THE NATURE AND AVAILABILITY OF 'NEGOTIATING DAMAGES' FOR BREACH OF CONTRACT

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The availability of 'negotiating damages' for breach of contract has recently aroused considerable judicial and academic interest across the Commonwealth. Strangely, however, this interest has been largely absent in Australia. After explaining that the essential purpose of such awards is to provide a monetary substitute for performance in circumstances where the usual monetary substitutes are inapposite, this article addresses this lacuna in Australian jurisprudence. More specifically, it is argued that Australian courts should develop the nascent law governing the availability of these awards more consistently with the analysis adopted by the Court of Appeal of Singapore in Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua *instead of following the Supreme Court of the United Kingdom's approach in* One Step (Support) Ltd v Morris-Garner.

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I Introduction

When, if ever, following the breach of a contractual obligation, should Australian law allow an award calculated by reference to the hypothetical 'release' fee that the reasonable plaintiff would have accepted in order to have released the defendant from performance of that obligation? Multiple labels have been used to describe such an award but, following the terminology preferred in *One Step (Support) Ltd v Morris-Garner* ('*One Step*'), the moniker 'negotiating damages' is adopted here.[1] The availability of negotiating damages for breach of contract has received surprisingly little judicial attention in Australia. By contrast, the availability of such awards has been recognised in New Zealand[2] and was recently considered at length by both the Supreme Court of the United Kingdom in *One Step* and the Court of Appeal of Singapore in *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* ('*Turf Club*').[3] The essential aims of this article are to

[1] [2019] AC 649, 664 [3] (Lord Reed JSC, Baroness Hale PSC, Lords Wilson and Carnwath JJSC agreeing), 703 [128] (Lord Carnwath JSC) ('*One Step*'). Cf the terminology used at first instance, adopted by Lord Sumption JSC, of '*Wrotham Park* damages': at 702 [124]. See also at 664 [1]–[2] (Lord Reed JSC, Baroness Hale PSC, Lords Wilson and Carnwath JJSC agreeing). Besides '*Wrotham Park* damages', such awards have also been labelled (a) user damages, (b) release fee damages and (c) licence fee damages: Andrew Burrows, 'One Step Forward?' (2018) 134 (October) *Law Quarterly Review* 515, 516; Edwin Peel, 'Negotiating Damages after *One Step*' (2019) 35(3) *Journal of Contract Law* 216, 225; James Edelman (ed), *McGregor on Damages* (Sweet & Maxwell, 21st ed, 2021) 449–50 [14-001] ('*McGregor*'); Jason NE Varuhas, 'Varieties of Damages for Breach of Privacy' in Jason NE Varuhas and NA Moreham, *Remedies for Breach of Privacy* (Hart, 2018) 55, 91.

[2] See, eg, *Cash Handling Systems Ltd v Augustus Terrace Developments Ltd* (1996) 3 NZ ConvC ¶95-307 ('*Cash Handling*'), discussed in Peter Watts, 'The Release Fee as a Remedy for Breach of Contract: The Judgment of Elias J in *Cash Handling* in the Light of *Morris-Garner*' in Simon Mount and Max Harris (eds), *The Promise of Law: Essays Marking the Retirement of Dame Sian Elias as Chief Justice of New Zealand* (LexisNexis, 2020) 227.

[3] [2018] 2 SLR 655, 667–8 [2]–[3], 690–741 [91]–[249], 743–57 [256]–[301] (Andrew Phang Boon Leong JA for the Court) ('*Turf Club*'); *One Step* (n 1) 664–5 [1]–[5], 669–90 [24]–[95]

explain the central nature and purpose of such awards and to draw upon these final-appellate-level decisions to advance a particular view as to how the nascent Australian law ought to develop.

The English approach enunciated in *One Step* is that negotiating damages are available as a response to breach of contract only when a defendant's breach of contract results in the plaintiff losing a 'valuable asset' that is 'created or protected' by the contractual right infringed.[4] The Singaporean approach expressed in *Turf Club* ostensibly allows for recovery on a more liberal basis. In Singapore, such awards will be available following a breach of contract to compensate a plaintiff for the loss of the promised performance where there is a '*remedial lacuna* due to the unavailability of orthodox compensatory damages and specific relief'.[5]

One important purpose of this article is to question the cogency of the reasoning, adopted in *One Step*, that negotiating damages should be available only when a plaintiff loses a valuable asset upon the occurrence of the relevant breach of contract. We argue that an appreciation that negotiating damages are best understood as a substitute for the promised performance reveals that this restriction on availability is unjustifiable. Our conclusion is broadly consistent with the characterisation, and reasoning, in *Turf Club* as well as Lord Sumption JSC's separate reasoning in *One Step* (that negotiating damages are compensatory in that they provide a tool for identifying the economic value of the performance of which the plaintiff has been deprived).[6] Additionally, we briefly consider the plausibility of an alternative basis for circumscribing the availability of negotiating damages for breach of contract that is consistent with the results in *One Step* and *Turf Club*: namely, that such awards are not justified

(Lord Reed JSC, Baroness Hale PSC, Lords Wilson and Carnwath JJSC agreeing), 692–702 [106]–[123] (Lord Sumption JSC), 703–11 [128]–[159] (Lord Carnwath JSC).

[4] See especially *One Step* (n 1) 688 [92] (Lord Reed JSC, Baroness Hale PSC, Lords Wilson and Carnwath JJSC agreeing). See also at 688 [91], 688–90 [93]–[95] (Lord Reed JSC, Baroness Hale PSC, Lords Wilson and Carnwath JJSC agreeing).

[5] *Turf Club* (n 3) 715 [177] (Andrew Phang Boon Leong JA for the Court) (emphasis altered). See also at 750–2 [277]–[283] (Andrew Phang Boon Leong JA for the Court).

[6] See *One Step* (n 1) 692–3 [106], 698–702 [115]–[124] (Lord Sumption JSC). For another defence of Lord Sumption JSC's view, see Horst K Lücke, '*Wrotham Park* Damages in the UK Supreme Court: *One Step v Morris-Garner*' (2020) 49(2) *Australian Bar Review* 259.

when the purpose of the relevant obligation is 'solely to protect the covenantee against damage to its commercial interests'.[7]

The argument we advance is developed across five substantive Parts. Part II sets the stage for the arguments that follow, defining key terms and explaining certain important distinctions — in particular, the distinction between damages that substitute for performance and damages concerned with making good certain adverse consequences that can be causally attributed to the breach of a legal duty. Part III explains why negotiating damages are best conceptualised as an instance of the former phenomenon and can be understood as compensatory only if the relevant loss being compensated is the loss of the *performance* to which the plaintiff was legally entitled. Part IV outlines the main deficiencies with alternative characterisations of negotiating damages. Part V then considers — and answers — the critical question: when should negotiating damages be available for a breach of contract? The essential answer provided is that, subject to the possible qualification on availability noted above, such awards ought to be available to compensate a plaintiff for (the value of) their lost performance in circumstances where no alternative monetary substitute for performance is available. Finally, Part VI briefly outlines the principles that should govern the quantification of these awards.

II Rights, Remedies, Performance and Substitutionary Damages

A *The Distinction between Primary and Secondary Legal Rights*

Understanding the purpose of awarding negotiating damages following a breach of contract requires appreciating what happens when the state, by curial intervention, makes a remedial order in response to a successful legal claim. The conventional view is that making such an order replicates (or enforces) the new 'secondary' legal right that arises by operation of law in substitution for the primary right created by the contract.[8] This analytical structure of the law of

[7] See *Marathon Asset Management LLP v Seddon* [2017] ICR 791, 848 [217] (Leggatt J) ('*Marathon Asset Management*'). For similar suggestions, expressed in alternative language, see Robert Stevens, *The Laws of Restitution* (Oxford University Press, 2023) 339 ('*Restitution*'); Daryl Xu, 'Negotiating Damages: Rationalising the Compensatory View' [2020] (7) *Journal of Business Law* 561, 571–5.

[8] *Robophone Facilities Ltd v Blank* [1966] 1 WLR 1428, 1446 (Diplock LJ); *Moschi v Lep Air Services Ltd* [1973] AC 331, 346–7, 350–1 (Lord Diplock, Lord Gardiner agreeing at 346);

damages for a breach of contract was recently reaffirmed by Lord Reed JSC (with whom Baroness Hale PSC, Lords Wilson and Carnwath JJSC agreed) in *One Step* itself.[9] With reference to Lord Diplock's leading speech in *Photo Production Ltd v Securicor Transport Ltd*,[10] Lord Reed JSC observed:

> Leaving aside the comparatively rare cases in which the court is able to enforce a primary obligation by decreeing specific performance of it, breaches of primary obligations give rise to 'substituted or secondary obligations' on the part of the party in default. Those secondary obligations of the contract breaker arise by implication of law …
>
> Damages for breach of contract are in that sense a *substitute for performance*. That is why they are generally regarded as an adequate remedy. The courts will not prevent self-interested breaches of contract where the interests of the innocent party can be adequately protected by an award of damages. Nor will the courts award damages designed to deprive the contract breaker of any profit

Photo Production Ltd v Securicor Transport Ltd [1980] AC 827, 848–9 (Lord Diplock) ('*Photo Production*'); *Lombard North Central plc v Butterworth* [1987] 1 QB 527, 538–9 (Mustill LJ, Lawton LJ agreeing at 547), quoting *Photo Production* (n 8) 849–50 (Lord Diplock); *Jobson v Johnson* [1989] 1 WLR 1026, 1032 (Dillon LJ), quoting *Photo Production* (n 8) 850 (Lord Diplock). See also *Honey Bees Preschool Ltd v 127 Hobson Street Ltd* [2018] 3 NZLR 330, 345 [50] (Whata J), where his Honour said that the distinction between primary and secondary obligations is a 'cornerstone' of contract law. An alternative view, advanced vigorously by the late Stephen A Smith, is that the court order creates a new 'tertiary' right that either replicates the content of a pre-existing (primary or secondary) right or is wholly creative in nature: see Stephen A Smith, *Rights, Wrongs and Injustices: The Structure of Remedial Law* (Oxford University Press, 2019) 9–10. See especially at ch 4. Note that it has been argued that a decree of specific performance simply replicates, *rather than* substitutes for, the relevant primary right(s): see David Winterton, *Money Awards in Contract Law* (Hart Publishing, 2015) 124–5 ('*Money Awards*'), discussing Rafal Zakrzewski, *Remedies Reclassified* (Oxford University Press, 2005). See especially at 2–13, 121–2, 134–42, 197, 199–200. The position taken here is that a decree of specific performance is nonetheless different from the original obligation to perform the contract as it still imposes new rights on the parties: (a) the decree carries with it the potential sanction for contempt of court; (b) the content of the decree is different to the primary obligation in the contract insofar as late performance is ordered; and (c) the order still responds to wrongdoing as it is only available where B has breached a contractual obligation (*or* where A can demonstrate that B intends to *breach* the contract) provided that A can also demonstrate that a court award of damages would be inadequate: see Winterton, *Money Awards* (n 8) 126; JD Heydon, MJ Leeming and PG Turner, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (LexisNexis Butterworths, 5th ed, 2015) 653–4 [20-025]–[20-030]. On the nature of specific performance, see Wesley Newcomb Hohfeld, 'The Relations between Equity and Law' (1913) 11(8) *Michigan Law Review* 537, 551 ('Relations'); *Fall v Eastin*, 215 US 1, 14–15 (Holmes J) (1909).

[9] *One Step* (n 1) 672–3 [34]–[35].

[10] *Photo Production* (n 8) 848–9.

> he may have made as a consequence of his failure in performance. Their function is confined to enforcing either the primary obligation to perform, or the contract breaker's secondary obligation to pay damages as a substitute for performance …[11]

This general approach to the concept of a 'primary right' and 'secondary right' draws on the work of John Austin, who influentially described the distinction between primary and secondary rights in his 19th-century *Lectures on Jurisprudence*. Of this distinction, Austin observed that

> [r]ights and duties which are consequences of delicts, are sanctioning (or preventive) and remedial (or reparative). In other words the ends or purposes for which they are conferred and imposed are two: first, to prevent violations of rights and duties which are not consequences of delicts; second, to cure the evils or repair the mischiefs which such violations engender.
>
> Rights and duties not arising from delicts may be distinguished from rights and duties which are consequences of delicts, by the name of 'primary' or principal. Rights and duties arising from delicts, may be distinguished from rights and duties which are not consequences of delicts by the name of 'sanctioning' or 'secondary'. I call them 'sanctioning,' because their proper purpose is to prevent delicts or offenses.[12]

While we do not endorse Austin's prophylactic account of the rationale for 'secondary' rights, for present purposes the essential observation to be derived from this passage is that the causative event that conditions the arising of a secondary right is the breach of a legal duty. In Austinian terms, the secondary right thus provides the appropriate legal response to the defendant's wrong.[13]

[11] *One Step* (n 1) 672–3 [34]–[35] (emphasis added).

[12] John Austin, *Lectures on Jurisprudence: Or the Positive Philosophy of the Law*, ed Robert Campbell (James Cockcroft, 1875) vol 2, 179–80 [1031].

[13] See ibid 184–6 [1037]–[1040]. See also Hohfeld, 'Relations' (n 8) 554, 556; Sir William R Anson, *Principles of the Law of Contract: With a Chapter on the Law of Agency*, ed Arthur L Corbin (Oxford University Press, 3rd ed, 1919) 463–4 [401]; Wesley Newcomb Hohfeld, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1917) 26(8) *Yale Law Journal* 710, 760; Peter Birks, 'Obligations: One Tier or Two?' in PG Stein and ADE Lewis (eds), *Studies in Justinian's Institutes in Memory of JAC Thomas* (Sweet & Maxwell, 1983) 18, 21; Peter Birks, 'Personal Property: Proprietary Rights and Remedies' (2000) 11(1) *King's College Law Journal* 1, 8; James Edelman, 'Gain-Based Damages and Compensation' in Andrew Burrows and Lord Rodger (eds), *Mapping the Law: Essays in Memory of Peter Birks* (Oxford University Press, 2006) 141, 142–6; Robert Stevens, 'Damages and the Right to Performance: A *Golden Victory*

This Austinian taxonomic delineation has some utility if only because it enables a degree of uniformity and consistency in the law of remedies. As Austin said:

> In strictness, my own terms, 'primary and secondary rights and duties,' do not represent a logical distinction … The reason for describing the primary right and duty apart, for describing the injury apart, and for describing the remedy or punishment apart, is the clearness and compactness which result from the separation. For the same remedial process is often applicable to a variety of classes of rights, and repetition is consequently avoided.[14]

Importantly, the delineation between primary and secondary rights also assists in making clear that the latter should bear a conceptual relationship to the former. We also contend that the content of the secondary right is justifiably constrained by the content of the primary right.[15] It is, after all, the existence of, and nonconformity with, the primary right that generates the need for a substitute in the form of the secondary right and corresponding correlative duty.

B *The Distinction between Two Kinds of Compensation*

A further precondition to understanding the nature of an award for negotiating damages following a contractual breach is an appreciation of the existence of (at least) two distinct kinds of damages award that may be made following the breach of a legal duty.[16] These distinct awards aim to 'compensate' the innocent

or Not?' in Jason W Neyers, Richard Bronaugh and Stephen GA Pitel (eds), *Exploring Contract Law* (Hart Publishing, 2009) 171, 171–2 ('Damages'); Stephen A Smith, 'Remedies for Breach of Contract: One Principle or Two?' in Gregory Klass, George Letsas and Prince Saprai (eds), *Philosophical Foundations of Contract Law* (Oxford University Press, 2014) 341, 354–61.

[14] Austin (n 12) vol 2, 185 [1038].

[15] Cf the view of Peter Birks that '[t]he content of the remedial or secondary obligation triggered by a wrong is for the law to decide as a matter of policy constrained only by extrinsic considerations': Peter Birks, 'The Concept of a Civil Wrong' in David G Owen (ed), *Philosophical Foundations of Tort Law* (Clarendon Press, 1995) 31, 51. For a detailed consideration of this question specifically confined to the contractual context, see Richard Craswell, 'Contract Law, Default Rules, and the Philosophy of Promising' (1989) 88(3) *Michigan Law Review* 489; Dori Kimel, *From Promise to Contract: Towards a Liberal Theory of Contract* (Hart Publishing, 2003) ch 4.

[16] For discussion of the application of the distinction in the context of a claim for false imprisonment, see *Lewis v Australian Capital Territory* (2020) 271 CLR 192, 241–7 [142]–[150] (Edelman J) ('*Lewis*'). See generally at 234–5 [123]–[125] (Edelman J). For further recent recognition in the context of a tortious claim for conspiracy by unlawful means, see *Talacko v*

plaintiff for two conceptually separate kinds of deprivation or 'loss', though on occasion they may be combined in a single award provided that double recovery is avoided.[17]

One kind of damages award, hereafter referred to as 'substitutionary', although other language could be adopted,[18] aims simply to compensate the plaintiff for the defendant's failure to deliver, or conform to, the substance of the relevant primary duty irrespective of what adverse consequences result from this failure.[19] The relevant 'loss' compensated here is best understood as (the objective value of) the undelivered performance or unconformed-to duty. This kind of award is not really for *breach* since the defendant's failure to comply with the primary duty merely provides the condition, rather than the justification, for the award.[20] A notable example of such an award being made following the breach of a contractual warranty is the sum awarded to the successful plaintiff in *Clark v Macourt* ('*Clark*'), a decision considered further below.[21] Arguably, another example is the award made to the plaintiff in *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* ('*Tabcorp Holdings*'),[22] although the characterisation of the 'cost of cure' award made there as substituting for the plaintiff's *contractual* right, as opposed to its proprietary right, is more contestable.[23]

Talacko (2021) 272 CLR 478, 495–9 [40]–[51] (Kiefel CJ, Gageler, Keane, Gordon, Edelman, Steward and Gleeson JJ) ('*Talacko*'). See generally at 484–5 [1]–[5] (Kiefel CJ, Gageler, Keane, Gordon, Edelman, Steward and Gleeson JJ).

17 *Lewis* (n 16) 241–7 [142]–[150] (Edelman J); *Talacko* (n 16) 495–9 [40]–[51] (Kiefel CJ, Gageler, Keane, Gordon, Edelman, Steward and Gleeson JJ). See below n 152 and accompanying text.

18 Damages for the 'performance interest' is a term familiar to many lawyers and broadly captures the same idea. However, the use of such terminology can result in the misconception that contracting parties merely have an 'interest', rather than a right, to contractual performance: see, eg, Katy Barnett, 'The "Performance Interest" in Contract Law' in John Eldridge and Timothy Pilkington (eds), *Australian Contract Law in the 21st Century* (Federation Press, 2021) 22, 26–7, 29, 38. See below n 37 and accompanying text.

19 For discussion of this point, see *Lewis* (n 16) 240–6 [142]–[149] (Edelman J); Robert Stevens, *Torts and Rights* (Oxford University Press, 2007) 59–62, 70–2 ('*Torts*').

20 See Ernest J Weinrib, 'Two Conceptions of Remedies' in Charles EF Rickett (ed), *Justifying Private Law Remedies* (Hart Publishing, 2008) 3, 15–23.

21 (2013) 253 CLR 1, 5–6 [1]–[6] (Hayne J), 15 [39] (Crennan and Bell JJ), 42 [146] (Keane J, Hayne J agreeing at 10 [23]) ('*Clark*'). See below nn 77–83 and accompanying text.

22 (2009) 236 CLR 272, 282–3 [1]–[5], 285–90 [13]–[21], 292 [27] (French CJ, Gummow, Heydon, Crennan and Kiefel JJ) ('*Tabcorp Holdings*').

23 See Stevens, 'Damages' (n 13) 188–92. For utilisation of this idea in a different context, see Stevens, *Torts* (n 19) 208. Note, however, that there is arguably a difference between English

The second kind of damages award that a plaintiff may recover is one aiming to make good the proven detrimental financial (and perhaps non-financial) consequences that the plaintiff can causally attribute to the relevant breach of the legal duty.[24] A notable example of this kind of award, again made following an action for damages for breach of a contractual warranty, is that sought by the plaintiff in *Burns v MAN Automotive (Aust) Pty Ltd* ('*Burns*').[25] Another example, this time sought following a contract's termination for anticipatory breach, is one of the claims brought by the unsuccessful plaintiff in *Upside Property Group Pty Ltd v Tekin* ('*Upside Property Group*').[26] Such claims are often described as seeking damages for 'consequential loss'[27] or, at least in the contractual context, damages for 'loss of profits'.[28]

Importantly, a failure to properly distinguish between an award of substitutionary damages and an award aiming to make good the (non-remote) causally attributable consequences of the breach will result in the application of inapposite legal principles. In relation to the former kind of claim, what must generally

and Australian law here in that in Australia it is well established that a plaintiff does not have to intend to incur the cost of cure before claiming such damages: *Bellgrove v Eldridge* (1954) 90 CLR 613, 617–20 (Dixon CJ, Webb and Taylor JJ) ('*Bellgrove*'); *Terrenus Energy SL2 Pte Ltd v Attika Interior + MEP Pte Ltd* [2025] 1 SLR 306, 316–19 [24]–[30] (Kannan Ramesh JAD for the Court).

[24] Although claims for 'consequential loss' for breach of contract are predominantly concerned with financial loss, damages for certain non-financial losses are occasionally recoverable: see Stevens, 'Damages' (n 13) 190–2, discussing *Ruxley Electronics & Construction Ltd v Forsyth* [1996] 1 AC 344 ('*Ruxley*'). Although there is obviously reason to distinguish these kinds of claims, there is also reason to observe that, in both being concerned with ameliorating the adverse consequences of a breach of legal duty, they also share something important in common.

[25] See (1986) 161 CLR 653, 656–8, 660 (Gibbs CJ), 662–8 (Wilson, Deane and Dawson JJ), 669–72 (Brennan J) ('*Burns*').

[26] (2017) 19 BPR 98819, 38144–8 [35]–[53] (Meagher JA, McColl JA agreeing at 38137 [1], Macfarlan JA agreeing at 38137 [2]) ('*Upside Property Group*'). The plaintiff also unsuccessfully claimed for the value of the lost performance or, alternatively expressed, the value of the lost bargain: at 38139–44 [12]–[34] (Meagher JA, McColl JA agreeing at 38137 [1], Macfarlan JA agreeing at 38137 [2]).

[27] For recent recognition of the distinctiveness of such awards in the contractual context, see *MDW Holdings Ltd v Norvill* [2023] 4 WLR 33, 51 [70] (Newey LJ, Asplin LJ agreeing at 55 [87], Whipple LJ agreeing at 55 [88]) ('*MDW Holdings*') — that case was discussed approvingly in Michael Dimarco and David Winterton, 'The Relevance of Hindsight in the Assessment of Damages for Breach of Warranty and Deceit' (2023) 139 (October) *Law Quarterly Review* 525.

[28] *Upside Property Group* (n 26) 38144 [36] (Meagher JA, McColl JA agreeing at 38137 [1], Macfarlan JJ agreeing at 38137 [2]).

be proved,[29] in addition to the contract's existence and the relevant breach, is the difference in value between the performance promised and the performance provided.[30] For the latter kind of claim, it is the existence of a discrepancy between the factual position that the plaintiff hypothetically would have occupied following performance at the date of trial and the factual position occupied instead that must be established on the balance of probabilities.[31] Additionally, such consequential awards are limited by remoteness and mitigation rules, which do not limit the availability of substitutionary awards.[32]

C *Application to Damages for Breach of Contract*

To explain further how this division operates in the contractual context: the first kind of substitutionary award described above aims to compensate the plaintiff for the *value* of the performance that the defendant promised (but failed) to provide.[33] The availability of such an award is consistent with the cardinal principle enunciated by Hayne J in *Clark* that 'loss' for the purposes of contract law encompasses 'the value of what the promisee would have received if the promise had been performed'.[34] Notably, the distinction between such an award and one compensating for 'consequential loss' was recently referred to with approval by Edelman J in *Moore v Scenic Tours* ('*Moore*').[35] His Honour

[29] Arguably, at least some cost of cure awards are also best characterised as substitutionary: see below Part II(D).

[30] As discussed further below in Part V(B), exceptionally, the question of whether the breach was a necessary condition of the failure to receive the promised performance or whether that failure would have happened anyway may also arise: see, eg, *Bunge SA v Nidera BV* [2015] Bus LR 987, 991 [7], 1002 [35]–[36] (Lord Sumption JSC, Lord Neuberger PSC, Lords Mance and Clarke JJSC agreeing), 1012 [84], 1013 [88]–[89] (Lord Toulson JSC, Lord Neuberger PSC, Lords Mance and Clarke JJSC agreeing) ('*Bunge*'); *Clark* (n 21) 8–10 [14]–[22] (Hayne J).

[31] See, eg, *Burns* (n 25) 660 (Gibbs CJ), 666–7 (Wilson, Deane and Dawson JJ), 679–80 (Brennan J); *Upside Property Group* (n 26) 38139 [12], 38141 [19]–[21] (Meagher JA, McColl JA agreeing at 38137 [1], Macfarlan JA agreeing at 38137 [2]).

[32] Cf Katy Barnett, 'Substitutive Damages and Mitigation in Contract Law: Tension between Two Competing Norms' (2016) 28 (Special Issue) *Singapore Academy of Law Journal* 795, 797–8 [3]–[5] ('Substitutive Damages').

[33] See *Bunge* (n 30) 995–6 [21] (Lord Sumption JSC, Lord Neuberger PSC, Lords Mance and Clarke JJSC agreeing).

[34] *Clark* (n 21) 7 [9] (Hayne J) (emphasis omitted). To similar effect, see at 32 [111] (Keane J, Crennan and Bell JJ agreeing at 11 [25]). For an opposing view (which is consistent with Gageler J's dissent at 15–22 [40]–[74]), see *Cessnock City Council v 123 259 932 Pty Ltd* (2024) 418 ALR 304, 307 [7] (Gageler CJ) ('*Cessnock City Council*').

[35] (2020) 268 CLR 326, 348–9 [64] ('*Moore*').

there described the 'fundamental difference' between the two components of a damages award for breach of contract in the following terms:

> Where contract damages provide compensation directly based on the performance interest, that component of the award is not concerned with loss in any real or factual sense. The compensation for the performance interest, 'by the value of the promised performance', appears 'as a "loss" only by reference to 'an unstated ought'. The aim of this component of the award is to provide the promisee with the difference between the value of what was promised and the value of what was received. The promisee had a primary right to performance of the contract so, upon termination, the law generally provides for a secondary right for the value of the performance that was not received or the difference in value due to the defect. …
>
> A promisee might also suffer true, consequential, loss from a breach of contract. These consequential losses might include economic (financial) losses to the promisee to the extent that they go beyond the value of the promised performance and are within the boundaries of legal responsibility. They can also include some non-economic losses.[36]

This recognition of the availability of two conceptually distinct kinds of damages award that may be made following a breach of contract is welcome. Care must nevertheless be taken here not to mischaracterise the distinction. According to his Honour, an award for what is alternatively referred to as 'the performance interest',[37] or the 'value of the promised performance',[38] is not 'concerned with loss in any real or factual sense'[39] because the deprivation of performance

[36] Ibid 348–9 [64], 349 [66] (emphasis in original) (citations omitted), quoting LL Fuller and William R Perdue Jr, 'The Reliance Interest in Contract Damages: 1' (1936) 46(1) *Yale Law Journal* 52, 53 (emphasis in original).

[37] *Moore* (n 35) 348 [64]. This terminology is eschewed here for two reasons. First, it may (misleadingly) suggest that all that the plaintiff has been deprived of is a subjective 'expectation' of performance rather than an objective legal entitlement. Secondly, it is ambiguous as to *how* any such interest (or legal entitlement) should be given effect: see generally David Winterton, 'Two Conceptions of the "Performance Interest" in Contract Damages' in Roger Halson and David Campbell (eds), *Research Handbook on Remedies in Private Law* (Edward Elgar, 2019) 132.

[38] *Moore* (n 35) 349 [66] (Edelman J). For his Honour's pre-curial adoption of similar terminology, see James Edelman, 'Money Awards of the Cost of Performance' (2010) 4(2) *Journal of Equity* 122 ('Cost of Performance').

[39] *Moore* (n 35) 348 [64] (Edelman J).

'appears as a "loss" only by reference to "an unstated *ought*"'.[40] This way of characterising matters is understandable since it is true that describing the deprivation to the plaintiff that results from the breach as a 'loss' assumes the existence of a legal *right* to performance.[41] However, it does not follow from this that such awards are not 'concerned with loss in any real … sense'.[42] At least if one assumes that the formation of a contract creates reciprocal rights to performance in each of the parties, the plaintiff has been deprived of the performance to which they were legally entitled.[43] Thus, at least in the standard case where

[40] Ibid, quoting Fuller and Perdue (n 36) 53 (emphasis in original).

[41] Although the existence of a legal right to performance has been questioned, almost all mainstream normative theories conclude that legally enforceable promises sometimes create legally binding obligations: see Peter Jaffey, 'Damages and the Protection of Contractual Reliance' in Djakhongir Saidov and Ralph Cunnington (eds), *Contract Damages: Domestic and International Perspectives* (Hart Publishing, 2008) 139, 145–9. On one view, contract enhances personal autonomy by allowing an individual to effectively bind their will to that of another. As a matter of rights-based deontology, given that one party wishes the other to be bound as a matter of equal treatment, it is morally right for both parties to keep their promises: see Charles Fried, *Contract as Promise: A Theory of Contractual Obligation* (Harvard University Press, 1981) 7–17; Stephen A Smith, *Contract Theory* (Oxford University Press, 2004) 57; Charles Fried, 'The Ambitions of *Contract as Promise*' in Gregory Klass, George Letsas and Prince Saprai (eds), *Philosophical Foundations of Contract Law* (Oxford University Press, 2014) 17, 20–1. For Kantians (and Hegelians),

> the ability to transact freely with others requires the ability to objectify one's intentions as, for example, offers and acceptances. One must be able to commit oneself freely to the objective meaning of one's utterances, even if that meaning does not correspond to one's subjective intention …

Allan Beever, 'Agreements, Mistakes, and Contract Formation' (2009) 20(1) *King's Law Journal* 21, 40, discussing Immanuel Kant, *Practical Philosophy*, ed tr Mary J Gregor (Cambridge University Press, 1996) ch 10, GWF Hegel, *Elements of the Philosophy of Right*, ed Allen W Wood, tr HB Nisbet (Cambridge University Press, 1991). On a consequentialist view, the law of contract is, on balance, beneficial: see, eg, Joseph Raz, 'Promises in Morality and Law' (1982) 95(4) *Harvard Law Review* 916, 936–8; Kimel (n 15) ch 3. Finally, natural law theorists will observe that the law of contract creates the stability and cooperation required to build the 'common good': see John Finnis, *Natural Law & Natural Rights* (Oxford University Press, 2nd ed, 2011) 303. John Finnis justifies objectivity based on the stability and cooperation required to build the 'common good' from the perspective of natural law. For a view of natural law like that of Finnis, see Nicholas J McBride, *The Humanity of Private Law: Part I* (Hart, 2018) 165. See generally at ch 3.

[42] See *Moore* (n 35) 348 [64] (Edelman J).

[43] As already observed, some have questioned the existence of such a reciprocal right: see above n 41. But it is not part of this article's purpose to defend the existence of a legal right to performance (other than indirectly by demonstrating the existence of damages awards that are best explained by reference to the proposition that contracts do indeed create legal rights to performance).

there is no reason to think that the plaintiff would not have received the promised performance 'but for' the breach,[44] the failure to provide the promised performance can plausibly be understood as constituting a 'real' loss measured against the baseline of the plaintiff's legal entitlements.[45]

His Honour's characterisation of the distinction in *Moore* should also be treated with caution for a second reason. Even awards for 'consequential loss' typically adopt the financial (or factual) position that the plaintiff *would* have been in had there been no breach as the relevant baseline against which the plaintiff's position is to be compared. If this were not the case, there would actually be no need to be concerned about the possibility of double recovery. As noted above, unequivocal examples of claims for 'consequential loss' adopting this baseline were considered in *Burns* and *Upside Property Group*.[46] Both cases involved claims for 'lost profits', which are subjectively focused and concerned with quantifying the deterioration in the plaintiff's actual projected financial position.[47] Awards for 'consequential loss', at least of this kind, are accordingly also premised upon the existence of a legal entitlement to receive the promised

[44] As Lord Sumption JSC (Lord Neuberger PSC, Lords Mance and Clarke JJSC agreeing) explained, that damages are sometimes awarded for the lost *performance* is the best explanation for the majority's decision in *Golden Strait Corpn v Nippon Yusen Kubishika Kaisha* [2007] 2 AC 353 ('*The Golden Victory*'): see *Bunge* (n 30) 994 [16], 995 [18], 995–7 [20]–[23]. But, as explained further below, the facts in *Clark* (n 21) itself actually provide another example of the phenomenon of the loss of (some of) the performance being overdetermined, because some of the undelivered straws of sperm would not have been usable anyway: see below nn 77–83 and accompanying text.

[45] This is what distinguishes a case like *Clark* (n 21) from a case such as *Lewis* (n 16) where the relevant infringed right was valueless because, on the relevant counterfactual, Lewis would have, or at least should have, been in prison anyway: see at 211 [42] (Gageler J), 213 [48] (Gordon J). Cf *Clark* (n 21) 5–6 [1]–[3] (Hayne J), 23–4 [75]–[87] (Keane J).

[46] *Burns* (n 25) 656–8, 660 (Gibbs CJ), 662–8 (Wilson, Deane and Dawson JJ), 669–72 (Brennan J); *Upside Property Group* (n 26) 38144–8 [35]–[53] (Meagher JA, McColl JA agreeing at 38137 [1], Macfarlan JA agreeing at 38137 [2]). For another example, see *Jackson v Royal Bank of Scotland* [2005] 1 WLR 377, 385–7 [26]–[34] (Lord Hope, Lord Nicholls agreeing at 379 [1], Lord Hoffmann agreeing at 379 [2], Lord Walker agreeing at 390 [45], Lord Brown agreeing at 392 [53]).

[47] *Burns* (n 25) 661 (Gibbs CJ), 666–9 (Wilson, Deane and Dawson JJ), 679–80 (Brennan J); *Upside Property Group* (n 26) 38144–5 [36]–[37] (Meagher JA, McColl JA agreeing at 38137 [1], Macfarlan JA agreeing at 38137 [2]). In the latter case, a claim for 'loss of bargain damages', which aim to substitute for (and objectively value) the promised performance, was also (unsuccessfully) brought: at 38138 [3], 38139–41 [12]–[21], 38148 [53] (Meagher JA, McColl JA agreeing at 38137 [1], Macfarlan JA agreeing at 38137 [2]).

performance;[48] it is simply that the focus of the award is the plaintiff's factual, rather than *normative*, position.[49]

Given these observations, it seems more likely that the failure to appreciate the existence of the distinction between the two kinds of damages awards outlined arises from: (a) the ambiguous and confusing terminology commonly employed within this area of the law — particularly the inconsistent use of terms like 'loss' and 'compensation'[50] — and (b) the fact that a deprivation in performance usually also results in a deterioration in the plaintiff's financial (or factual) position — measured against the hypothetical 'non-breach position'[51] — that is at least equivalent to, if not greater than, the value of the performance that has been lost.[52] But while this is typically the case, it is not invariably so. Occasionally, as in *Clark*, the value of the lost performance can greatly exceed the plaintiff's proven recoverable 'consequential loss'.[53]

D *Substitutionary Damages Awards following a Breach of Contract*

With the existence of the distinction between damages awards that substitute for the lost performance and damages awards that make good consequential loss established, and the likely reasons for the widespread failure to appreciate this distinction noted, the discussion now turns to a fuller explanation of the different kinds of substitutionary awards that are available. In particular, while

[48] Cf claims for the recovery of reasonable contractually related expenditure as damages for breach of contract. It is possible that some of these awards are not best understood as an (admittedly imperfect) attempt to place the plaintiff into the same position as if the contract had been performed but instead as aiming to place this party into some other position: see David Winterton, 'Clarifying the Basis for Recovering Reliance Expenditure as Damages for Breach of Contract in Australia' (2025) 141 (January) *Law Quarterly Review* 19, 23–4, discussing *Cessnock City Council* (n 34). Significantly, however, at least under Australian and English law, proof that some of the expenditure would not have been recouped will, to that extent, reduce the damages awarded: at 305–6 [1]–[3] (Gageler CJ), 319–21 [51]–[56] (Gordon J), 333–5 [116]–[120], 337–8 [127]–[129], 339–41 [133]–[140], 344–5 [152]–[154], 349 [168] (Edelman, Steward, Gleeson and Beech-Jones JJ), 354 [191] (Jagot J).

[49] It might accordingly be said that such awards have a primarily consequentialist orientation and that awards for the value of the lost performance have a primarily deontological orientation, though more discussion than is possible here would be required to substantiate this claim.

[50] For detailed discussion, see Winterton, *Money Awards* (n 8) ch 3.

[51] This is the terminology helpfully employed in Adam Kramer, *The Law of Contract Damages* (Hart Publishing, 2nd ed, 2017) 15 [1.43]. See also at 15–16 [1.44]–[1.48].

[52] See also ibid 15–16 [1.43]–[1.48].

[53] See below nn 77–83 and accompanying text.

there is some debate regarding the correct taxonomy here,[54] Commonwealth case law appears to recognise (at least) two distinct kinds of monetary substitutes for contractual performance.[55]

The first of these monetary substitutes for performance is an award of the difference between the market value of the defective performance provided by the defendant and the market value of proper performance in conformity with the contract.[56] This is 'the difference in (market) value' measure. Typically,[57] such an award can be understood either as quantifying the objective value of the performance that has not been delivered[58] or as providing the plaintiff with the sum of money necessary to otherwise obtain substitute performance from elsewhere.[59] The basis for the second conceptualisation is that once the plaintiff has in their hands both (a) defective performance and (b) the market value of the difference between proper (in the sense of contractually compliant) and defective performance as at the date of breach, then (c) the plaintiff has the monetary equivalent of the promised performance (which might be effected by, for example, selling what has been provided and purchasing a market substitute).[60]

[54] See, eg, Stevens, 'Damages' (n 13) 171–2; Stephen A Smith, 'Substitutionary Damages' in Charles EF Rickett (ed), *Justifying Private Law Remedies* (Hart Publishing, 2008) 93, 93–5; Charlie Webb, 'Performance and Compensation: An Analysis of Contract Damages and Contractual Obligation' (2006) 26(1) *Oxford Journal of Legal Studies* 41, 41–2; Winterton, *Money Awards* (n 8) ch 5.

[55] Damages awarded in lieu of an order for specific performance or the granting of an injunction constitute a third kind of monetary substitute for performance: see Stevens, 'Damages' (n 13) 186. Obviously, we also claim that 'negotiating damages' should be recognised as constituting yet another example of this phenomenon.

[56] See, eg, *Clark* (n 21) 31 [108] (Keane J), quoting *Tabcorp Holdings* (n 22) 286 [13] (French CJ, Gummow, Crennan and Kiefel JJ). See generally *Williams Brothers v ED T Agius Ltd* [1914] AC 510, 519–21 (Viscount Haldane LC, Lord Parker agreeing at 534), 522–3 (Lord Dunedin, Lord Parker agreeing at 534), 527–9 (Lord Atkinson, Lord Parker agreeing at 534) 531, 533 (Lord Moulton, Lord Parker agreeing at 534) ('*Williams Brothers*').

[57] Breach by delay poses unique difficulties in valuation: see, eg, *Leeda Projects Pty Ltd v Zeng* (2020) 61 VR 384, 403 [62]–[63], 405–6 [77]–[80], 412 [109], 430–1 [184]–[185] (McLeish JA, Tate JA agreeing at 386 [1], Kaye JA agreeing at 387 [4]–[5]), in which it appears that the respondent framed both of the (alternative) claims she made as being for 'consequential loss' and was therefore (unsurprisingly) limited to recovering damages to make good the proven adverse consequences of the breach.

[58] See, eg, *Bunge* (n 30) 995–6 [21] (Lord Sumption JSC, Lord Neuberger PSC, Lords Mance and Clarke JJSC agreeing).

[59] Winterton, *Money Awards* (n 8) ch 5. See especially at 180.

[60] See David Winterton, 'Claims for the Value of the Lost Contractual Performance' (2019) 45(1) *University of Western Australia Law Review* 75, 79–80 ('Claims').

Arguably, a second kind of monetary substitute for performance recognised in the case law is an award of the cost of obtaining the contracted-for performance from the open market either through repairs or, if necessary, by replacement.[61] This is commonly referred to as the 'cost of cure'[62] or 'cost of reinstatement'[63] measure and can be understood as roughly awarding a monetary equivalent of an order for specific performance.[64] Notably, for both an order for specific performance or an award of the cost of cure — provided that double recovery is precluded — the plaintiff may also recover damages for delay measured either on an objective basis[65] or on the basis of 'consequential loss' for certain causally attributable adverse consequences of the delay.[66] Further, when specific performance is ordered, the other main kind of non-pecuniary adverse consequence of the breach, which in *Ruxley Electronics & Construction Ltd v Forsyth* was described as the plaintiff's 'loss of amenity',[67] is ameliorated by the order, and the same can be said for a cost of cure award. This final point is significant because it represents a major point of distinction between the first and second kinds of monetary substitutes for performance that we have identified and is also what makes plausible the view, advanced by Robert Stevens, that (at least some) cost of cure awards could be understood as making good consequential loss.[68]

The availability of this second kind of monetary substitute for performance is subject to the further limitation that where the reasonable cost of cure is

[61] See *Bellgrove* (n 23) 617 (Dixon CJ, Webb and Taylor JJ), cited in *Tabcorp Holdings* (n 22) 284 [15] (French CJ, Gummow, Heydon, Crennan and Kiefel JJ); Winterton, *Money Awards* (n 8) ch 5. For academic support for this conceptualisation, see, eg, Smith, 'Substitutionary Damages' (n 54); Webb (n 54); Edelman, 'Cost of Performance' (n 38) 131–2. See also John Ren, 'Measure of Damages for Defective Building Work' (2014) 32(1) *Journal of Contract Law* 69. For an alternative analysis, see Stevens, 'Damages' (n 13).

[62] See, eg, Alexander FH Loke, 'Cost of Cure or Difference in Market Value? Towards a Sound Choice in the Basis for Quantifying Expectation Damages' (1996) 10(3) *Journal of Contract Law* 189; Smith, 'Substitutionary Damages' (n 54); Ren (n 61).

[63] See, eg, Loke (n 62) 190, 195, 198–203; *Tabcorp Holdings* (n 22) 284 [9]–[10], 287 [15] n 8, 289 [18] (French CJ, Gummow, Heydon, Crennan and Kiefel JJ). See also *Ruxley* (n 24) 354 (Lord Bridge), 355–9 (Lord Jauncey), 359–61 (Lord Mustill), 363–9, 371–5 (Lord Lloyd).

[64] See also Winterton, *Money Awards* (n 8) ch 5.

[65] See Stevens, 'Damages' (n 13) 189–90, discussing *McAlpine Construction Ltd v Panatown Ltd* [2001] 1 AC 518, 554 (Lord Goff); *Lahoud v Lahoud [No 2]* [2012] NSWCA 55, [20] (Handley AJA, Sackville AJA agreeing at [38]).

[66] Stevens, 'Damages' (n 13) 190–2, discussing *Ruxley* (n 24).

[67] See *Ruxley* (n 24) 365 (Lord Lloyd).

[68] See Stevens, 'Damages' (n 13) 175.

higher than the difference in (market) value measure, the cost of cure will not be awarded unless it would be (or was) reasonable for the plaintiff to incur the cost of cure.[69] The nature and content of the 'reasonableness' restriction on recovery of the cost of cure is a matter of some controversy and has been discussed elsewhere.[70] But detailed examination of this question here is unnecessary to establish the central thesis advanced. The important point for present purposes is that damages substituting for the promised performance are normally assessed objectively by reference to the value of that performance at the date it was due,[71] although cost of cure awards can be assessed at the date of trial or the date at which the repairs should reasonably have been completed.[72]

Each of the damages awards just identified also has other salient features. In particular, these awards will not be diminished by rules restricting the recoverability of damages for 'consequential loss' such as those described under the labels of 'remoteness' and 'mitigation'. As Edelman J explained in *Moore*, it is only where a plaintiff brings a claim for consequential loss that the principles of mitigation and remoteness apply to demarcate a defendant's compensatory liability.[73] As noted, if the formation of a valid contract creates correlative legal rights and obligations to performance, this is justified by reference to the idea that any 'secondary right' arising upon breach[74] should be directed to achieving 'next best' conformity with the primary right infringed[75] and on the basis that next-best conformity can plausibly be achieved *either* by ordering specific performance (or its monetary equivalent in the form of the cost of cure) or by attempting to quantify the objective value of the performance denied by the breach. Additionally, the availability of such an award or order, like the

[69] *Bellgrove* (n 23) 618–19 (Dixon CJ, Webb and Taylor JJ); *Westpoint Management Ltd v Chocolate Factory Apartments Ltd* [2007] NSWCA 253, [45]–[62] (Giles JA, McColl JA agreeing at [112], Campbell JA agreeing at [113]).

[70] See Loke (n 62) 194–203; Ren (n 61) 72–5, 85–91; Winterton, *Money Awards* (n 8) ch 5.

[71] Smith, 'Substitutionary Damages' (n 54) 111–13. See, eg, *Millett v Van Heek & Co* [1921] 2 KB 369, 376 (Atkin LJ).

[72] Smith, 'Substitutionary Damages' (n 54) 111–13; Ren (n 61) 70; Stevens, 'Damages' (n 13) 191. Again, this has led some (plausibly) to claim that such awards are better understood as compensating for consequential loss: see also at 188–92. However, cases where a plaintiff reasonably delayed taking remedial action can also be seen as adding further (recoverable) consequential loss to the quantum claimed.

[73] See *Moore* (n 35) 349 [67]; Stevens, 'Damages' (n 13) 181.

[74] See Stevens, 'Damages' (n 13) 172.

[75] See ibid 174–5. John Gardner notes that legal responses to a breach of contract, like those to tortious wrongdoing, are primarily reparative and attempt to achieve primarily corrective justice: John Gardner, *Torts and Other Wrongs* (Oxford University Press, 2019) 336–41 ('*Wrongs*').

availability of an action for the agreed sum, is not dependent upon proof of any adverse consequences that are causally attributable to the breach, so there is no need for a plaintiff to establish any financial, or even factual, deterioration in its projected 'non-breach' position.[76]

As foreshadowed earlier, the correctness of this final proposition was unequivocally confirmed by the High Court of Australia in its leading decision in *Clark*. The Court there awarded Clark approximately $1 million following a breach of warranty, under a contract for the sale of a business, that identification of the donors of 3,513 straws of sperm complied with certain specified guidelines.[77] Significantly, that sum was awarded despite the fact that it greatly exceeded the extent to which Clark could prove that she was financially worse off in consequence of the breach,[78] since she had apparently passed on to her clients most of the costs that she had incurred in acquiring replacement sperm.[79]

This approach to damages assessment is also codified in the relevant sale of goods legislation. For example, under such legislation, where damages are awarded for breach of a warranty of quality, the appropriate 'prima facie' measure is a sum reflecting the difference in value between the goods contracted for and the goods received.[80] It is also significant, however, that this legislation merely codifies the common law position that preceded it.[81] Relevantly, damages are recoverable irrespective of whether the plaintiff avoided any initial

[76] Cf the argument of Robert Stevens that the reasonableness restriction on cost of cure awards is best understood as an application of the avoidable loss rule of mitigation: see Stevens, 'Damages' (n 13) 191. See generally Loke (n 62) 195.

[77] *Clark* (n 21) 5–6 [1]–[6], 10 [23] (Hayne J), 15 [39] (Crennan and Bell JJ), 23–4 [78]–[79], 24–5 [83]–[85], 25 [88], 26 [93], 28 [98], 42 [146] (Keane J).

[78] As Keane J observed, Clark 'may have been able to charge fees for her services in the conduct of her practice which were within the market range but returned her a greater profit because she was not obliged to incur the extra cost of replacement sperm', so her lost profits may well have been significantly greater than what she could recover (due both to difficulties in proof and the impact of remoteness rules): ibid 37 [129].

[79] Ibid 14 [37] (Gageler J).

[80] See, eg, *Sale of Goods Act 1979* (UK) s 53(3); *Sale of Goods Act 1923* (NSW) s 54(3); *Goods Act 1958* (Vic) s 59(3). Notably, while additional damages for non-remote consequential loss may be awarded, this prima facie measure is generally not reduced. The clearest example of this approach is evident in the following decision of the House of Lords: *Re R & H Hall Ltd v W H Pim (Junior) & Co's Arbitration* [1928] All ER Rep 763 ('*Re R & H*'), discussed in Stevens 'Damages' (n 13) 176–8.

[81] *Clark* (n 21) 12 [28] (Crennan and Bell JJ), citing *Barrow v Arnaud* (1846) 8 QB 595; 115 ER 1000, 1006 (Tindal CJ for the Court) (Court of Exchequer Chamber). See also *Jones v Just* (1868) LR 3 QB 197, 199–201 (Mellor J for the Court).

balance-sheet losses suffered by passing on the subject goods via a sub-sale.[82] Thus, the value of the plaintiff's damages award is not affected by subsequent events but is determined solely by the value of the performance that the plaintiff contracted to receive.[83]

III Negotiating Damages for Breach of Contract as a Monetary Substitute for Performance

With the preceding preliminaries established, our focus now turns to the topic of negotiating damages. Notably, there are multiple ways in which scholars and judges have attempted to characterise such awards.[84] The position advocated here is that, when awarded for breach of contract, such damages are 'compensatory'[85] but only in the specific sense that the other kinds of substitutionary damages we have identified can be similarly described since they do not attempt to redress or nullify ultimate balance-sheet deterioration (otherwise referred to as (financial) 'consequential loss').[86] Negotiating damages can only legitimately be described as compensatory if they are understood as compensating a plaintiff for the (value of the) performance that has been denied by the breach. As explained earlier, on this view, what is being compensated is deprivation of the promised performance entailed by the defendant's breach of duty rather than any contingent deterioration in the plaintiff's financial (or factual) position measured against the financial (or factual) position that the plaintiff

[82] See, eg, *Williams Brothers* (n 56) 520 (Viscount Haldane LC, Lord Parker agreeing at 534), 523 (Lord Dunedin, Lord Parker agreeing at 534), 529 (Lord Atkinson, Lord Parker agreeing at 534), 530 (Lord Moulton, Lord Parker agreeing at 534); *Slater v Hoyle & Smith Ltd* [1920] 2 KB 11, 14–15 (Bankes LJ), 16–18 (Warrington LJ), 19–25 (Scrutton LJ). See also *Clark* (n 21) 11–12 [28] (Crennan and Bell JJ). Cf *Bence Graphics International Ltd v Fasson UK Ltd* [1998] QB 87, 97–101 (Otton LJ), 107 (Auld LJ).

[83] For recent support in the context of breach of warranty under a share sale, see *MDW Holdings* (n 27) 48 [49] (Newey LJ, Asplin LJ agreeing at 55 [87], Whipple LJ agreeing at 55 [88]).

[84] This point is analysed later: see below Part IV.

[85] A (likely) implication of our view, considered further below, is that *all* instances of negotiating damages are 'compensatory' in the specific sense that we identify, but establishing the truth of this proposition is beyond the scope of this article: see below Part IV. See generally *Bunnings Group Ltd v CHEP Australia Ltd* (2011) 82 NSWLR 420 ('*Bunnings Group*').

[86] See above nn 55–72 and accompanying text. Consequential loss can also be non-financial: see Stevens, 'Damages' (n 13) 190–2, discussing *Ruxley* (n 24).

would have occupied but for the breach.[87] That is to say, negotiating damages are an example of compensatory damages only in the limited sense that they compensate the plaintiff for the loss of the promised (and objectively valuable) performance.[88]

Obviously, negotiating damages can also be termed 'substitutive',[89] or 'substitutionary',[90] in that they provide a monetary equivalent (ie substitute) for contractual performance.[91] While we have no objections to the use of either label, the need for this terminological clarification (and insistence) arises from the fact that some scholars have incorrectly claimed that the adoption of such a view involves a 'radical' reorientation of the law of damages.[92] But framing such awards as providing compensation for the value of the lost performance is consistent with the language that courts themselves commonly use when assessing damages for breach of contract.[93] Significantly, the position that negotiating damages for breach of contract compensate for the lost performance was also recently taken by the Court of Appeal of Singapore in *Turf Club*, who observed that negotiating damages are

[87] See above nn 55–72 and accompanying text. See also Hugh G Beale (ed), *Chitty on Contract* (Sweet & Maxwell, 34th ed, 2021) vol 1, 2513 [32-172]; Edelman (ed), *McGregor* (n 1) 450 [14-003].

[88] If the performance is not objectively valuable, only nominal damages are available unless the plaintiff can prove that some kind of recoverable (financial or non-financial) consequential loss was suffered: see below Part V(B).

[89] Stevens, *Torts* (n 19) ch 4. See also Stevens, 'Damages' (n 13) 192–4.

[90] Winterton, 'Claims' (n 60) 84. See also at 85; Smith, 'Substitutionary Damages' (n 54).

[91] See, eg, Mitchell McInnes, 'Gain, Loss and the User Principle' (2006) 14 *Restitution Law Review* 76, 83; Stevens, 'Damages' (n 13) 192–4; Winterton, *Money Awards* (n 8) 201. See also at 202–14.

[92] Josias Senu, 'Negotiating Damages and the Compensatory Principle' (2020) 40(1) *Oxford Journal of Legal Studies* 110, 118, citing Andrew Burrows, *Remedies for Torts, Breach of Contract, and Equitable Wrongs* (Oxford University Press, 4th ed, 2019); Kit Barker, 'Damages without Loss: Can Hohfeld Help?' (2014) 34(4) *Oxford Journal of Legal Studies* 631, 644–5; Andrew Burrows, 'Are "Damages on the Wrotham Park Basis" Compensatory, Restitutionary or Neither?' in Djakhongir Saidov and Ralph Cunnington (eds), *Contract Damages: Domestic and International Perspectives* (Hart Publishing, 2008) 165, 181–5 ('*Wrotham Park* Basis'). Cf Andrew Burrows, *A Restatement of the English Law of Contract* (Oxford University Press, 2016) 21, 135.

[93] See, eg, *Cessnock City Council* (n 34) 307 [6] (Gageler CJ), 318 [48] (Gordon J), 336–7 [126] (Edelman, Steward, Gleeson and Beech-Jones JJ), 364–5 [231]–[232] (Jagot J); *New South Wales v Stevens* (2012) 282 NSWLR 106, 110–12 [14]–[27] (McColl JA, Ward JA agreeing at 114 [40]).

> compensating the plaintiff for the loss of the performance interest (*ie*, the primary right to performance of the defendant's obligations) which he has been deprived of due to the defendant's breach of contract.[94]

As should be clear from what has been said, we agree with the characterisation in *Turf Club* that negotiating damages compensate for the lost contractual performance. For the sake of clarity and simplicity, however, we can reduce the case in favour of this characterisation to the following five reasons:

1 Negotiating damages are assessed objectively and in a depersonalised manner; it is unnecessary that they correspond to the provable financial deterioration in the particular plaintiff's position that can be causally attributed to the breach. Rather, the court assesses negotiating damages by using the hypothetical fee that the reasonable plaintiff would have accepted in order to have released the defendant from the performance of an obligation. The depersonalised nature of this inquiry reflects the conventional approach to assessing damages for the value of the lost performance based on the market proxies of the cost of cure and difference in value measures;

2 Negotiating damages are assessed at the date of breach: the point in time at which the defendant failed to perform their obligation(s). If negotiating damages sought to compensate the plaintiff for consequential financial (or factual) detriment, or strip away gains made by a defendant, then they would be assessed ex post facto (eg at the date of trial). But the quantification of such awards at the date of breach is consistent with the view that they seek to compensate for performance simpliciter;

3 At least absent the existence of a contrary intention (expressly or impliedly) discernible from the parties' contract, it cannot plausibly be suggested that the availability of negotiating damages is precluded by rules of remoteness.[95] This reflects the approach to claims for the value of the lost performance which, similarly, are not capable of being limited by rules of remoteness.[96] Put simply, the loss of the promised performance is one that arises 'naturally,

[94] *Turf Club* (n 3) 728 [215] (Andrew Phang Boon Leong JA for the Court) (emphasis in original).

[95] For the view that the contractual remoteness rule is best understood as being based on an implied exclusion of recovery for certain kinds of loss that is derivable from an objective construction of the parties' contract, see Venkatesan Niranjan, 'The Contract Remoteness Rule: Exclusion, Not Assumption of Responsibility' in Andrew Dyson, James Goudkamp and Frederick Wilmot-Smith (eds), *Defences in Contract* (Hart Publishing, 2017) 187.

[96] The clearest example of this is *Re R & H* (n 80), discussed in Stevens, 'Damages' (n 13) 176–8. Cf *Williams Brothers* (n 56), discussed in Stevens, 'Damages' (n 13) 176–9.

ie, according to the usual course of things, from such breach of contract itself' and is therefore necessarily always a 'loss' that is within the reasonable contemplation of the parties at contract formation — it is therefore not 'too remote';[97]

4 Consistent with point 3 above, since the principles of mitigation are also concerned with restricting the recovery of causally attributable consequential loss, those principles will never be operative to limit the availability of a claim for negotiating damages;[98] and

5 In the context of the law of torts, infringement of intellectual property rights and *Lord Cairns' Act* damages (ie damages awarded in lieu of an injunction or specific performance via s 2 of the *Chancery Amendment Act 1858* (UK) and its modern equivalents), equivalent awards are also best conceptualised as compensatory in the substitutionary sense.[99]

Finally, it is necessary to respond to an objection that is sometimes raised against the understanding of negotiating damages advanced here. Kit Barker, for example, has claimed that a

> 'substitutive' or 'vindicatory' analysis of awards could have far-reaching implications for our legal landscape, introducing a new species of damages into the law in virtually every case of wrongdoing. For example, in every case in which a contract was breached, the innocent party would potentially have the right to claim a sum of damages representing a permission fee.[100]

The first point to make in response to this objection is that, as noted above, it misunderstands the true aim of a 'permission fee' award by misunderstanding what 'substitution' means in this context. The aim of the award is not, like nominal damages, simply to 'vindicate', or mark the violation of, a right.[101] Rather,

[97] See *Hadley v Baxendale* (1854) 9 Ex 341; 156 ER 145, 151 (Alderson B for the Court).

[98] Notably, there is an extent to which it could be said that an aspect of mitigation is implicitly built into difference in value awards in any event: see *Bunge* (n 30) 994–5 [16]–[17] (Lord Sumption JSC, Lord Neuberger PSC, Lords Mance and Clarke JJSC agreeing); Barnett, 'Substitutive Damages' (n 32) 796–8 [3]–[5].

[99] See, eg, *Bunnings Group* (n 85) 466–8 [173]–[177] (Allsop P, Macfarlan JA agreeing at 473 [206]); *One Step* (n 1) 689 [95] (Lord Reed JSC, Baroness Hale PSC, Lords Wilson and Carnwath JJSC agreeing); *Fuller v Albert [No 3]* [2021] NSWCA 226, [23] (Macfarlan and Brereton JJA, Emerton AJA). See also Peel (n 1) 217–24.

[100] Barker (n 92) 636–7.

[101] See below Part V(B).

at least in the contractual context, the award aims to *value* that part of the legal entitlement to performance that has not been conformed to by the defendant. Although exceptionally the defendant may be able to establish that the promised performance would have been lost anyway,[102] generally speaking the failure to perform a legal duty in and of itself deprives the right-holder of something that was objectively valuable irrespective of what consequences ultimately result from this deprivation.

This observation, alongside what we have said above, also makes clear the second error contained within the above quotation. As already explained, in the contractual context it may be possible to have recourse to an available market to substitute for the performance that has been lost either by reference to the difference in (market) value measure or the cost of cure measure. In such cases, to additionally award a permission fee would constitute double recovery since negotiating damages simply represent a *next* 'next-best' substitute for performance when substitution via either of the two aforementioned measures is not possible or (perhaps) unjustifiable for some other reason. Barker's objection is, accordingly, misconceived.

IV The Difficulties with Alternative Accounts of Negotiating Damages for Breach of Contract

The nature of negotiating damages has proven to be a source of great academic interest.[103] The focus of this article is on breach of contract, so there is no need to account for the availability of such awards in every potential context where such damages may be awarded. Nonetheless, the view advanced here is (broadly) consistent with scholarship,[104] and case law,[105] that characterises all instances of negotiating damages as being awarded to compensate for the infringements of primary rights simpliciter or, stated more precisely, to

[102] As noted earlier, occasionally nothing of value is lost *due to the breach* because, on the relevant counterfactual, whatever was valuable would have been lost anyway: see above nn 19–23 and accompanying text. See also David Winterton, 'Limiting the Recovery of Damages for Breach of Contract in Australia: Some Important Unresolved Questions' in John Eldridge and Timothy Pilkington (eds), *Australian Contract Law in the 21st Century* (Federation Press, 2021) 54, 64–6 ('Limiting the Recovery'), discussing *Clark* (n 21).

[103] For useful summaries, see Burrows, '*Wrotham Park* Basis' (n 92); Barker (n 92) 637.

[104] See, eg, Peel (n 1) 230–1.

[105] See, eg, *Turf Club* (n 3) 728 [215] (Andrew Phang Boon Leong JA for the Court) (emphasis in original).

compensate for the loss of some valuable aspect of a legal entitlement.[106] While such a view appears to be ascendant and, in our view, is difficult to deny for the reasons we have outlined, it is nevertheless not yet universally accepted. It is accordingly necessary to briefly consider — and refute — the three main alternative accounts as to the nature of negotiating damages that have been advanced in the relevant academic literature.

A *Views Based on Consequential Loss or Consequential Gain*

One alternative view, now largely discredited, is that negotiating damages compensate a plaintiff for 'consequential loss'. Probably the most well-known (and, prima facie, plausible) version of this view is that which characterises the relevant 'consequential loss' as the lost opportunity to bargain for a 'release fee'.[107] The fundamental difficulty with this account is its artificiality.[108] As others have observed, if negotiating damages did compensate for the lost opportunity for the plaintiff to bargain with the defendant for a release fee, the objective sums that courts have awarded would be manifestly unrealistic.[109] This would particularly be the case in circumstances where a plaintiff would never have accepted a sum (or would have only accepted a manifestly unreasonable sum) to accede to the breach. Further related difficulties with this view are that it cannot account for the inapplicability of limiting principles such as remoteness and mitigation and that it is inconsistent with the wholly objective nature of the assessment of such awards.

A second alternative view is that negotiating damages are concerned with recouping (some of) the defendant's consequential gains from the breach.[110]

[106] For a seminal discussion, see Stevens, *Torts* (n 19) ch 4.

[107] See, eg, Robert J Sharpe and SM Waddams, 'Damages for Lost Opportunity To Bargain' (1982) 2(2) *Oxford Journal of Legal Studies* 290, 290.

[108] Such artificiality has been noted by commentators: see, eg, Burrows, 'One Step Forward?' (n 1) 518; Jason Fee, '*Wrotham Park* Damages in Singapore: One Small Step' [2019] (4) *Lloyd's Maritime and Commercial Law Quarterly* 500, 503. This view is also noted in James Edelman, *Gain-Based Damages: Contract, Tort, Equity and Intellectual Property* (Hart Publishing, 2002) 180–1 ('*Gain-Based Damages*').

[109] See Craig Rotherham, '"*Wrotham Park* Damages" and Accounts of Profits: Compensation or Restitution?' [2008] (1) *Lloyd's Maritime and Commercial Law Quarterly* 25, 30–2. See also Senu (n 92) 118.

[110] Beale (ed) (n 87) vol 1, 2513 [32-172]; Edelman (ed), *McGregor* (n 1) 457 [14-017].

Notable proponents of this view include James Edelman[111] and Katy Barnett.[112] Andrew Burrows also once advocated a version of this view.[113] But, following the *One Step* decision, he now appears to have accepted that it is untenable (at least in the contractual context).[114] One motivation for the adoption of this characterisation of negotiating damages is the artificiality, referred to above, that is involved in characterising such damages as compensatory in circumstances where the plaintiff would never have acceded to the breach. This view nevertheless also has serious deficiencies; two of these deficiencies, in particular, stand out:

1 The view upon which this account is based is misconceived: it makes the common mistake of failing to appreciate the distinction between damages concerned with substituting for, or valuing, the lost performance and damages concerned with making good the adverse consequences of the breach. As this article has explained, the negotiating damages award is being used as a proxy to affix a value to the performance that was promised but not provided. That the plaintiff has been deprived of that value does not depend upon the existence of an intention to enforce that right; and

2 More fundamentally, gain-based accounts for negotiating damages have their own difficulties accounting for the present state of the law. There are two main reasons for this. The first is that there are some unequivocal examples of cases where the sum awarded to the plaintiff clearly exceeds the gain made by the defendant as a consequence of the breach.[115] The second is that the gain-based view of negotiating awards does not account for the way in which judges themselves frame such awards. As Stephen A Smith explained, one important — arguably, very important — criterion for

[111] Edelman, *Gain-Based Damages* (n 108) chs 3, 5.

[112] Katy Barnett, *Accounting for Profit for Breach of Contract: Theory and Practice* (Hart Publishing, 2012). See especially at chs 1–3, 6.

[113] Burrows, '*Wrotham Park* Basis' (n 92). See especially at 176–81, 185.

[114] See Andrew Burrows, 'Negotiating Damages in the UK Supreme Court' in John Eldridge and Timothy Pilkington (eds), *Australian Contract Law in the 21st Century* (Federation Press, 2021) 42. See especially at 42–3, 52–3.

[115] *Pell Frischmann Engineering Ltd v Bow Valley Iran Ltd* [2011] 1 WLR 2370, 2387–9 [50]–[58] (Lord Walker JSC for the Court) ('*Pell Frischmann Engineering*') is the best example in the breach of contract context, but *Inverugie Investments Ltd v Hackett* [1995] 1 WLR 713, 715, 717–19 (Lord Lloyd for the Court) provides another notable example in the context of a claim for trespass. This point is developed in greater depth in David Winterton, 'Contract Theory and Gain-Based Recovery' (2013) 76(6) *Modern Law Review* 1129, 1136–8; Barker (n 92) 643–4.

> assessing the persuasiveness of (at least) 'interpretive theories' of a particular area of law is the extent to which a theory can account for the reasons that judges actually give for their decisions.[116]

Ultimately, the essential flaw underpinning both the 'consequential-loss'- and the 'consequential-gain'-based accounts is that each fails to properly recognise the fundamental distinction between the 'result' of particular conduct — here, the loss of the promised performance — and the 'consequences' that may contingently follow from this result — here, the financial (or non-financial) deterioration in the plaintiff's position that may (or may not) result.[117] The fundamental distinction between these two phenomena, and the importance of keeping them conceptually distinct, have been explored by philosophers.[118] Although the law clearly recognises this distinction, not all lawyers (or legal commentators) appear to have appreciated this.[119]

B *Loss of a Hohfeldian Power (To Obtain an Injunction)?*

A third alternative account of negotiating damages — one that avoids at least some of the difficulties so far identified — has recently been advanced by Barker. According to this account, negotiating damages are best understood as compensating a plaintiff for the loss of a Hohfeldian power to obtain an injunction.[120] It is true that upon a breach of contract, unless that breach has been sufficiently anticipated, the plaintiff loses the power to seek or obtain, for example, a quia timet.[121] However, although constituting a valiant (and somewhat ingenious) attempt to salvage a consequence-focused view of 'negotiating damages' from the deficiencies already identified with both the 'consequential-loss'-based view and the 'consequential-gain'-based view, this account is also ultimately unpersuasive.

[116] See Smith, *Contract Theory* (n 41) 24–5.

[117] This distinction is explored in John Gardner, 'Obligations and Outcomes in the Law of Torts' in Peter Cane and John Gardner (eds), *Relating to Responsibility: Essays for Tony Honoré on His Eightieth Birthday* (Hart Publishing, 2001) 111, 130.

[118] Ibid, citing Georg Henrik von Wright, *Norm and Action: A Logical Enquiry* (Routledge & Kegan Paul, 1963), Anthony Kenny, *Will, Freedom and Power* (Basil Blackwell, 1975).

[119] For notable exceptions, see, eg, Stevens, *Torts* (n 19) ch 4; Donal Nolan, 'Rights, Damage and Loss' (2017) 37(2) *Oxford Journal of Legal Studies* 255. See especially at 256.

[120] Barker (n 92).

[121] Ibid 653. See also *Hasham v Zenab* [1960] AC 316, 329–30 (Lord Tucker for the Court).

The essential problem with Barker's analysis is that it amounts to a form of conceptual overkill. Fundamentally, this approach collapses into a version of the 'substitutionary' account we have advanced here: to say that the power to obtain an injunction has been lost is simply to say that a legally recognised right has been infringed. The power that has been lost in these cases itself depends upon the prior existence of the relevant (primary) right in substitution for which damages are being awarded. Put another way, Barker's analysis is only necessary if one rejects the idea that a failure to obtain something of value to which you were legally entitled is a real 'loss' for which damages may be awarded. But for reasons already provided, we reject this view as misconceived. In other words, the power to obtain an injunction is protected as a derivative matter by compensating for the value of the lost performance, and the law of contract will only compensate a plaintiff where a primary right has been infringed. A plaintiff has no ability to complain about losing a Hohfeldian liberty, power or immunity unless that primary right has first been infringed and, normatively speaking, it is the existence of the right — and the fact of its infringement — upon which all else of significance depends. In essence, the power to obtain an injunction is protected as a derivative matter by compensating for the value of the lost performance, and the law of contract will only compensate a plaintiff where a primary right has first been infringed.

V When *Should* Negotiating Damages for Breach of Contract Be Available in Australia?

A *The Case for a Broad View of Availability*

Generally speaking, the most appropriate monetary substitute for performance is the difference in market value between the performance promised and the performance provided. As noted, at least where repairing the breach is 'reasonable' in the relevant sense, it is additionally arguable that awarding the cost of curing the breach (ie the monetary equivalent of specific performance) is also an appropriate way to substitute for the lost performance. As outlined, the use of these measures is justified, and it reflects the current state of the law on the basis that, taking account of all relevant considerations, such awards constitute next-best substitutes for performance in the relevant circumstances because the plaintiff obtains either the value of the lost performance or the means by which to obtain its next-best equivalent from elsewhere. Occasionally, however, the breach is irreversible — and so cannot be cured — and there is also no available market to which reference can be had for the purpose of an objective valuation

of the lost performance. A central claim made by this article is that, in these circumstances, resort to negotiating damages as a *next* next-best substitute for performance is prima facie appropriate.[122]

The central justification for recognising the wider availability of such awards in Australia is the necessity of treating like cases alike. At the outset of this article, we noted that the High Court of Australia has reaffirmed that damages for breach of contract may compensate for either (a) the value of the lost performance or (b) consequential losses.[123] The most persuasive account as to why damages for breach of contract are awarded to compensate for the value of the lost performance is probably that the reasons that justified the primary obligation persist following breach; as such, they demand next-best conformity.[124] Generally speaking, an award of 'substitutionary' damages is the most appropriate way of achieving this objective. However, at least (a) where the relevant contractual right is objectively valuable,[125] (b) when a plaintiff does not obtain specific relief and (c) where the cost of cure and difference in value measures cannot be quantified, a 'secondary right' that produces next-best conformity with the primary right to performance is most appropriately valued by asking: what sum of money would a reasonable plaintiff accept to release a defendant from performance of that primary obligation? We submit that this question is essentially just another way of asking what price the contractual obligation breached would fetch if sold in any (hypothetically) available market.[126]

Alternatively expressed, (substitutionary) damages compensating a plaintiff for their lost performance ought not to depend upon the contingency of

[122] As noted, the possibility of a more restrictive view is considered below: see below Part V(E). Conversely, a more expansive view, which we do not endorse, is that negotiating damages should be available for a breach of contract where it is merely sufficiently difficult (in the sense of either conceptually or practically difficult) to assess the difference in value, or cost of cure, measure.

[123] See above Part II(B).

[124] See Stevens, 'Damages' (n 13) 174–6. See also Gardner, *Wrongs* (n 75) 337.

[125] See below Part VI.

[126] This would also typically reflect the value of the lost *chance* to obtain the promised performance. Negotiating damages awards are therefore (unsurprisingly) relevantly analogous to damages for loss of a chance where there was an express or implied *promise* to provide the chance but must be distinguished from damages claims for the loss of a chance consequent upon the performance of the contract: see generally *Crown Insurance Services Pty Ltd v National Mutual Life Association of Australasia Ltd* (2005) 13 ANZ Ins Cas ¶61-659, 78193 [13] (Buchanan JA, Warren CJ agreeing at 78191 [1], Byrne AJA agreeing at 78194 [16]). Claims of the latter kind are properly understood as concerned with making good 'consequential loss' and are therefore circumscribed by rules of remoteness and mitigation.

whether there happens to be a market 'proxy' that can be used to determine the objective value of what has been lost. A principled explanation for why the availability of damages substituting for the lost performance should depend upon the existence of a market for the legal entitlement that has been expropriated remains to be articulated, and it seems doubtful that it ever will be.[127] Limiting availability to circumstances where a market proxy exists makes the enforcement of a plaintiff's primary right to performance through an award of damages wholly contingent upon external factors that are irrelevant to the assessment of interpersonal justice between plaintiff and defendant. Put simply, next-best conformity with the plaintiff's entitlement to performance via an award of damages should not depend upon (a) the contingencies of whether the breach happened to be reversible and (b) whether the objective value of that performance can be determined by reference to an available market. Noteworthy instances of circumstances where such damages have been awarded include certain breaches of a restrictive covenant,[128] the breach of a confidentiality agreement[129] and the breach of a restraint of trade clause.[130] A further possible case where availability may be justified is following the breach of a promise to sell a chattel for which no market substitute is available.[131]

[127] This claim is subject to the qualification that there *may* be a justified restriction on the availability of such awards: see below Part V(E).

[128] See, eg, *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 1 WLR 798, 805–6, 809, 811–16 (Brightman J) ('*Wrotham Park Estate*').

[129] See, eg, *Pell Frischmann Engineering* (n 115) 2373–4 [5]–[6], 2388–9 [55]–[58] (Lord Walker JSC for the Court); *Vercoe v Rutland* [2010] EWHC 424 (Ch), [1], [4], [274], [286]–[322], [361] (Sales J).

[130] See, eg, *One Step (Support) Ltd v Morris-Garner* [2017] QB 1, 5 [1], 29–33 [114]–[134] (Christopher Clarke LJ, King LJ agreeing at 47 [135]), 47–51 [136]–[152] (Longmore LJ), revd *One Step* (n 1). For a forceful critique of both the reasoning and result in *One Step* (n 1), see Paul S Davies, 'One Step Backwards: Restricting Negotiating Damages for Breach of Contract' [2018] (4) *Lloyd's Maritime and Commercial Law Quarterly* 433.

[131] While a plaintiff would here normally be expected to seek specific performance, such an order might not be sought due to the plaintiff's changed circumstances, or the order might be denied due to the existence of a sufficiently strong countervailing consideration: see *Googe v Spoljaric* [2017] WADC 99, [243]–[262] (Gething DCJ). In these circumstances, just like the case of an ordinary breach of warranty, the plaintiff should be able to elect between claiming damages for (recoverable) consequential loss or an appropriate monetary substitute for the promised performance: see *Clark* (n 21) 29 [101]–[104] (Keane J).

B *Vale Nominal Damages?*

Where a plaintiff suffers no compensable loss following a contractual breach it is trite law that they are only entitled to nominal damages.[132] If it is correct that negotiating damages ought to be more readily available, would this result in an award of substantial damages in all cases where only nominal damages were previously available so that for every breach of contract a plaintiff will be entitled to a substantive negotiating damages award? The short answer is no. First, a plaintiff will still need to persuade the trier of fact as to the value of the negotiating damages award.[133] A plaintiff will, therefore, be limited to nominal damages where they fail to adduce evidence as to the value of the reasonable fee for releasing the defendant from performance.[134]

Secondly, and more fundamentally, sometimes the primary contractual right that has been infringed is valueless. In such a case the plaintiff will only be entitled to nominal damages. The High Court of Australia's decision in *Lewis* provides one notable example of the infringement of a contextually valueless right, at least according to the reasoning of the majority.[135] Another example of this phenomenon, this time in the contractual context, is the decision in *Bunge SA v Nidera BV*, where the Supreme Court of the United Kingdom unanimously held that no damages were available to the innocent buyers under a contract for the sale of goods that had been anticipatorily breached by the sellers because the sellers could (and would) have validly terminated the contract prior to the due date for delivery in any event.[136]

Thirdly, *Clark* itself also demonstrates the possibility that the contractual right infringed, or some part of this entitlement, may be valueless. This is because, although 3,009 of the straws transferred to Clark were defective, she only recovered the value of 1,996 straws since it was found that some of the straws would have been unusable anyway due to the operation of the 'family limit

[132] *Luna Park (NSW) Ltd v Tramways Advertising Pty Ltd* (1938) 61 CLR 286, 300–1, 305 (Latham CJ), 311–12 (McTiernan J). See also at 307 (Rich J).

[133] See *Briginshaw v Briginshaw* (1938) 60 CLR 336, where Dixon J relevantly observed that '[t]he truth is that, when the law requires the proof of any fact [on the balance of probabilities], the tribunal must feel an actual persuasion of its occurrence or existence before it can be found': at 361.

[134] See also *Lewis* (n 16) 245 [148] (Edelman J).

[135] Ibid 205 [19] (Kiefel CJ and Keane J), 211 [42] (Gageler J), 213 [48], 234 [122] (Gordon J).

[136] *Bunge* (n 30) 989–92 [1]–[11], 1002 [35]–[36] (Lord Sumption JSC, Lord Neuberger PSC, Lords Mance and Clarke JJSC agreeing), 1006 [56]–[57], 1008 [63], 1013 [88]–[89] (Lord Toulson JSC, Lord Neuberger PSC, Lords Mance and Clarke JJSC agreeing).

rule'.[137] If, hypothetically, the effect of this rule would have been to make *all* of the transferred straws unusable, only nominal damages could have been awarded because the breach would not have caused any part of the promised performance to have been lost.

C *Difficulties with the* One Step *Formulation*

As noted earlier, a more restrictive view — at least compared to the position defended here — as to the availability of negotiating damages for breach of contract was enunciated by the Supreme Court of the United Kingdom in *One Step*. Lord Reed JSC (with whom Baroness Hale PSC, Lords Wilson and Carnwath JJSC agreed) there held that

> [n]egotiating damages can be awarded for breach of contract where the loss suffered by the claimant is appropriately measured by reference to the economic value of the right which has been breached, considered as an asset. That may be the position where the breach of contract results in the loss of a valuable asset created or protected by the right which was infringed. The rationale is that the claimant has in substance been deprived of a valuable asset, and his loss can therefore be measured by determining the economic value of the right in question, considered as an asset. The defendant has taken something for nothing, for which the claimant was entitled to require payment.[138]

We argue that Australian courts should not follow this approach to the availability of negotiating damages and should instead look to the Court of Appeal of Singapore's decision in *Turf Club* for guidance in developing the relevant Australian law. Notably, however, Lord Reed JSC's analysis in *One Step* does come close to recognising that negotiating damages compensate for lost performance. For example, his Lordship notes elsewhere in *One Step* that damages for breach of contract are 'a substitute for performance'[139] and also holds that negotiating damages are compensatory.[140] Nevertheless, Lord Reed JSC then attempted to ring fence the availability of such damages by reference to the

[137] *Clark* (n 21) 5 [2], 6 [5]–[6], 10 [23] (Hayne J), 15 [39] (Crennan and Bell JJ), 25 [85], 25–6 [89]–[90], 42 [146] (Keane J, Crennan and Bell JJ agreeing at 10 [24]). See also 16–17 [50] (Gageler J). This aspect of the case is discussed in Winterton, 'Limiting the Recovery' (n 102) 64–6.

[138] *One Step* (n 1) 690 [95].

[139] Ibid 673 [35].

[140] Ibid 689–90 [95].

plaintiff being 'deprived of a valuable asset'.[141] The most fundamental difficulty with this restriction is that the justification for imposing it remains unstated.[142] Additionally, however, there are at least two further reasons why this particular basis for restriction is problematic.

The first additional problem with this approach is that it requires careful analysis in order to identify a deprivation of a 'valuable asset' resulting from a breach of contract. But it is unclear what, in addition to a breach of contract itself, is required for the 'loss of a valuable asset created or protected by the right that was infringed'.[143] This criterion therefore cannot be applied with a high degree of certainty. The basis for Lord Reed JSC's focus on the need for an 'asset' to be protected by the contractual right appears to be analogical reasoning with the proprietary torts and intellectual property cases that uncontroversially result in awards of negotiating damages.[144] Again, while his Lordship's cautious approach is somewhat understandable, a convincing explanation for restricting the availability of negotiating damages to cases in which the breach of contract is analogous to the proprietary torts remains at large. Moreover, for the reasons we have outlined, the preferable analogy, at least in the contractual context, as recognised in *Turf Club*, is to the award of damages for the value of the lost performance.[145]

A further difficulty with the approach adopted by the Supreme Court in *One Step* is that it leads to the anomalous result that negotiating damages may be recoverable in many (but not all) breach of contract cases unless it is no longer possible to obtain coercive or injunctive relief when the proceedings are commenced. The Court affirmed the view that *Lord Cairns' Act* damages compensate for the loss of coercive relief.[146] Such awards can be calculated on the negotiating damages basis.[147] Importantly, the prevailing view is that *Lord Cairns'*

[141] Ibid.

[142] This, in turn, leaves the scope of the Lord Reed JSC's proposed restriction uncertain. For example, it is unclear whether goodwill protected by a negative covenant could be seen as an asset: see Davies (n 130) 439; ibid. See also Man Yip and Alvin WL See, 'One Step Away from Morris-Garner: Wrotham Park Damages in Singapore' (2019) 135 (January) *Law Quarterly Review* 36, 38–9.

[143] Ibid; Burrows, 'One Step Forward?' (n 1) 520–1; Yip and See (n 142) 39; Peel (n 1) 233.

[144] See *One Step* (n 1) 688–90 [92]–[95] (Lord Reed JSC, Baroness Hale PSC, Lords Wilson and Carnwath JJSC agreeing).

[145] *Turf Club* (n 3) 712–13 [170] (Andrew Phang Boon Leong JA for the Court).

[146] *One Step* (n 1) 680 [62], 689 [95] (Lord Reed JSC, Baroness Hale PSC, Lords Wilson and Carnwath JJSC agreeing).

[147] Ibid 689 [95].

Act damages can be claimed for breach of contract provided that coercive relief is *possible* at the time when proceedings are commenced.[148] This means that a plaintiff in a breach of contract case can simply seek an injunction or specific performance as an indirect means of claiming negotiating damages. Such a strategy, however, (a) is unlikely to be available to unsophisticated parties and (b) will be unavailable to parties where coercive relief is not possible at the point in time at which proceedings are commenced.[149]

D *Some Difficulties with the* Turf Club *Formulation*

A view that is much closer to that defended here as regards the availability of negotiating damages for breach of contract was enunciated by the Court of Appeal of Singapore in *Turf Club*. The Court there observed that negotiating damages

> *should, as a matter of principle, be recognised as a head of contractual damages in Singapore law*. However, they play a *limited role* and apply only in *a specific type of case*, namely where there is a *remedial lacuna* due to the *unavailability of orthodox compensatory damages and specific relief* (which is a difficulty that primarily arises in the context of *negative covenants*), and *where this lacuna can be rationally and sensibly filled by reference to the hypothetical bargain measure* (which requires the court to determine the sum which the plaintiff could have reasonably extracted from the defendant as the price or licence fee to obtain the plaintiff's consent to act).[150]

In general, we support the formulation of the Court of Appeal in *Turf Club* and suggest that it constitutes a useful starting point for the development of the nascent Australian law. Despite this, it remains necessary to explain briefly why we do not consider this formulation to be a perfect description of when negotiating damages ought to be available for breach of contract. Our (relatively) minor difficulties with the test there formulated are as follows:

1 Further guidance is needed as to whether there is in fact a 'remedial lacuna' in a breach of contract claim (ie a normatively undesirable gap in the

[148] See, eg, *Mills v Ruthol Pty Ltd* (2004) 61 NSWLR 1, 13 [61] (Palmer J).

[149] Indeed, this may be the case where a defendant has concealed the existence of their wrong, as noted in Davies (n 130) 440.

[150] *Turf Club* (n 3) 715 [177] (Andrew Phang Boon Leong JA for the Court) (emphasis altered).

remedies available).[151] To resort to a spatial metaphor and conclude that there is a 'gap' or 'lacuna' in the law does not say whether or not that 'gap' is remedially desirable or not. The thesis defended here provides clearer guidance as to *when* and *why* there is a remedial lacuna in the law. Subject to the possible qualification considered immediately below, it is not justifiable to compensate a plaintiff for the value of the lost performance where there is a market to calculate the cost of cure or difference in value measures but not to compensate them for the value of the lost performance where such a calculation is not possible. In both cases a plaintiff should be compensated in monetary terms for the performance that has been denied by the breach;

2 Consistently with the thesis advanced in this article, and subject to the possible qualification considered below, to stipulate that 'orthodox compensatory damages' must be unavailable is only defensible if this is understood to mean that damages substituting for the lost performance are unavailable; as long as there is not an alternative monetary substitute for performance available, we contend that it should be possible to seek negotiating damages even if the plaintiff has a further claim for consequential loss (or wasted expenditure) available, though this is obviously subject to the requirement that double recovery is precluded;[152] and

3 The decision in *Turf Club* focuses on negative covenants as being the paradigmatic example of where there will be a remedial lacuna in the law. As the Court observed, 'the logic and nature of the hypothetical bargain measure applies *primarily* to negative covenants'.[153] We agree with this observation,

[151] See also Fee (n 108) 506.

[152] Precisely what constitutes 'double recovery' is explained by Stevens, who correctly observes that the plaintiff's claim in, for example, *British Westinghouse Electric & Manufacturing Company Ltd v Underground Electric Railways Company of London Ltd* [1912] AC 673, 688 (Viscount Haldane LC, Lord Ashbourne agreeing at 692, Lord Macnaghten agreeing at 692, Lord Atkinson agreeing at 692)

> was not one for the difference in market value between the machines promised and those delivered … [and that] such a claim could not have been brought in addition to that which was asserted. The plaintiff had recovered substantial damages for the losses incurred because the machines were defective during the years up until their replacement. A plaintiff cannot recover *both* the difference in value between what it was promised and what it received, *and* the expense it in fact incurs in making good the defective performance. Recovering the former means that the latter loss is, to that extent, not incurred. … Recovery under one head reduces the damages recoverable under the other …

Stevens, 'Damages' (n 13) 181 (emphasis in original).

[153] *Turf Club* (n 3) 715 [175] (Andrew Phang Boon Leong JA for the Court) (emphasis altered).

but only because a breach of such an obligation (a) is generally irreversible (such that substantive performance is impossible) and (b) concerns a subject matter that (at least generally) is not traded on an open market.[154] Accordingly, it would be a mistake to read, and ultimately to apply, *Turf Club* as drawing an invariable distinction between the availability of negotiating damages for negative and positive contractual obligations.[155] Rather, that distinction provides a useful 'rule of thumb' for when it is significantly more likely to be appropriate to award negotiating damages.[156] It is nevertheless important to appreciate that there is nothing in principle to prevent negotiating damages being available following the breach of a positive obligation, albeit such circumstances will be comparatively rare.[157]

E *The Possibility of a More Restrictive Approach*

The *One Step* decision has provoked significant academic commentary including various attempts to rationalise the conclusion that no claim for negotiating damages was available on the facts. Edwin Peel, for example, has proposed that the availability of negotiating damages for breach of contract should depend upon whether the plaintiff's 'right created the expectation of a price payable by the defendant, irrespective of any actual pecuniary loss' with the answer to this inquiry depending upon 'the proper construction of the contractual right in question'.[158] This suggestion might be just an alternative way of describing the distinct restriction on recovery considered immediately below. But if not, the difficulty with this proposal is its failure to provide an account of *when* any such expectation of a price arises. Such circumstances must at least include when the right possesses objective value in the sense that there is a market in which it could be traded. But the difficult question that this view confronts is why no expectation of a price also arises when the right, even though bargained for,

[154] See Watts (n 2) 228, 231–2, discussing *One Step* (n 1), *Cash Handling* (n 2); Yip and See (n 142) 37.

[155] See *Turf Club* (n 3) 733–4 [228]–[229] (Andrew Phang Boon Leong JA for the Court).

[156] See also Yip and See (n 142) 37–9, 41; Fee (n 108) 506.

[157] *Turf Club* (n 3) 733–4 [228]–[229] (Andrew Phang Boon Leong JA for the Court). Peter Watts also notes that negotiating damages will generally be available where the contractual promise breached is negative in nature but then observes, by example, that '[t]he same conclusion may be appropriate where the promisor has promised personal performance of a contractual promise': Watts (n 2) 248.

[158] Peel (n 1) 241.

merely possesses subjective value to the plaintiff.[159] Put another way, given that the relevant right–duty relation was the product of an enforceable contractual bargain, it is not obvious why the plaintiff should not receive compensation for the defendant's involuntary expropriation of this entitlement even if the value of the right was wholly personal to the plaintiff.

A more promising basis for restricting the availability of negotiating damages for breach of contract has been proposed by Stevens.[160] This basis is notably consistent with the result in *One Step*, and it draws upon Leggatt J's earlier analysis in *Marathon Asset Management LLP v Seddon* ('*Marathon Asset Management*').[161] According to this view, in addition to there being no alternative monetary substitute for performance available because of the non-existence of an available market in the relevant sense, the contractual obligation breached must not merely be a means by which to achieve some further commercial end.[162] Notably, Daryl Xu has advanced a similar analysis, arguing that this restriction on availability is also consistent with *Turf Club* alongside most, if not all, of the relevant earlier English authorities.[163] As noted, Leggatt J earlier proposed essentially the same view in *Marathon Asset Management* by observing that negotiating damages for breach of contract are only available when the purpose of the obligation breached was not 'solely to protect the covenantee against damage to its commercial interests'.[164]

While Xu's claim that this restriction on availability is capable of being reconciled with all of the earlier English decisions is debatable,[165] what is hereafter referred to as 'the mere means restriction' does seem to provide an alternative

[159] For a notable example of such a case where a 'release fee' award was made in response to a breach of contract, see *Cash Handling* (n 2) 192423–30 (Elias J).

[160] Stevens, *Restitution* (n 7) 338–9.

[161] *Marathon Asset Management* (n 7), cited in Stevens, *Restitution* (n 7) 339; One Step (n 1), discussed in Stevens, *Restitution* (n 7) 338–9. See also *Marathon Asset Management* (n 7) 848 [217] (Leggatt J). Significantly, it might even be claimed that, reading *One Step* (n 1) charitably, the more promising basis proposed by Stevens is what Lord Reed JSC really meant: see at 688 [95] (Lord Reed JSC, Baroness Hale PSC, Lords Wilson and Carnwath JJSC agreeing).

[162] Stevens, *Restitution* (n 7) 338–9.

[163] Xu (n 7) 571–5.

[164] See *Marathon Asset Management* (n 7) 848 [217]. Notably, however, Stevens, Daryl Xu and Leggatt J all appear to leave open the possibility that negotiating damages may be available where the purpose of the relevant breached obligation was solely to secure some further *non-economic* end: see also Stevens, *Restitution* (n 7) 339; Xu (n 7) 573–5.

[165] See, eg, *Pell Frischmann Engineering* (n 115), discussed in Xu (n 7) 571–2, 574.

rationalisation for the results in *One Step* and *Turf Club*.[166] As foreshadowed above, perhaps the simplest way to understand this restriction is that it attempts to distinguish between a contractual right that possesses only subjective *pecuniary* value to the particular plaintiff and one that possesses *either* some non-pecuniary value to the plaintiff *or* some more objective financial value in the sense that there are at least some other people who would be willing to exchange valuable consideration for it. Negotiating damages would be unavailable in the former situation, but they would be available in the latter scenario. Consider, for example, *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* itself. According to Stevens,

> the purpose of the negative covenant was to stop excess housing in … a development impacting upon existing and future homeowners. The rightholder wanted the covenant respected for the benefit of all those who acquired a portion of the overall development, their own possible consequential economic loss being irrelevant to the purpose of that right.[167]

As Stevens explains, that is an entitlement for which existing or prospective home owners within the Wrotham Park estate would be willing to pay. This observation reveals one plausible justification for this restriction.[168] Putting aside the possibility, considered below, of an alternative justification for awarding substitutionary damages following contractual breach, if negotiating damages are indeed best understood as a monetary substitute for performance *and* substitutionary damages awards are only available in response to the breach of contractual rights possessing objective value, it seems to follow that negotiating damages should also only be available as a response to the breach of such rights. Put another way, where the sole purpose of the obligation breached was to 'protect the covenantee against damage to its commercial interests',[169] it may plausibly be argued that there is no justification for giving the plaintiff a choice between framing their claim for damages as one seeking to make good any contingent consequential commercial loss suffered by the particular plaintiff that

[166] Arguably, it can also explain another case decided in the aftermath of *One Step* (n 1) where negotiating damages for breach of contract were denied on the basis of Lord Reed JSC's 'valuable asset' restriction: see *Priyanka Shipping Ltd v Glory Bulk Carriers Pte Ltd* [2019] 1 WLR 6677, 6688 [51], 6707 [148], 6708–9 [159], 6717–19 [190]–[200], 6719–20 [206] (David Edwards QC).

[167] Stevens, *Restitution* (n 7) 339, discussing *Wrotham Park Estate* (n 128).

[168] For further discussion, see Xu (n 7) 575–9.

[169] See *Marathon Asset Management* (n 7) 848 [217] (Leggatt J).

is causally attributable to the breach and one seeking the objective value of the promised performance. We present this argument for consideration cognisant of the fact that the mere means restriction will necessarily raise difficult interpretative questions as to when a contractual obligation is properly construed merely as a means to some commercial end, and such difficulties *arguably* provide one good reason against the restriction's incorporation into Australian law.

Expressing the matter in this way reveals that much turns on whether it is indeed true that substitutionary damages are only available for the infringement of contractual rights that do not merely possess subjective value to the particular plaintiff. We have, however, claimed that it is arguable that this is not the case given the possibility of substitutionary cost of cure awards and, notably, that the argument for this conceptualisation of cost of cure awards is probably more defensible under Australian law than it is in the United Kingdom. Thus, at least if the substitutionary understanding of (at least some) cost of cure awards is accepted, the wider availability of negotiating damages for breach of contract may cohere better with the broader Australian law of contract damages than it does with the law in the United Kingdom, even putting the *One Step* decision itself aside. Put another way, it may prove difficult to reconcile imposing the mere means restriction on the availability of negotiating damages for breach of contract with the broader Australian law governing the availability of substitutionary damages following contractual breach.

To conclude, the justifiability of the mere means restriction must ultimately depend upon the true justification for awarding substitutionary damages more generally. If this justification is simply that something of not merely subjective value to the particular plaintiff has been promised but not provided, the mere means restriction appears to be theoretically defensible, even if it may ultimately still prove to be very difficult to apply in practice. If, however, at least some part of the justification for awarding substitutionary damages is to provide the plaintiff, in the face of evidential difficulties in proving its recoverable consequential loss, with a practically expedient way in which to value the bargained-for but unperformed promise, irrespective of the (objective) value of that promise, the mere means restriction is indefensible. While all this indicates the need for further academic and judicial consideration of the mere means restriction, we do not object to its adoption by Australian courts on a provisional basis if, by removing one possible objection, it makes more likely an award of negotiating damages for breach of contract in circumstances where,

at least according to the account presented here, the justification for their availability is indisputable.

VI The Quantification of Negotiating Damages for Breach of Contract

Before concluding, something should be said about the principles that govern the assessment of negotiating damages for breach of contract when such awards are available. Space restrictions preclude a detailed treatment of this topic here, but we suggest that the principles forwarded by Goh Yihan, which were broadly endorsed by the Court of Appeal of Singapore in *Turf Club*, provide a sensible starting point for the law's further development.[170] As observed in *Turf Club*, such 'damages are to be measured by such a sum of money as might reasonably have been demanded as a quid pro quo for relaxing the covenant' and 'the assessment is objective and by reference to a hypothetical bargain rather than the actual conduct and position of the parties'.[171] Notably, the Court also expressed support for Goh's more 'specific submissions on the assessment of *Wrotham Park* damages' to the effect that

> (a) The negotiation is between a willing buyer and a willing seller, and the fact that a party would have refused to make a deal is to be ignored. Events subsequent to the hypothetical bargain, 'such as that the contract-breaker's profit turned out to be much smaller than expected, should not normally be taken into account'.
>
> (b) Relevant factors that may be taken into account include (i) the likely parameters given by ordinary commercial considerations bearing on each of the parties; (ii) any factor affecting the balance to be struck between the competing interests; and (iii) the need to ensure that the award does not provide a relief out of proportion to the real extent of the plaintiff's interest in proper performance judged on an objective basis.
>
> (c) The quantum of the defendant's actual gain does not itself form the basis of the award, as *Wrotham Park* damages are not partial disgorgement, but are relevant as a matter of evidence in providing a good estimate of the anticipated profit at the time of breach.

[170] See *Turf Club* (n 3) 692–3 [98]–[99], 739–41 [243]–[249] (Andrew Phang Boon Leong JA for the Court).

[171] Ibid 739 [244] (emphasis omitted).

> (d) The date of assessment is as at the date of breach.
>
> (e) The plaintiff must demonstrate that the defendant would not have obtained the benefit but for the breach. In addition, considerations of remoteness (whether the defendant could reasonably foresee the gain) and mitigation (whether the plaintiff has unreasonably delayed in initiating the claim) may well apply.[172]

While we broadly endorse these principles as an appropriate starting point for the law's further development, two qualifications are necessary. First, we reject the suggestion in paragraph (e) that 'considerations of remoteness … and mitigation … may well apply' for reasons that were explained earlier,[173] and notably this point was in fact expressly acknowledged by the Court of Appeal.[174] Secondly, we note that there is some uncertainty as to what is meant by the stipulation at the beginning of paragraph (e) that the 'plaintiff must demonstrate that the defendant would not have obtained the benefit but for the breach'.[175] While it may well be that the ultimate legal onus remains on the plaintiff to demonstrate that the breach was a necessary condition of the lost performance, it seems likely that, at least in relation to certain other possible sufficient conditions for the loss of this benefit, the defendant possesses (at least) an evidentiary onus to raise possible alternative explanations for the occurrence of the loss.[176]

[172] Ibid 692–3 [99]. See also at 739 [243]. Regarding paragraph (a), note that while we agree, as explained in *MDW Holdings* (n 27), that such evidence of 'an event which was contingent at the date of assessment' is irrelevant to the assessment of substitutionary damages, this does not, as we explained, preclude the possibility of admitting evidence of events subsequent to the hypothetical bargain 'to cast light on events which had happened by the date of assessment': see at 48 [48] (Newey LJ, Asplin LJ agreeing at 55 [87], Whipple LJ agreeing at 55 [88]). See also at 48–9 [49] (Newey LJ, Asplin LJ agreeing at 55 [87], Whipple LJ agreeing at 55 [88]).

[173] *Turf Club* (n 3) 693 [99] (Andrew Phang Boon Leong JA for the Court). See above Part III.

[174] See *Turf Club* (n 3) 740–1 [248] (Andrew Phang Boon Leong JA for the Court).

[175] See ibid 693 [99] (Andrew Phang Boon Leong JA for the Court).

[176] Notably, this approach is broadly consistent with the views expressed by Gageler and Edelman JJ in *Berry v CCL Secure Pty Ltd* (2020) 271 CLR 151 in the context of a statutory damages claim for misleading and deceptive conduct, in relation to how the evidentiary onus may shift throughout the trial while the legal onus remains constant: see at 188 [65]–[66]. See also at 156 [1] (Bell, Keane and Nettle JJ). Note further that sometimes the defendant may have the *legal* onus of proving that the performance would have been lost anyway. See, eg, the position taken in relation to post-breach events in *The Golden Victory* (n 44), discussed in *Bunge* (n 30) 991 [7], 994–7 [16]–[23] (Lord Sumption JSC, Lord Neuberger PSC, Lords Mance and Clarke JJSC agreeing), 1012–13 [85]–[88] (Lord Toulson JSC, Lord Neuberger PSC, Lords Mance and Clarke JJSC agreeing).

VII Conclusion

Negotiating damages for breach of contract are best understood as an appropriate award compensating — or substituting — for the deprivation of (the value of) the contractually promised performance that results from the relevant breach. Given the law's recognition of the existence of a legal right to contractual performance and the availability of other forms of substitutionary damages for breach of contract, we have argued that such awards should be more readily available in Australia. Most importantly, negotiating damages are generally appropriate when other monetary substitutes for the promised performance are unavailable. More controversially, it may be that such awards are also appropriate when awarding one of the standard substitutionary measures is technically possible but the measure is denied for some other reason: for example, when awarding the cost of cure is 'unreasonable' in the *Ruxley* sense.[177]

As well as advocating for the wider availability of negotiating damages under Australian law, this article also had several other important objectives. One was to outline the significant difficulties faced by alternative attempts to explain negotiating damages and to make clear why our proposed account is superior to these alternatives. Another aim was to demonstrate the serious conceptual and practical difficulties that attend the particular limitation on the availability of negotiating damages for breach of contract that was imposed in *One Step* and to explain why Australian courts should not endorse this approach. A third objective was to outline the main principles that should determine the quantification of negotiating damages. The final objective was to consider, albeit relatively briefly, the plausibility of certain alternative limitations on the availability of negotiating damages for breach of contract that have been proposed as preferable explanations for the results in *One Step* and *Turf Club*. The most promising of these alternative limitations is that negotiating damages should be available only when the purpose of the relevant duty breached was not 'solely to protect the covenantee against damage to its commercial interests'.[178]

[177] This might even constitute the preferable explanation for the £2,500 award made in *Ruxley* (n 24) itself: see at 353–4 (Lord Bridge), 359 (Lord Jauncey, Lord Keith agreeing at 353), 361 (Lord Mustill, Lord Keith agreeing at 353), 375 (Lord Lloyd, Lord Keith agreeing at 353). The alternative, more generally accepted explanation, favoured by Lord Mustill in *Ruxley* (n 24), is that the award was compensation for the non-pecuniary loss of amenity suffered by the plaintiff in not obtaining the pool contracted for: see at 360–1. See, eg, Dennis Ong, 'Non-Financial Loss Resulting from Tort and Breach of Contract: The Availability of a Monetary Remedy That Is Non-Compensatory, Non-Restitutionary, Non-Punitive, and Not a Mere Solatium' (2002) 22(1) *University of Queensland Law Journal* 20, 27–8.

[178] See *Marathon Asset Management* (n 7) 848 [217] (Leggatt J).

Although no definitive position was taken in relation to whether this restriction should be embraced by Australian courts, it was recognised that it may be both substantially reconcilable with the decided cases and — depending on the true justification for substitutionary damages awards — rationally defensible.