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The Law of Contracts and Restitution: A Comparative Introduction

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Remedies

Select bibliography

Glaß, *Gefahrtragung und Haftung beim gesetzlichen Rücktritt* (1959); Grunsky, 'Der Ersatz fiktiver Kosten bei der Unfallschadensregulierung', *NJW* 1983, 2465; Heldrich, 'Vergeudung von Freizeit als Vermögensschaden?', *NJW* 1975, 1737; Honsell, 'Herkunft und Kritik des Interessebegriffs im Schadensersatzrecht', *JuS* 1973, 69; Huber, 'Die Haftung des Rücktrittsgläubigers beim gesetzlichen Rücktritt und des Käufers bei der Wandelung', *JZ* 1987, 649; Keller, *Das negative Interesse im Verhältnis zum positiven Interesse* (1948); Köhler, 'Abstrakte oder konkrete Berechnung des Geldersatzes nach § 249 Satz 2 BGB?' in *Festschrift für Larenz* (1983), 349; idem, 'Grundfälle zum Gewährleistungsrecht bei Kauf, Miete und Werkvertragsrecht', *JuS* 1979, 267; idem, 'Kaufrechtliche Haftung für Mangelfolgeschäden', *JuS* 1982, 13; Lange, *Schadensersatz*, 2nd edn. (1990); Larenz, *Lehrbuch des Schuldrechts, I, Allgemeiner Teil*, 14th edn. (1987) §§ 28, 29; Leser, *Der Rücktritt vom Vertrag* (1975); Medicus, *Schuldrecht, I, Allgemeiner Teil*, 8th edn. (1995) §§ 52, 58; idem, 'Naturalrestitution und Geldersatz' *JuS* 1969, 449; Steindorff, 'Abstrakte und konkrete Schadensberechnung', *AcP* 158 (1959/60) 431; idem, 'Gewinnentgang und Schadensberechnung des Verkäufers', *JZ* 1961, 12; Treitel, *Remedies for Breach of Contract. A Comparative Account* (1991); Wiedemann, 'Thesen zum Schadensersatz wegen Nichterfüllung', *Festschrift für Hübner* (1984) 719; Wieling, 'Synallagma bei Nichtigkeit und gesetzlichem Rücktritt', *JuS* 1973, 397.

I. SPECIFIC PERFORMANCE

(*a*) *Sale of specific goods*

In English law it is axiomatic that a seller who is in breach of contract to deliver specific or ascertained goods can be faced with an action for damages. The buyer may not, as a rule, demand specific performance. Only in relatively rare cases will a court grant the plaintiff's application and make a decree directing the defendant to perform the contract specifically. Since this remedy has its origin in the equitable jurisdiction of the Court of Chancery, its granting is entirely at the discretion of the court. In practice this means that the power vested in the court will not be exercised when the chattel is an

ordinary article of commerce which is of no special value to the plaintiff and damages would be full compensation. (Section 52 Sale of Goods Act 1983/1979).

German law has chosen a different starting point. As a matter of principle, the creditor is entitled to a judgment for performance. Although the BGB does not contain an express rule to this effect, there can be no doubt that this principle is inherent in a number of provisions in the general part of the law of obligations. Thus § 241 BGB provides that the creditor is 'entitled to claim performance from the debtor' (*'berechtigt, von dem Schuldner eine Leistung zu fordern'*). To the same effect is § 249 BGB which states that a person who is obliged to make compensation 'shall restore the situation which would have existed if the circumstances rendering him liable to make compensation had not occurred.' This is known as the principle of *Naturalherstellung* (restitution in kind). It may be contrasted with several subsequent provisions which show that the duty to make compensation in money (*Ersatz in Geld*) ranks second, viz. it takes the place of *Naturalherstellung* only in cases where it is either impossible or insufficient to compensate the creditor, or where restitution in kind would require unreasonable efforts or expense (§§ 250 I2, 251 BGB). The provisions just mentioned lay down substantive rights (*materielle Ansprüche*). The pertinent procedural remedy would then be an action for performance (*Leistungsklage*) which the Code of Civil Procedure (ZPO) prescribes for all cases in which a plaintiff asks the court for a judgment ordering the defendant to do or not to do a particular thing (see § 253 *et seq.* ZPO).

Leaving aside for a moment the question whether claims for specific performance of contracts of sale are frequent in practice, the seller's obligation to transfer property may be enforced by taking the property from the seller and giving it to the buyer. In this context it should be remembered that in German law a contract for the sale of specific goods does not yet operate as a transfer of ownership (in contrast to sections 16–18 Sale of Goods Act 1893/1979). As explained in Chapter 1, the transfer of property is regarded as a separate legal transaction (*dinglicher Vertrag*) which must be distinguished from the underlying obligation (§ 433 in conjunction with § 929 BGB). According to § 929 BGB it is necessary that the seller of the chattel deliver it to the buyer and both agree that the ownership is transferred thereby. At this point, three provisions of the ZPO fill the gap which arises if the seller is unwilling to co-operate: the judgment ordering specific performance is treated as a substitute for the 'agreement' (*Einigung*) to transfer the ownership (§ 894 ZPO), and the 'delivery' (*Übergabe*) of the chattel is enforced by the bailiff (*Gerichtsvollzieher*), who takes it from the seller and hands it over to the buyer (§§ 883, 897 ZPO).

Although no statistics exist to substantiate the following point, the general

belief is that buyers will resort to such proceedings only in relatively rare cases. For, though they make sense when the subject matter of the contract is unique—as, for instance, a certain picture or other work of art—the situation is entirely different where the contract concerns a chattel which may easily be obtained elsewhere on the market. The buyer will then prefer to give the defaulting seller a reasonable period of time within which to perform his obligation. As stated in Chapter 6 above, this must be combined with a warning that the creditor (buyer) will refuse to accept performance after the expiration of the period of grace (*Nachfrist*). If, then, no performance has taken place, the buyer will be entitled to demand compensation for non-performance or to withdraw from the contract (§ 326 I BGB).

For the sake of clarity it should be added that a seller of specific goods which turn out to be defective will not be faced with a claim for 'enforced performance'. He is neither obliged to remove the defect, nor expected to deliver similar goods which are free from defects. However, as already indicated in Chapter 6, in such cases the seller is deemed to have warranted to the buyer that, at the time when the risk passes to the buyer, (i.e. at the moment of delivery), the chattel 'is free from defects which diminish or destroy its value or fitness for its ordinary use, or the use provided for in the contract' (§ 459 I 1 BGB). As a consequence, the buyer of a defective chattel who did not know of the defect and whose ignorance was not due to gross negligence (§ 460 BGB), has the choice between two claims: he may either demand annulment of the sale (*Wandelung*), or reduction of the purchase price (*Minderung*)—§ 462 BGB. Damages may only be claimed if the seller also warranted that the chattel has certain promised qualities (§ 459 II, 463 I 1 BGB: *Eigenschaftszusicherung*). The same applies if the seller has fraudulently concealed a defect (§ 463 I 2 BGB). It should be noted that these remedies are only concerned with the question whether the buyer has received the value he was entitled to expect under the contract (*Leistungsinteresse*). Different considerations apply when it comes to damage done by defective goods causing injury to persons or other property (*Integritätsinteresse*) for here we reach the disputed boundaries of contract and tort.

(*b*) *Sale of generic goods*

What has been said in regard to the claim for specific performance against a seller of ascertained goods who is unwilling to perform his obligation under the contract, applies with equal force to a seller of generic goods. But in this case it is even more obvious that commercial men will rarely resort to enforced performance. For in the vast majority of cases they will prefer to hold the defaulting seller liable in damages if they had to buy such goods elsewhere at a higher price. However, it will be different in times of scarcity

of such goods and other sudden changes of economic circumstances. The buyer will then be interested in specific performance because damages will not be sufficient compensation. The petrol crisis in the early seventies offers a good illustration for this proposition. (See: *Sky Petroleum Ltd.* v. *V.I.P. Petroleum Ltd.*, [1974] 1 W.L.R. 576, Chancery Division, *per Goulding*, J.).

Unless otherwise agreed upon by the parties to a contract, a seller of generic goods must deliver merchandise 'of average kind and value' (§ 243 I BGB: '*mittlerer Art und Güte*'). If he delivers goods which are below this standard, the law regards this an unsuccessful attempt at performance which has not yet extinguished the original claim to performance. Nevertheless, § 480 I BGB enables the buyer to waive this claim and to cancel the contract or to keep the goods at a reduced price. (Case 116.)

In this context some have wondered whether this is good law for all possible cases. For there may be situations in which it would be just and reasonable to give the seller a chance to remedy the defect either by repair or by delivery of substitute goods. For this purpose let us assume the goods delivered did not conform with the contract. If this lack of conformity was only slight, and the seller immediately offers substitute goods, it requires a legitimate interest on the part of the buyer if he is to be allowed to reject this offer. There is authority that in a situation like this a buyer could be precluded from rejecting the delivery of substitute goods. This ruling is based upon standards of good faith prevailing in commercial dealings (§ 242 BGB; see Reichsgericht, 6 November 1917 = RGZ 91, 110, 113). It must, however, be admitted that in German sales law, as it stands now, these are exceptional cases. The Bundesgerichtshof has repeatedly held that, as a matter of principle, the buyer of generic goods need not agree to the seller's offer to deliver substitute goods which are free from defects. This Court has also rejected the seller's argument based upon § 243 BGB: the first delivery having been below the required average kind and value, it must follow that the original obligation still exists and hence must be capable of fulfilment by the seller. It is, however, obvious that this reasoning deprives the buyer of his choice of remedies which he enjoys under § 480 I BGB (see Bundesgerichtshof, 5 October 1966 = NJW 1967, 33, Case 117).

Claims on warranties in sales law are subject to short periods of prescription, i.e. the functional equivalent of 'limitation of actions' in a legal system based on the Common law. In the case of movables the prescription period is six months after delivery unless the seller has fraudulently concealed the defect (§ 477 I BGB). The soundness of this rule, which operates even if the buyer was unable to realize the defect, has recently come under attack. In its defence it has been said that the legislator wished to avoid evidentiary difficulties; for how can a buyer convincingly show that the defect existed already at the moment of delivery if a longer period of time has elapsed?

Most of the rules laid down in regard to warranty claims for specific or ascertained goods are also applicable to the sale of generic goods. This means that a buyer who has received defective goods, must decide within the short period of prescription which of the three remedies available under § 480 BGB he prefers: cancellation of the sale (*Wandelung*), reduction of the price (*Minderung*), or delivery of substitute goods (*Nachlieferung*). If the seller agrees, the cancellation or reduction 'is effected' (§ 465 BGB: '*ist vollzogen*'), or if he wishes substitute goods, and the seller consents thereto, the original claim for performance of the contract is confirmed thereby. It is important to note that the claims resulting from cancellation or reduction are no longer subject to the short period of prescription; and it goes without saying that the same is true of the claim for substitute goods to which the normal period of prescription applies (see Bundesgerichtshof, 10 January 1958 = NJW 1958, 418).

Thus far it has been assumed that the seller has given his consent to the buyer's demand. But what happens if the seller denies the defect in the goods? In this case the buyer must bring an action within the short period of prescription. If he succeeds, the judgment operates as the seller's consent (§ 894 ZPO). Again, the claims resulting from this judgment are subject to the regular periods of prescription that are prescribed by the law of contract, the regular period being thirty years (§ 195 BGB), but for many everyday transactions it being only two years (§ 196 BGB).

As has already been hinted at, the soundness of some of the rules which have just been described, is a matter of serious doubt. The Federal Ministry of Justice has responded to this criticism voiced by scholars and practitioners as well. A committee of experts working under the aegis of this Ministry has made far-reaching proposals aiming at the reform of the law of obligations (see *Abschlußbericht der Kommission zur Überarbeitung des Schuldrechts*, 1992, edited by the Federal Minister of Justice and discussed in a different context in Chapter 6, above). For present purposes, most important among the proposals contained in this reform project are the ones which aim to introduce unified periods of prescription. (According to these proposals, the regular period of prescription for all contract-based claims should be three years: § 195 I BGB-KE). This rule is designed to overcome the inconveniences resulting from the six months' period in § 477 BGB (see also Bundesgerichtshof, 2 June 1980 = BGHZ 77, 215, 223 where the Court indicated *obiter* that a seller may be stopped from pleading prescription if this would amount to an 'abuse of the law'. The effect which these differing periods of prescription have on plaintiffs trying to avoid them by invoking the general part of the law of obligations and, in particular, the notion of positive breach of contract, was discussed in Chapter 6, above).

Another important proposal aims at a reform of the entire law of sales

warranties: the buyer may request substitute goods if the chattel was defective; and the seller is given the choice either to repair the defect or, if the contract concerns generic goods, to deliver goods which are free from defects (§ 438 I BGB-KE). This proposal may be traced back to the Uniform Law on the International Sale of Goods (ULIS—the Hague Convention of 1 July 1964, Arts. 42, 44) and, more recently, to the Vienna Convention of the United Nations on Contracts for the International Sale of Goods (CISG of 11 April 1980, Arts. 46, 48). As stated in Chapter 6, both Conventions have been a source of inspiration for this German reform project in the area of sales law.

(c) *Contracts for work and labour—building contracts*

The general attitude prevailing in Common law systems with regard to specific performance of contracts for work and labour and building contracts seems to be clear: non-performance or unworkmanlike performance does not give rise to a decree for specific performance. This is certainly so 'at law' where an action for breach of contract will lie instead. However, there remains the question whether the position is different 'in equity' where specific performance may be ordered in the discretion of the court.

As far as work on goods is concerned, it appears that damages are a sufficient remedy. This accounts for the complete dearth of judicial authority in England. But the situation is different with respect to building contracts. For here one finds a certain type of case which has been recognized by the courts as forming an exception to the general rule that specific performance of a building contract will not be ordered.

The cases where this remedy was granted show that several conditions must be satisfied. Thus, first the obligation of the contractor must be precisely defined, so that the court can ascertain without difficulty which performances are required. Secondly, damages must not compensate adequately the employer. Thirdly, the contractor must be in possession of the land on which the building is to be erected. The last of these conditions shows the exceptional nature of the situation in which an order for specific performance will be made in English law. It concerns actions brought by vendors and lessors of land against their purchasers or lessees who had covenanted to erect certain buildings thereon within a fixed period of time. The English leading case of *Wolverhampton Corporation* v. *Emmons*, (1901) 1 Q.B. 515 (C.A.) where the plaintiff, an urban sanitary authority, had sold and conveyed to the defendant a plot of land in pursuance of a scheme of street improvement, can serve as an illustration.

There the defendant had covenanted with the vendor that he would erect buildings thereon within a certain period of time. In a situation like this pecuniary damages are no adequate remedy against a recalcitrant

contracting party who must not be allowed to obstruct an improvement scheme for a non-sanitary area. The decision shows that the public interest may be an additional consideration militating in favour of an order for specific performance. In a more recent case the defendant, a landlord, was in breach of a covenant to repair the external walls of a building. Again, the plaintiffs had a substantial interest in the specific performance of the contract and damages would not have been an adequate compensation for the defendant's failure to build or to repair, because the defendant was in possession of the land so that the plaintiffs could not have employed another person to do the work without committing trespass. (See *Jeune* v. *Queens Cross Properties Ltd.*, [1973] 3 All ER 97). In the normal case, where construction work is to be carried out on the employer's land, this difficulty does not exist. This explains why specific performance is not ordered with regard to rectification of a defective work (see W. Lorenz, 'Contracts for Work on Goods and Building Contracts' in *International Encyclopedia of Comparative Law*, Vol. VIII: *Specific Contracts*, Ch. 8 (1976) sections 18, 98; Treitel, *The Law of Contract*, 9th edn. (1995), 932).

In a legal system such as the German where, at least theoretically, the claim for specific performance of contractual obligations is the rule rather than the exception, other questions arise. For instance, whether the hirer or employer who is entitled to refuse the acceptance of defective work may not merely demand the removal of the defect, but may insist on the production of a new work. The relevant provision of the BGB, after stating that the produced work must be free from defects, merely says that 'the employer may demand the removal of the defect' (*'kann der Besteller die Beseitigung des Mangels verlangen'*) if the work is not of such quality' (§ 633 II 1 BGB.) A literal interpretation of this provision seems to lead to a negative answer. Indeed, this is the opinion which has prevailed for some time in German law. The whole discussion which need not be repeated here has suffered from too much theory. A factual approach shows that the problem is not of equal significance in all types of cases in this area of the law.

It would seem that in cases concerning the repair of goods belonging to the hirer, removal of the defect and production of a new work are not necessarily distinguishable. Thus, a workman who has undertaken to replace the broken leg of a chair and does so by using defective wood, will certainly be compelled to do the whole work again if the hirer demands the 'removal of the defect'. In a case like this, removal of the defect practically amounts to the production of a new work, for both may require the same effort. It would be incomprehensible, indeed, if a provision which is silent on the production of a new work, but gives the hirer a right to demand rectification of the work, did not cover this case also. On the other hand, the situation may be viewed differently where a non-fungible thing as, for instance, a machine,

is to be produced from material provided by the workman. Obviously, the measures to be taken by the workman in order to satisfy his customer if the machine turns out to be defective will depend upon the nature of the defect. Where it concerns merely a certain part of the machine which may be replaced by a spare, this will still be regarded as removal of the defect. But can the same be said if the design was faulty and the hirer demands the delivery of a machine of perfect design? This hypothetical case is interesting also in so far as it shows an affinity with contracts of sale (see § 651 I BGB: contract for the delivery of work = *Werklieferungsvertrag*).

From the cases already mentioned, the preliminary conclusion may be drawn that the solution to this problem cannot depend upon a mere conceptual distinction between 'removal of defect' and 'production of a new work'. Even if such a clear-cut distinction did exist, economic aspects would also have to be taken into consideration in order to determine which remedy best suits the legitimate interest of the parties in the particular case. This is also the approach which has recently been taken by the Bundesgerichtshof in a case which concerned a contract to install windows and doors with aluminium frames in a family home.

In that case, the contract stipulated for the lowest possible heat loss factor. When the work had been performed it turned out that the promised protection from heat loss had not been achieved. Therefore, the employer demanded remedy of the defect by means of an exchange of all frames and wings of windows and doors with new ones with the appropriate heat loss factor. The action succeeded. The Court openly departed from its established case law by declaring that the claim for removal of defects may amount to the production of a new work (*Neuherstellung*) if this is the only possible way to remedy the defects effectively (see Bundesgerichtshof, 10 October 1985 = BGHZ 96, 111, 117, Case 118).

What has been said thus far with respect to the contractor's obligation to remove defects in the work or even to produce a new work is, however, subject to an important qualification: the contractor is entitled to refuse such removal if it requires disproportionate outlay (§ 633 II 2 BGB). In laying down this rule the legislator had in mind cases where the cost of this effort would exceed the damage suffered by the employer. Therefore the BGB qualifies the demand for removal of defects by considerations of economic reasonableness. This applies, of course, with equal force to the claim for production of a new work. (Cf. *Ruxley Electronics Ltd.* v. *Forsyth* (1995) 3 WLR 118 (HL): cost of reinstatment was an unreasonable claim in the circumstances. Measure of damages should be the diminution of value in the work = *Minderung*.)

Although the BGB is based upon the principle that, first of all, the employer must give the contractor a fair chance to remedy the defect in the

work, there is another important qualification which must be borne in mind. Apart from the case where removal of the defect is impossible or is refused by the contractor, 'the immediate enforcement of the claim for cancellation or reduction of the remuneration may be justified by a special interest of the employer' (§ 634 II BGB). In the above-mentioned example of the roofing contractor, whose entire work proved to be worthless, the employer, quite understandably, will not be interested in the production of a new work by this contractor. If it comes to litigation, the controversy will turn on the question whether the price may be reduced to nil, and whether damages may be claimed in addition. The disappointed employer will then entrust a more competent and reliable contractor with the production of a new work. The General Conditions for Building Works (*Verdingungsordnung für Bauleistungen* = VOB/B), which are widely used in the building industry, are to the same effect (see Bundesgerichtshof, 8 December 1966 = BGHZ 46, 242, 245–6, Case 119).

2. EXCEPTIONS FROM THE PRINCIPLE OF NATURALHERSTELLUNG

As has already been pointed out in the context of sale of specific or generic goods, enforced performance is the rule in German law, whereas in Common law systems it is an exception to the general availability of damages. However, it could also be shown that in actual practice specific performance is by no means the rule in German law. Moreover, there may be situations in which the difference between enforced performance and damages can only be discovered with the magnifying glass of the lawyer. Thus, where the buyer owes the seller the price for goods sold and delivered, a judgment ordering payment of the price entitles the creditor to enforced performance. This is the position in German law. In English law the seller would get the same by way of substitutionary relief in money; and in both systems the seller could also claim interest on this sum because the buyer is in default. (Treitel, *Remedies for Breach of Contract* (1991), 75, gives another example which shows that in cases where a sum of money is owed the difference between the two legal systems is merely a matter of legal theory: an employee is wrongfully dismissed before the end of his agreed period of service. In English law the employee is entitled to recover the remuneration by way of damages, but in German law he could sue the employer for the agreed remuneration. In both systems a deduction may be made if he had earnings from other employment or if he 'maliciously omitted' to earn money by seeking and accepting employment (see § 615 I 2 BGB).)

When it comes to cases of injury to a person or damage to a thing, the creditor has the choice between restitution in kind (*Naturalherstellung*) or a sum of money which is necessary for such restitution (§ 249 I 2 BGB).

Compensation in money may also be had in some other situations: restitution in kind may be impossible or insufficient to compensate the creditor (§ 251 I BGB); restitution in kind would require disproportionate outlays (§ 251 II BGB); the creditor has fixed a reasonable period for the restitution by the person claimed to be liable, but restitution is not effected in due time (§ 250 BGB).

(*a*) *Personal injury*

For obvious reasons § 249 I 2 BGB leaves it to the injured person to decide whether the person claimed to be liable should have a determining influence on the restoration of his or her health. Under this provision the injured person may demand 'the sum necessary for such restitution'. In the typical cases which have given rise to litigation, the injured person has already incurred medical expenses, and he or she (or the insurer by way of *cessio legis*) demands their reimbursement. In cases of serious injuries it may happen that a costly medical treatment was not or was only partially successful. The defendant may then be tempted to question the necessity of the plaintiff's expenses. However, the courts will look at the chances of restoring health from an *ex ante* position when deciding whether this particular medical treatment was still in keeping with the *lex artis* (see the cases listed by Palandt/Heinrichs, *BGB*, 55th edn. (1996) § 249 no. 10).

As will be shown below (*b*) the Bundesgerichtshof has held repeatedly that in case of damage to property, the owner or possessor is entitled to a sum of money necessary for repair, but need not use this money for carrying out such repair. In a case like this, it is entirely in the claimant's discretion how this money will be spent. This explains why the same questions have been raised with respect to personal injury. May the injured person claim a fictitious sum of money as compensation for the injury, even though the money will not be spent for the restoration of his or her health? The problem has come up in connection with personal injury sustained in a traffic accident. The claimant had to undergo a bowel operation which was the immediate consequence of the accident caused by the defendant. The operation was successful, but some scars remained on the skin of the abdomen. The defendant's insurer was willing to pay the estimated costs of this operation in advance and without being sure that this money would really be used for the removal of the scars.

The Bundesgerichtshof dismissed the plaintiff's action for fictitious damages. The Court took great pains to distinguish this case from previous cases concerning damage to property. While it is axiomatic that an owner may freely dispose of his movables, which necessarily includes the decision not to have the damaged chattel repaired and to buy something else instead, the same considerations cannot apply to the restoration of the bodily integrity

(*Herstellung der körperlichen Integrität*) because this is essentially a non-pecuniary damage (*Nichtvermögensschaden*). Therefore the decision of the injured person to continue to live with those scars, rather than submitting to a medical treatment with no guaranteed success, is made on an entirely different footing. Damage of this kind is not within the scope of § 253 BGB; and the point has been reached when § 253 BGB becomes irrelevant. Compensation for non-material damage may thus only be demanded as provided by law. But in the instant case the prerequisites of § 847 BGB granting damages for pain and suffering were absent (see Bundesgerichtshof, 14 January 1986 = BGHZ 97, 14, Case 120 overruling the courts of Appeal of Celle and Stuttgart).

(*b*) *Damage to property*

Experience suggests that in the vast majority of cases damage to property is caused by tortious acts or omissions. Such claims are based upon the delict provisions of the BGB (§ 823 *et seq.*). These provisions must, however, be supplemented by §§ 249–52 BGB containing the general rules of the law of damages which are applicable to contractual relations as well (see Bundesgerichtshof, 14 June 1967 = WM, 1967, 749 concerning damage done to an apartment; liability of the lessee for the loss suffered by the lessor after the end of the contract period because the rooms were uninhabitable while under repair. See, also, Bundesgerichtshof, 10 October 1985 = BGHZ 96, 124 concerning the inconvenience caused by the defects of a car-park in the basement of a house for which the contractor was responsible to the building owner who could not garage his car). Since the manifold problems arising in the law of torts are beyond the scope of this book, the reader is referred to Markesinis '*The German Law of Torts*' (3rd edn. 1994, p. 928 *et seq.*) where the subject of 'damage to property' is dealt with from the aspect of the law of delict. Attention here will thus be drawn only to some exceptions from the principle of *Naturalherstellung* which may have some bearing on the law of contract, too.

A crucial type of case which has come before German courts in recent years has turned on the question whether it may still be regarded as 'damage to property' if a person who, as a result of an accident caused by the defendant, is deprived of the possibility of use (*Nutzungsmöglichkeit*) of a chattel. It all started with actions brought by motor-car owners whose vehicles were damaged in accidents for which the defendants were held responsible. While the car is undergoing necessary repair its owner cannot use it. It is settled law that the owner may make up for this loss by hiring a similar car at the expense of the tortfeasor. But may he also claim a corresponding sum of money if he abstains from hiring a substitute vehicle? Astonishingly enough, the Bundesgerichtshof has repeatedly held that this is a recognizable head of

damage: the 'temporary loss of the possibility of using a car' (*vorübergehender Verlust der Gebrauchsmöglichkeit eines Kraftfahrzeugs*) is regarded as forming part of the damage to property which must be made good (see Bundesgerichtshof, 30 September 1963 = BGHZ 40, 345 and Bundesgerichtshof, 15 April 1966 = BGHZ 45, 212 applying § 251 BGB). These decisions have met with strong criticism in German legal literature. The fear was expressed that this new case law might open the floodgates and lead to the 'commercialization' of all sorts of losses of amenities of life connected with the use of one's property. It thus became foreseeable that henceforth the courts would have to decide whether or not this *ratio decidendi* holds good also for such items as fur coats, motor boats, swimming pools and the like (see Palandt/Heinrich, *BGB*, 55th edn. (1996) Vorbemerkung vor § 249 no. 25–31, where all these cases are listed). Not surprisingly perhaps, in most of these cases the actions failed; but the reasoning of the courts bristles with distinctions which are not really convincing. So, eventually, the point was reached at which the Great Senate for Civil Matters (*Großer Senat für Zivilsachen*) had to be convened in order to secure the necessary uniformity of decision making in this area of the law (see § 137 GVG = *Gerichtsverfassungsgesetz*, i.e. the German Judicature Act).

In this case a 'luxury residential building' had become uninhabitable for five weeks because construction work carried out at a steep slope below had endangered the safety of its foundations. Since the owner of his house was forbidden to live there, she used a nearby camping bus as an emergency shelter. There was no dispute about the amount necessary for the repair of the building. The controversy turned on DM 3.000 which the owner demanded from the defendant contractor in addition for the 'loss of the possibility of using her house'. The Bundesgerichtshof reached the conclusion that this may be regarded as recoverable property damage under the compensatory principle of the BGB, even though the owner of the house did not incur expenses or lost any income thereby. The essential point in the elaborate reasoning of the Court is this: there is no substantial difference between the use of one's property for gainful professional activities and the use of such property for maintaining one's typical lifestyle. However, beyond this limit no compensation can be awarded because this would violate § 253 BGB which allows compensation in money for non-material damage only as provided by law (see Bundesgerichtshof, 9 July 1986 = BGHZ 98, 212).

The reader will probably be inclined to ask whether this decision of the full Court has brought about the final clarification of a difficult problem. The answer to this question can hardly be in the affirmative. Recently the Court had to deal again with a case in which the owner of a house was prevented from using an apartment situated in the basement. Owing to the insufficient outer insulation of the basement humidity had penetrated the

walls thus making the apartment uninhabitable. The plaintiff had bought this house from the defendants four years ago. The contract contained a clause disclaiming all liability for defects in the building. In the instant case this disclaimer was invalid because the vendors had fraudulently concealed this defect (§ 463 I 2 BGB granting compensation for non-performance). The plaintiff was awarded a sum of money needed for carrying out the repair of the building, but the Court was not prepared to give judgment for an additional amount of DM 7,800. This head of damage had been claimed as compensation for not having been able to use the apartment in the basement. However, the plaintiff had to admit that it was used only occasionally by her son who was living elsewhere. Therefore the Court was of the opinion that this apartment was not part of that property which the plaintiff must have permanently at her disposal for maintaining her lifestyle. It would have been different if the apartment was used by a person belonging to her household (see Bundesgerichtshof, 21 February 1992 = BGHZ 117, 260 applying the *ratio decidendi* of BGHZ 98, 212, Case 123).

As has been shown *supra* (*a*), the Bundesgerichtshof does not recognize fictitious damages in regard to personal injury. The decisive point is that non-material damage can only be compensated in money if the law expressly allows it (§ 253 BGB). In cases of personal injury § 847 BGB is the relevant provision which grants money compensation for pain and suffering (*Schmerzensgeld*). Obviously, such considerations cannot apply to property which is at the owner's free disposal.

Let us suppose a car was damaged in an accident caused by the defendant. The owner of the damaged car may, of course, claim compensation covering the cost of repair, but he is free to decide whether or not to have the car repaired. If the owner of the car happens to be a motor mechanic by profession who has himself repaired the damage by using spare parts bought by himself, he may also demand compensation in money. The amount will be the same as if this repair had been carried out in a garage. The Bundesgerichtshof in deciding such a case even held that the VAT sum which a garage would have added to its bill could be claimed (see Bundesgerichtshof, 19 June 1973 = BGHZ 61, 56, Case 121).

(*c*) *Cases where Naturalherstellung would require an unreasonable effort*

Obviously, the general rule that the person claimed to be liable owes *Naturalherstellung* (§ 249 BGB) does not operate when reparation in kind is impossible or insufficient to compensate the claimant. It goes without saying that this does not yet bring our inquiry to an end. The person liable must compensate the creditor in money (§ 251 I BGB). The same applies 'if restitution in kind is possible only through disproportionate outlays' (§ 251 II BGB). In this context a very special problem may arise. Suppose that specific

restoration is possible, but the result of so acting would leave the creditor with a more valuable object than he had before. The problem must be solved by applying the general rule (§ 249 BGB); but regard must be had to the 'compensatory principle' which permeates the law of liability and forbids any enrichment of the plaintiff. This is corroborated by another general principle known as *Vorteilsausgleichung*, i.e. compensating advantages resulting from the damaging event will be taken into account. It must, however, be emphasized that the present problem, usually expressed with the catchword 'new for old' (*neu für alt*), has nothing to do with *Vorteilsausgleichung stricto sensu* because this 'advantage' is not the immediate result of an injury inflicted upon a person or upon property, but accrues to the claimant at a later stage when the damage must be made good. Nevertheless, the tendency in German law is for the courts to make allowance for improvements on the claimant's position. In English law there seems to be only the case of *Harbutts 'Plasticine' Ltd.* v. *Wayne Tank and Pump Co. Ltd.*, [1970] 1 QB 447, decided by the Court of Appeal but subsequently overruled by the House of Lords ten years later, but not on the point presently under consideration (see *Photo Production Ltd.* v. *Securicor Transport Ltd.*, [1980] AC 827). In the case before the Court of Appeal a factory was burnt down due to the negligence of the defendant contractor. Lord Denning, MR, who gave the leading judgment of the Court, pointed out that the destruction of a building is different from the destruction of a chattel as, for instance, where a second-hand car is destroyed. In this case the owner gets its value because he can go to the market and replace it. He cannot charge the defendant with the cost of a new car. But when the plaintiffs' mill was destroyed they had no choice: 'They were bound to replace it as soon as they could, not only to keep their business going, but also to mitigate the loss of profit for which they would be able to charge the defendants' (per Lord Denning, MR, loc. cit. 468). The result was an improved, more modern, building. The plaintiffs got 'new for old', without giving credit under the heading of 'betterment'.

The Bundesgerichtshof had to deal with comparable fact-situations at least twice. In both cases buildings were burnt down. In the first case, decided in 1959, the defendants had set fire to an agricultural building, and in the more recent case of 1987 a residential building was badly damaged in a fire negligently caused by the defendant. In both cases there was no question about the liability of the defendants, but the extent of their liability was in doubt. Applying § 249 *et seq.* BGB the Court was confronted with the following alternative: if *Naturalherstellung* is deemed possible, the sum of money which the owner may claim under § 249 I 2 BGB for the purpose of reconstructing the building will not cover the total amount necessary for all materials, work, and labour. The court will hear an expert in order to find

out the market value of the former building and will then strike a balance between this value and the increased value of a new building of the same type. In the end this will result in a deduction of 'new for old' under the heading of 'betterment'. This corresponds with the solution which would have been reached in cases falling under § 251 II BGB, i.e. where restitution in kind is possible only through disproportionate outlays. In other words: the sum of money which may be claimed for *Naturalherstellung* under § 249 I 2 BGB is the same as the compensation in money under § 251 II BGB (see Bundesgerichtshof, 24 March 1959 = BGHZ 30, 29, Case 122 and Bundesgerichtshof, 8 December 1987 = BGHZ 102, 322).

3. COMPENSATION: *SCHADENSERSATZ*

(*a*) *The interests protected*

'The rule of the Common law is, that where a party sustains a loss by reason of a breach of contract, he is, in so far as money can do it, to be placed in the same position, with respect to damages, as if the contract had been performed' (*Robinson* v. *Harman* (1848) 1 Ex. 850, 855 *per* Parke, B). In the case from which this citation is taken the defendant had promised 'to grant a valid lease', even though he knew that he had no title. The plaintiff was, therefore, allowed to claim the damages which resulted from the 'loss of bargain'.

This situation must be distinguished from others in which a disappointed party may only recover wasted expenditure. Where such 'reliance loss' may be claimed, the plaintiff is put into the position in which he would have been if the intended contract had never been concluded. (See: *Cullinane* v. *British 'REMA' Manufacturing Co., Ltd.* [1954] 1 QB 292, 303 *per* LJ Evershed, MR and *Anglia Television Ltd.* v. *Reed*, [1972] 1 QB 60, 63–4 *per* Lord Denning, MR.)

Although there may be some overlap, reliance loss must be distinguished from 'restitution' which aims at depriving the defendant of a benefit obtained at the expense of the plaintiff. Thus, a seller who has been paid in advance, but fails to make delivery of the goods sold, owes the buyer restitution of the price. The restitution claim is useful in cases where the plaintiff can neither show any loss of profit nor can he establish any wasted expenditure (see Treitel, *The Law of Contract*, 9th edn. (1995), 848–50).

Leaving aside, at least for the moment, certain peculiarities of the BGB with its somewhat complicated interaction of legal institutions concerning faulty performance (*Leistungsstörungen*), it may be stated that the three categories of compensation mentioned above can also be found in German private law. For the sake of clarity it should, however, be emphasized that the claim for restitution is not one for 'damages' *stricto sensu*. Moreover, a distinction must be made between a restitutionary claim resulting from termination of a contract (*Rücktritt vom Vertrag*, §§ 346 to 361 BGB), and a claim for return of an unjustified enrichment (*ungerechtfertigte Bereicherung*, §§ 812 to 822 BGB) which may, for instance, be brought if a performance was made in fulfilment of a contractual obligation which afterwards turns out to have been void. This distinction is important because these two claims may, in some instances, differ in their extent. Generally speaking, however, a claim for return of an unjustified enrichment is weaker because an innocent defendant may plead 'change of position' (see § 818 III BGB: the obligation to return or to make good the value is excluded where the recipient is no longer enriched).

(*b*) *Expectation interest: Erfüllungsinteresse*

In German legal literature 'expectation interest' is often referred to as *Erfüllungsinteresse* or *positives Interesse*, but the BGB speaks of *Schadensersatz wegen Nichterfüllung* (damages for non-performance). This comprises cases where a debtor is held liable on account of non-performance, delayed performance, or defective performance. (As to the conditions for this, see the discussion in Chapter 6 above.) However, a warning, given earlier in this book, must be repeated here. Defective performance does not necessarily give rise to an action for damages. Thus, as already stated, a seller who has delivered a defective chattel is not, normally, liable in damages, for he is only under a 'guarantee liability' (*Gewährleistungshaftung*, §§ 459, 480 BGB) which means that the buyer can choose between cancellation of the contract (involving mutual restoration of benefits received) and reduction of the purchase price (§ 462 BGB). But a seller who has warranted that the thing sold has certain promised qualities, or who fraudulently conceals a defect, is held liable for expectation loss (§ 463 BGB).

An action for damages will also lie where defective performance has caused personal injury or damage to property (*damnum circa rem*). In such cases, the plaintiff may, of course, also bring a tort action (§ 823 I BGB). In German law, as it stands now, such concurring actions fulfil a useful function because they complement each other both in regard to the conditions and to the extent of liability. (For further details in English see: Markesinis, *The German Law of Torts*, 3rd edn., (1994), 804.) These contract/tort borderline cases are not, however, without their doctrinal difficulties as English lawyers know full well.

A contractual claim for damages on account of defective performance would have to be based on *positive Vertragsverletzung* (positive breach of contract) sometimes also referred to as *Schlechterfüllung*. It requires fault which is presumed so that it is up to the debtor to disprove this presumption. This distribution of the burden of proof is based upon an