* sought to mitigate losses by repudiating the charter party contract.[62] Combined with the duty to mitigate on the innocent party, the end result of an accepted repudiation is that it allows both parties to hedge their losses and gains. By including a purely financial interest as a legitimate interest, the courts effectively prevent this positive result by permitting too wide a range of interests to facilitate rejections of repudiations, which are essentially demands for specific performance.[63] The courts have effectively ignored Lord Reid's proposition that the legitimate interest should be weighted against claiming damages, a proposition that would have helped the courts evaluate the legitimacy of financial interests. As in a system of law dependant on how a claim is made, as English common law is, a commercial party can present any interest as 'financial', it is best to do away with considering purely financial interests as legitimate.

If the 'legitimacy' of the interest is measured according to the commercial sensibility of the decision to reject the repudiation, it is clear that a purely financial interest lacks entirely in requisite legitimacy. It is simply illogical for a commercial party to risk heftier losses for no more potential gain. A financial interest cannot, therefore, be regarded as a 'legitimate' interest, as, in light of the above, it is wholly financially unsound for the party to not to make any attempt to mitigate or alleviate its losses. Professor Morgan views the principle of mitigation as supporting the abolition of *White & Carter* altogether.[64] He strongly advocates that the mitigation principle presides over contractual remedies in a way that does not allow the innocent party to reject a repudiation, as it is thus caused a loss 'it could have easily avoided'. Morgan holds that a requirement to mitigate should arise automatically upon a repudiation,[65] and that too much emphasis is recently placed on the value of performance.[66] Nevertheless, there is no need to amputate the leg of a patient with merely a sore toe. There are many instances where it is unrealistic to claim

[61] Omri Ben-Shahar & Oren Bar-Gill, 'Threatening an Irrational Breach of Contract' (2003) 11 Supreme Court Economic Review 143.

[62] *The Alaskan Trader* (n 20); *The Aquafaith* (n 31).

[63] *The Puerto Buitrago* (n 24) 259.

[64] Jonathan Morgan, 'Smuggling Mitigation into the *White & Carter v McGregor*: Time to Come Clean?' (2015) LMCLQ 575.

[65] ibid 584, 590.

[66] ibid 583.

that proper adequate mitigation can be expected of an innocent party. In such cases, a 'Writ in water' rejection should be made available precisely because the nature of the innocent party's interest in the contract indicates that there is no feasible way to mitigate for its loss; for example, where that party is an employee or holiday goer. For this reason, a 'legitimate interest' qualification that excludes purely financial interests will be useful to differentiate those worthy parties from those who should be subjected to a duty to mitigate outright.

5. What Should Constitute a 'Legitimate Interest'

By ruling out financial interest as a legitimate interest, one admittedly kicks a hornet's nest by insinuating that repudiation ought be accepted other than in very specific fact patterns. In wholly commercial endeavours, such an assumption is sound in light of the points presented above. When the contract is not entirely for financial gain but provides for additional gains of a different kind, the 'legitimate interest' comes into play. It is where the principal value of performance is one for which damages cannot easily account and mitigation cannot be equally successful in achieving that a legitimate interest should be found. If a financial interest is rejected as a legitimate interest, one must evaluate what *types* of interests could qualify as legitimate. In *White & Carter*, Lord Reid gave one example of a report being prepared by an expert after he is informed that it is no longer necessary, but it was primarily to present the paradigm case of an obligation to pay that is dependent on performance.[67] Other than that, it is evident from the case law that, in attempting to define a legitimate interest, there has been little attempt to consider the specific interests that might answer that test.

Watts v Morrow provides an interesting, comparative, starting point.[68] In *Watts* the claimants attempted to mount a claim for damages for the distress they suffered as a result of breach of a survey contract. Bingham LJ held that there were two exceptions to the general rule that non-pecuniary losses cannot be recovered,[69] the first of which is of particular relevance here.

Bingham LJ held that non-pecuniary interests could be recovered where 'the very object of a contract is to provide pleasure, relaxation, peace of mind or freedom from molestation.'[70] This exception represents an acknowledgement of values to performance other than financial gains that may be held by a party to a contract. Such a 'value' should represent the legitimacy of an interest to reject a

[67] *White & Carter* (n 4) 428.
[68] [1991] 1 WLR 1421.
[69] ibid 1445.
[70] ibid.

repudiation—a principal value to performance for which damages cannot easily account and mitigation cannot be equally successful in achieving.

Many decisions and doctrines are based on different 'values' provided for by unique contracts,[71] including freedom from molestation,[72] secrecy of information,[73] and pleasure and relaxation.[74] In *Jarvis v Swan Tours*, the disappointment in not obtaining the benefit of enjoyment was accounted for by the Court of Appeal.[75] It would probably have been accounted for had Swan Tours simply repudiated the travel contract and not merely poorly performed since the court recognised that the breach was not fundamental and nevertheless opted to grant damages for distress and disappointment.[76] Similarly, in cases where one company concludes an advertising contract with another and the other repudiates, the company seeking exposure has a legitimate interest in rejecting the repudiation. The value of exposure at the desired period of time would be an interest not fully accountable in damages. The loss of exposure time at a period when such exposure was critical for the company is neither included in the costs of finding a new advertising contract nor can it be effectively mitigated. Advertising benefits are not impossible to assess at a particular point in time but their cumulative effect in obtaining new customers, maintaining existing ones, and creating a 'loyalty' culture is likely to be considered too remote for a damages award for a single repudiated advertising contract.

The main criticism of such a formulation is that it narrows down the election. However, this formulation of 'legitimate interest' is not as narrow as may seem. A court may find that a 'legitimate interest' in rejecting repudiation is commercial reputation and the desire not to seem commercially unreliable or unstable. Such a value may be considered such that is not properly ascertainable by way of damages. Accepting commercial reputation as a legitimate interest will widen this formulation to encompass cases where the rejection of the repudiation is due to a calculated assessment and help set apart the malicious from the genuine performance seekers without the unnatural resort to 'good faith'. The initial teething problems of such a formulation of 'legitimate interest' are evident, especially in the context of employment contracts, but its result would be a much higher degree of certainty for contracting parties. Claimants will be aware of the circumstances in which they hold a 'legitimate interest' allowing them to reject a repudiation. The category should not, however, be closed. The courts should allow for introduction of new 'legitimate interests' as new fact patterns emerge in order for this formulation of the qualification to have the most positive effect.

With this approach, a difference may emerge between judicial treatment of elections to accept or reject a repudiation and elections to accept or reject

[71] *Farley v Skinner* [2002] 2 AC 732, 753.
[72] *Watts v Morrows* (n 68).
[73] *Attorney General v Blake* [2000] 4 All ER 385.
[74] *Jackson v Horizon Holidays* [1975] 1 WLR 1468.
[75] [1973] QB 233.
[76] [1973] QB 233, 240 per Stephenson LJ.

repudiatory breaches. The categories of 'legitimate interests' for the former is likely to be more restrictive than that of the latter. For example, in the employment context, an employee rejecting a repudiatory breach by an employer could have the 'legitimate interest' of 'having an occupation' or even dignity, while these would not be accepted as a 'legitimate interest' in instances of fully fledged dismissals. This possibility of a more nuanced approach is appropriate when considering the variety of possible interests in many different sectors that the courts will face. This flexibility brought about by the suggested formulation of 'legitimate interest' will not create uncertainty since there will be a clear yardstick for legitimacy. The variety of interests will all have to represent a principal value to performance that is not compensable by way of damages or can be easily mitigated. An approach that is both nuanced and flexible, but also creates certainty at the same time is a desirable outcome. Such an outcome is not achieved by the 'reasonableness' alternative.

6. Considering the 'Reasonableness' Alternative

Although the language of reasonableness has been often utilised in the case law,[77] the reasonableness concept does not succeed in achieving the same outcome as the reformulated 'legitimate interest'. A 'reasonableness' standard looks into the defendant's behaviour in rejecting the repudiation and it is usually measured against peers such as 'the reasonable man'[78] or 'the officious bystander'.[79] Standards of behaviour are measured in a comparative fashion, and seek to find the average conduct of, in this instance, commercially sound businessmen. However, in the case of rejected repudiations it is much more precise to look into the reason for the rejection itself, rather than as to what a 'reasonable businessman' do in response to the circumstances. It is less able to result in a clear delineation between circumstances of a rejection that enable keeping the contract alive and those which do not.

Further, if we maintain that the election of the innocent party whether to accept or reject the repudiation is a free one, it should be able to make it even if the reasonable man would not have. The main question is not whether the choice itself was reasonable, but rather whether the party had an interest legitimate enough to entitle it to make that choice.

Finally, unlike other areas of contract the law, where these tests are used to resolve ambiguities in party intention, here a party makes a clear-cut decision. There is therefore no need to speculate what that party would have done; this will lead into an examination as to *why* the party acted the way it did and whether its reasons are meritorious. It will provide for a redundant step before naturally proceeding to examine the interests of the rejecting party and will eventually require deployment

[77] *The Puerto Buitrago* (n 24); *The Odenfeld* (n 19).

[78] *ICS v West Bromwich Building Society* [1998] 1 W.L.R. 896, 913 per Lord Hoffman.

[79] *Shirlaw v Southern Foundries* (1926) Ltd [1939] 2 KB 206, 227–8 per MacKinnon LJ.

of a concept akin to 'legitimate interest'. A straightforward examination into the legitimacy of the interest can come up with answers irrespective of sometimes artificial ponderings as to how many or how few reasonable men would have made the same choice.

7. Conclusion

The main issue with the 'legitimate interest' qualification to the innocent party's ability to elect whether to accept or reject a repudiation is that it requires clarification. Since the decision in *White & Carter*,[80] the language of the courts in applying it has been unnecessarily ambiguous and confusing. Neither the current formulation of 'legitimate interest' post-*Aquafaith*,[81] nor Leggatt J's dictum in *MSC Mediterranean v Cottonex*[82] are loyal to Lord Reid's original intention. Furthermore, both are unsatisfactory. The *Aquafaith* and the preceding line of cases are unsatisfactory due their misguided use of 'reasonableness' terminology to define a 'legitimate interest' and their recognition of a purely finanial interest as a 'legitimate interest'. The *MSC Mediterranean* decision is similarly unsatisfactory due to its unsuccessful attempt at solving the difficulties brought about by the recognition of a purely financial interest as a 'legitimate interest' through an untenable analogy to 'good faith' and the unnecessary concept of 'realistic prospect of performance.'

This lack of clarity is caused by the express recognition of purely financial interests as legitimate. Lord Reid's dictum conveys that the legitimacy of the rejection should be weighted against claiming damages.[83] While this was mentioned by Lord Denning in *The Puerto Buitrago*[84] and applied by the arbitrator in *The Alaskan Trader*,[85] it has since been disregarded by the courts. Instead, the courts opted to hold that *any* financial interest is valid irrespective of whether the rejecting party would have been equally better off by mitigating and claiming damages.

A purely financial interest must not be considered a legitimate interest. It is financially unsound for a company not to attempt any form of mitigation and opt for the uncertain route of litigation. That is especially true when the repudiating party does so due to financial difficulties. A rejection of a repudiation for solely a financial interest is a risky bet which can result in no more than the financial value of performance, a value that the much safer and more certain route of mitigation and damages provides. The ability to claim a financial interest as legitimate without any comparison to damages means that a rejecting commercial party can frame its claim so that its interest is always legitimate. This is evident by the case law and the rarity of a finding that an interest is illegitimate. The recognition of a

[80] *White & Carter* (n 4).
[81] *The Aquafaith* (n 31).
[82] *MSC Mediterranean* (n 36).
[83] *White & Carter* (n 4) 431.
[84] *The Puerto Buitrago* (n 24).
[85] *The Alaskan Trader* (n 20).

purely financial interest as legitimate results in the unfortunate serialisation of a potentially highly valuable and useful qualification. What constitutes a 'legitimate interest' should therefore be redefined.

This redefinition should not take the form of replacing the qualification altogether with a 'reasonableness' test. While it is capable of testing whether an interest is 'legitimate', it will not produce a sufficient level of certainty. Moreover, a 'reasonableness' test is redundant as it will nevertheless require deployment of an analysis of the legitimacy of the interests in place. Overall, the test in instances of rejected repudiations does not address an ambiguity in party intention. The test must be more precisely described as appertaining to the rationale behind the choice made, rather than to whether it would have been the popular choice amongst peers.

Defining a 'legitimate interest' as requiring a principal value to performance for which damages cannot easily account and mitigation cannot be equally successful in achieving is the soundest solution. The principal value can take many forms and does not overburden the field by placing strenuous limitations on the validity of rejections of repudiations. On the contrary, it affords the courts requisite flexibility to respond to novel fact patterns along with the certainty of a clear yardstick. If the party's interest in performance has been recognised in previous cases as compensable by way of damages and it can be expected to take reasonable steps to mitigate for it, the interest is illegitimate. Maintaining this alternative formulation is preferable to imposing a duty to mitigate as it responds better to situations in which it is impracticable to require the innocent party to mitigate. Delineating the types of interests that are legitimate will result in law that is, on the one hand, more nuanced, and, on the other, more certain.