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

The availability of negotiation 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. Specifically, it argues that Australian courts should develop the nascent law governing the availability of these awards more consistently with the analysis adopted by the Singaporean Court of Appeal in *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* rather than following the United Kingdom Supreme Court's approach in *Morris-Garner v One Step (Support) Ltd.*

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 this award but, following the terminology preferred in *Morris-Garner v One Step (Support) Ltd*,[1] the moniker "negotiating damages" is adopted here.[2] The availability of negotiating damages for breach of contract has received surprisingly little judicial attention in Australia but, by contrast, was recently considered at length by both the Supreme Court of the United Kingdom in *One Step*, and the Court of Appeal of the Republic of Singapore in *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua*.[3] The essential aims of this article are to 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

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[1] *Morris-Garner v One Step (Support) Ltd* [2019] AC 649; [2018] UKSC 20 (*One Step*).

[2] Such awards have been labelled (i) user damages; (ii) *Wrotham Park* damages; (iii) release fee damages; (iv) licence fee damages. See further, James Edelman (ed) *McGregor on Damages* (21st ed, Sweet & Maxwell 2020) at [14-001]; Andrew Burrows, 'One Step Forward' (2018) 134 LQR 515, 516; Edwin Peel, 'Negotiating Damages after *One Step*'(2019) 35 *Journal of Contract Law* 216, 225.

[3] *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2018] 2 SLR 655; [2018] SGCA 44 (*Turf Club*).

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 inappropriate. Our conclusion is broadly consistent with the characterisation, and reasoning, in *Turf Club*, as well as Lord Sumption'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 that the plaintiff has been deprived of.[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 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 four substantive Parts. Part Two sets the stage for the substantive arguments that follow, defining key terms and explaining certain important distinctions, in particular that between damages that substitute for performance and damages concerned to make good certain adverse consequences that can be causally attributed to the breach of a legal duty. Part Three 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 Four outlines the main deficiencies with alternative characterisations of negotiating damages. Part Five 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) her lost performance in circumstances where no

[4] *One Step* (n 1) [92].
[5] *Turf Club* (n 3) [177].
[6] For another defence of Lord Sumption's view, see H Lücke, '*Wrotham Park* damages in the UK Supreme Court: *One Step v Morris-Garner*' (2020) 49 *Australian Bar Review* 259.
[7] See *Marathon Asset Management LLP v Seddon* [2017] EWHC 300 (Comm) (*Marathon Asset*), [217] (Leggatt J). For similar suggestions, expressed in alternative language, see R Stevens, *The Laws of Restitution* (OUP 2023) 339 and D Xu, 'Negotiation Damages: Rationalising the Compensatory View' [2020] JBL 561, 571.

alternative monetary substitute for performance is available. Finally, Part Six 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[8] for the primary right created by the contract.[9] This analytical structure of the law of damages for a breach of contract was recently reaffirmed by Lord Reed (with whom Lady Hale, Lord Wilson & Lord Carnwarth agreed) in the *One Step* case itself. With reference to Lord Diplock's leading speech in *Photo Production Ltd v Securicor Transport Ltd*,[10] Lord Reed there observed that:

> "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[.] ….
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> 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

[8] It has been argued that a decree of specific performance simply replicates, rather than substituting for, the relevant primary right(s): Rafal Zakrzewski, *Remedies Reclassified* (OUP 2005) 2–13. 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: (i) the decree carries with it the potential sanction for contempt of court; (ii) the content of the decree is different to the primary obligation in the contract insofar as late performance is ordered; and (iii) 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 A can also demonstrate that a court award of damages would be inadequate. On the nature of specific performance see: Wesley Newcomb Hohfeld, 'The Relations between Equity and Law' (1912–1913) 11 Michigan Law Review 537, 551; *Burnley v Stevenson* (1873) 15 Am Rep 621, 24 Ohio St 474, 478–79 (McIlvaine J); *Bullock v Bullock* (1894) 52 N J Eq 561, 46 Am St Rep 528, 534 (Magie J); *Fall v Eastin* (1909) 215 US 1, 14 (Holmes J).

[9] *Robophone Facilities Ltd v Blank* [1966] 1 WLR 1428, 1446–7 (Diplock LJ); *Moschi v Lep Air Services Ltd* [1973] AC 331, 346–47 (Lord Diplock); *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827, 848–49 (Lord Diplock); *Lombard North Central Plc v Butterworth* [1987] QB 527, 538 (Mustill LJ); *Johson v Johnson* [1989] 1 WLR 1026, 1032 (Dillon LJ); *Honey Bees Preschool Limited v 127 Hobson Street Limited* [2018] NZHC 32, [50] (Whata J) where his Honour said that the distinction between primary and secondary obligations is the "cornerstone" of contract law. An alternative view, advanced vigorously by the late Professor Stephen 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 further S Smith, *Rights, Wrongs and Injustices: The Structure of Remedial Law* (OUP 2019) 9–10.

[10] *Securicor* (n 9) 848–849

> 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 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 Professor 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.
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> 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

[11] *One Step* (n 1) [34]–[35] (emphasis added).
[12] John Austin, *Lectures on Jurisprudence* (5th edn, James Cockcroft and Co 1885) vol II [1031].

defendant's wrong.[13] This Austinian taxonomical delineation has some utility if only because it enables a degree of uniformity and consistency in the law of remedies. As Austin said:[14]

> "[i]n 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."

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 and non-conformity 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 awards that may be made following the breach of a legal duty.[16] These distinct awards aim to "compensate" the innocent plaintiff for two conceptually separate kinds of deprivation or "loss", though on occasion they may be awarded in combination provided there is no double recovery.

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[13] ibid [1037]–[1040]. See too WN Hohfeld, 'The Relations between Equity and Law' (n 8) 554, 556; William Anson and Arthur Corbin, *Principles of the Law of Contract* (3rd Amen edn, OUP 1919) [401]; WN Hohfeld, 'Fundamental Legal Conceptions as Applied to Judicial Reasoning II' (1917) 26 YLJ 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) 21; Peter Birks, 'Personal Property: Property Rights and Remedies' (2000) 11 KCLJ 1, 8; James Edelman, 'Gain-Based Damages and Compensation' in Andrew Burrows and Lord Rodger of Earlsferry (eds) *Mapping the Law: Essays in Memory of Peter Birks* (OUP 2006) 142–46; Robert Stevens, 'Damages and the Right to Performance: A *Golden Victory* or Not?' in Jason Neyers, Richard Bronaugh and Stephen Pitel (eds), *Exploring Contract Law* (Hart 2009) 171, 172; Stephen Smith, 'Remedies for Breach of Contract: One Principle or Two?' in Gregory Klass, George Letsas and Prince Saprai (eds), *Philosophical Foundations of Contract Law* (OUP 2014) 354–361.

[14] Austin (n 12) [1038].

[15] Compare Peter Birks, *The Concept of a Civil Wrong* (OUP 1995) 31, 51: 'The 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'. For detailed consideration of this question specifically confined to the contractual context, see R Craswell 'Contract Law, Default Rules, and the Philosophy of Promising' (1989) 88 Michigan Law Review 489 and D Kimel, From Promise to Contract (Hart 2002), chapter 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] HCA 26; (2020) 271 CLR 192 [142]–[149] (Edelman J) (*Lewis*) and for further recent recognition in the context of a tortious claim for conspiracy by unlawful means, see *Talacko v Talacko* [2021] HCA 15; (2021) 272 CLR 478, [40]–[51] (the Court).

One kind of damages award, hereafter referred to as "substitutionary" although other language could be adopted,[17] 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.[18] The relevant "loss" compensated here is best understood as the objective value of what has not been delivered or conformed to. 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.[19] 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*, a decision considered further below.[20] Arguably, another example is the award made to the plaintiff in *Tabcorp Holdings v Bowen Investments*,[21] although the characterisation of such "cost of cure" awards, particularly when made following the infringement of a property right held by the plaintiff,[22] as substitutionary is more contestable.[23]

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)[24] consequences that the plaintiff can causally attribute to the relevant breach of the legal duty. A notable example of such an award, again made following the breach of a contractual warranty, is that sought by the unsuccessful plaintiff in *Burns v M.A.N. Automotive (Aust) Pty Ltd*.[25] Another, this time made following a contract's termination for anticipatory breach, is that brought by the unsuccessful plaintiff in *Upside Property Group Pty Ltd v Tekin*.[26] Such awards are often described as being for "consequential loss"[27] or, at least in the contractual context, for "lost profits".[28]

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[17] 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 misunderstandings. See further the text from n 34.
[18] For discussion, see *Lewis* (n 15) [142]–[184] (Edelman J) and R Stevens, *Torts and Rights* (OUP 2007) chapter 4.
[19] See E Weinrib, 'Two Conceptions of Remedies', in Charles Rickett (ed), *Justifying Private Law Remedies* (Hart 2008) 3.
[20] [2013] HCA 56; (2013) 253 CLR 1 (*Clark*). See the text a (n 20).
[21] [2009] HCA 9; (2009) 236 CLR 272 (*Tabcorp*).
[22] For utilisation of this idea in a different context, see Stevens *Torts and Rights* (n 18) 208.
[23] See, eg, Stevens, 'Damages and the Right to Performance' (n 13). Although there is arguably a difference between English and Australia law here in that in Australia it is well established a plaintiff does not have to intend to incur the cost of cure before claiming such damages: see *Bellgrove v Eldridge* (1954) 90 CLR 613 (*Bellgrove*).
[24] Although claims for "consequential loss" for breach of contract are predominately concerned with financial loss, damages for certain non-financial losses are occasionally recoverable. Although there is obviously reason to distinguish these kinds of claims, there is also reason to observe that in both being concerned to ameliorate the adverse consequences of a breach of legal duty, they share something in common.
[25] (1986) 161 CLR 653 (*Burns*).
[26] [2017] NSWCA 336 (*Upside*).
[27] For recent recognition of the distinctiveness of such awards in the contractual context, see *MDW Holdings Limited v James Norvill and Ors* [2022] EWCA Civ 883; [2023] 1 All ER 929 (*MDW*) [70] (Newey LJ, Asplin LJ and Whipple LJ agreeing), discussed with approval in M Dimarco and D Winterton, 'The Relevance of Hindsight in the Assessment of Damages for Breach of Warranty and Deceit' (2023) 139 LQR 525.
[28] *Upside* [35] (Meagher JA, McColl and Macfarlane JJ agreeing).

Importantly, a failure properly to distinguish between an award of substitutionary damages and an award aiming to make good the 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[29] be proved, 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 now occupied that must be established on the balance of probabilities.[31] Additionally, such consequential awards are limited by rules of remoteness and mitigation, which have no bearing upon the availability of substitutionary awards.

c. Application to Damages for Breach of Contract

To explain further how this division operates in the contractual context, the primary kind of substitutionary award described above is directed to compensating the plaintiff for the value of the performance that the defendant promised to provide.[32] The availability of such an award is consistent with the cardinal principle enunciated by Hayne J in *Clark v Macourt* that "loss" for the purposes of contract law encompasses "the value of what the promisee would have received if the promise had been performed".[33] 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*, where his Honour 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

[29] As noted below, arguably at least some cost of cure awards are also best characterised as substitutionary.
[30] As discussed further below, exceptionally, the question of whether the breach was a necessary condition of the failure to receive the promised performance or would have happened anyway may also arise. See, eg, *Bunge SA v Nidera BV* [2015] UKSC 43; [2015] 3 All ER 1082 (*Bunge*) and *Clark* (n 20).
[31] See, e.g., *Burns* (n 25); *Upside* (n 26).
[32] See *Bunge* (n 30) [21] (Lord Sumption) and *MDW* (n 27) [44]–[49].
[33] *Clark* (n 20) [9] (Hayne J). To similar effect, see *Clark* (n 20) [111] (Keane J).

> provides for a secondary right for the value of the performance that was not received or the difference in value due to the defect. ….
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> 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".[34]

Justice Edelman's recognition of the availability of two conceptually distinct kinds of damages awards that may be made following a breach of contract is welcome. Care must nevertheless be taken here not to mischaracterise this distinction. According to his Honour, an award for what is alternatively referred to as "the performance interest",[35] or the value of the promised performance,[36] is not "concerned with loss in any real or factual sense" because the deprivation of performance "appears as a 'loss' only by reference to 'a unstated ought'".[37] 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*. [38] However, it does not follow from this that such awards are not "concerned with loss in any real…sense". At least assuming that the formation of a contract creates reciprocal

[34] [2020] HCA 17; (2020) 268 CLR 326 (*Moore*) [64] (Edelman J).

[35] This terminology is eschewed here both because it may (misleadingly) suggest that all the plaintiff has been deprived of is a subjective 'expectation' of performance rather than an objective legal entitlement and because it is ambiguous as to *how* any such interest (or legal entitlement) should be given effect. On this latter point, see D Winterton, 'Two Conceptions of the Performance Interest in Contract Damages' in D Campbell and R Halson, (eds), *Research Handbook on Remedies* (Edward Elgar 2019) 130.

[36] For Edelman J's adoption of similar terminology in earlier academic writing, see J Edelman, 'Money Awards of the Cost of Performance' (2010) 4 *Journal of Equity* 122.

[37] *Moore* (n 34) [64] (Edelman J).

[38] Although the existence of a legal right to performance is sometimes questioned, almost all mainstream normative theories conclude that legally enforceable promises sometimes create legally binding obligations. On one view, contract enhances personal autonomy by allowing an individual to effectively bind her 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: Charles Fried, *Contract as Promise: A Theory of Contractual Obligation* (Harvard University Press, 1981) 7–17; Stephen Smith, *Contract Theory* (OUP 2004) 57; Charles Fried, 'The Ambitions of Contract as Promise' in Gregory Klass, George Letsas and Prince Saprai, *Philosophical Foundations of Contract Law* (OUP 2014) 17. 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': see A Beever, 'Agreements, Mistakes, and Contract Formation' (2209) King's Law Journal 21, 40, discussing I Kant, *The Metaphysics of Morals*, reprinted in Mary Gregor (ed), *Immanuel Kant Practical Philosophy* (Cambridge University Press 1996) 353. On a consequentialist view, the law of contract produces more benefits than costs: Joseph Raz, 'Review: Promises, Morals, and Law' (1982) 95(4) *Harvard Law Review* 916, 936–8 and D Kimel, *From Promise to Contract: Towards a Liberal Theory of Contract* (Hart 2003), Chapter 3. Finally, natural law theorists will observe that the law of contract creates the stability and cooperation required to build the 'common good': John Finnis, *Natural Law & Natural Rights* (2nd edn, OUP 2011) 303 (justifying 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 Finnis, see Nicholas J McBride, *The Humanity of Private Law Part I: Explanation* (Hart 2018) 165.

rights to performance in each of the parties,[39] the plaintiff has been deprived of the performance to which it was legally entitled. Thus, at least in the standard case where there is no reason to think that the plaintiff would not have received the promised performance 'but for' the breach,[40] the failure to provide the promised performance can plausibly be understood as constituting a "real" loss,[41] measured against the baseline of the plaintiff's legal entitlements.

Justice Edelman's characterisation of the distinction in *Moore* should also be treated with some caution for a second reason. Even awards for "consequential loss" typically adopt as the relevant baseline against which the plaintiff's position to be compared is the financial (or factual) position that the plaintiff *would* have been in had there been no breach. The proof that this is so consists in the fact that, if it were not, 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 v M.A.N. Automotive (Aust) Pty Ltd*,[42] and *Upside Property Group Pty Ltd v Tekin*.[43] Both cases involved claims for "lost profits",[44] which are subjectively focussed and concerned to quantify the deterioration in the plaintiff's actual projected financial position. Awards for "consequential loss", at least of this kind, are accordingly also premised upon the existence of a legal entitlement to receive the promised performance;[45] it is simply that the focus of the award is the plaintiff's factual, rather than *normative*, position.[46]

In view of these observations, it is suggested that the more likely reasons for why there is often a failure to appreciate the existence of the distinction between the two kinds of damages awards outlined above are: (i) the ambiguous and confusing terminology commonly employed within

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[39] As observed in the previous footnote, some have questioned the existence of such a right. But it is not part of the purpose of this article to defend the existence of a legal right to performance, other than indirectly by demonstrating the existence of damages award that are best explained by reference to the proposition that contracts do indeed create legal rights to performance.

[40] As Lord Sumption explained in *Bunge* (n 30) [16], this is the best explanation for the majority's decision in *The Golden Victory* [2007] 2 AC 353. But the facts in *Clark* (n 20) actually provide another example of this phenomenon as explained further below.

[41] This is what distinguishes a case like *Clark* (n 20) from a case such as *Lewis* (n 18) where the relevant infringed right was valueless because, on the relevant counterfactual, Mr Lewis would, or at least should, have been in prison anyway.

[42] *Burns* (n 25).

[43] *Upside* (n 26) [35]. For another example, see *Jackson v Royal Bank of Scotland* [2005] UKHL 3; [2005] 1 WLR 377.

[44] In *Upside*, an alternative claim for "loss of bargain damages", which aim to substitute for (and objectively value) the promised performance, was also (unsuccessfully) brought.

[45] Compare a claim for 'wasted expenditure', which is not necessarily premised upon the existence of a legal right to performance. Although, at least under Australian and English law, proof that the expenditure would not have been recouped will reduce the damages awarded.

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

this area of the law, particularly inconsistent use of terms like "loss" and "compensation";[47] and (ii) 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"[48] — that is at least equivalent to, if not greater, than the value of the performance that has been lost. But while this is typically the case, it is not invariably so. Occasionally, as in *Clark v Macourt*, the value of the lost performance greatly exceeds the plaintiff's proven, recoverable "consequential loss".

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 kinds of substitutionary awards available. In particular, while there is some debate regarding the correct taxonomy here,[49] Commonwealth case law appears to recognise (at least)[50] two distinct kinds of monetary substitutes for contractual performance.

The first monetary substitute 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.[51] This is commonly referred to as "the difference in (market) value" measure. Typically,[52] such an award can be understood either as quantifying the objective value of the performance that has not been delivered,[53] or as providing the plaintiff with the sum of money necessary to otherwise obtain substitute performance from elsewhere. The basis for the second conceptualisation is that once the plaintiff has in her hands both: (i) defective performance; and (ii) the market value of the difference between proper (in the sense of contractually compliant) and defective performance as at the date of breach, then (iii) the

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[47] For detailed discussion, see D Winterton, *Money Awards in Contract Law* (Hart 2015) chapter 3.
[48] This is the terminology helpfully employed in A Kramer, *The Law of Contract Damages* (2nd edn, Hart 2017) 14–15.
[49] Compare Stevens, 'Damages and the Right to Performance' (n 13) with S Smith, 'Substitutionary Damages' in C Rickett (ed), *Justifying Private Law Remedies* (n 19) 93; C Webb, 'Performance and Compensation: An Analysis of Contract Damages and Contractual Obligation' (2006) 26 OJLS 41, and Winterton, *Money Awards* (n 47) chapter 5.
[50] 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. Obviously, we also argue here that "negotiating damages" constitute yet another example of this phenomenon that should be recognised.
[51] See, e.g., *Williams Bros v Agius Ltd* [1914] AC 510 (*Williams Bros*) and *Clark* (n 20).
[52] Breach by delay poses unique difficulties in valuation. See, e.g., *Leeda Projects Pty Ltd v Zeng* [2020] VSCA 192; (2020) 61 VR 384 (Leeda Projects) where it appears that the plaintiff framed both of the (alternative) claims it made as being for "consequential loss", and was therefore (unsurprisingly) limited to recovering damages to make good the proven adverse consequences of the breach.
[53] See, e.g., *Bunge* (n 30) [21] (Lord Sumption).

plaintiff has the monetary equivalent of the promised performance (e.g. by selling what has been provided and purchasing a market substitute).[54]

Arguably,[55] 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 by repairs,[56] or, if necessary, replacement. This is commonly referred to as the "cost of cure" or "cost of reinstatement" measure and can be understood as roughly equivalent to awarding a monetised equivalent of an order for specific performance. Notably, for both an order for specific performance or an award of the cost of cure, provided double recovery is precluded, the plaintiff may also recover damages for delay, measured either on an objective basis,[57] or by an award of "consequential loss" for the causally attributable adverse consequences of the delay. However, when specific performance is ordered, the main other kind of non-pecuniary adverse consequence of the breach, which in *Ruxley* was described as the plaintiff's "loss of amenity",[58] 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 kind of monetary substitutes for performance that we have identified and is also what makes plausible the view, advanced by Stevens, that (at least some) 'cost of cure' awards could be understood as making good consequential loss.

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 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.[59] 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.[60] Fortunately, 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

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[54] See further D Winterton, 'Claims for the Value of the Lost Contractual Performance' (2019) 45 *University of Western Australia Law Review* 75.

[55] For an alternative analysis see Stevens, 'Damages and the Right to Performance' (n 13).

[56] *Bellgrove* (n 23); *Tabcorp* (n 21). For academic support of this conceptualisation, see Smith, 'Substitutionary Damages' in C Rickett (ed), *Justifying Private Law Remedies* (n 19) 93; Webb, 'Performance and Compensation' (n 49); and Edelman, 'Money Awards of the Cost of Performance' (n 36). See too J Ren, 'Measure of Damages for Defective Building Work' (2014) 32 JCL 6.

[57] For support, see, e.g., *McAlpine Construction Ltd v Panatown Ltd* [2001] 1 AC 518, 554 (Lord Goff).

[58] See *Ruxley Electronics & Construction Ltd v Forsyth* [1996] AC 344, 360 (Lord Mustill).

[59] *Bellgrove* (n 23) 618–619; *Tabcorp* (n 21) [13]; *Westpoint Management* [2007] NSWCA 253 [61].

[60] See, e.g., A Loke, 'Cost of Cure or Difference in Market Value? Towards a Sound Choice in the Basis for Quantifying Expectation Damages' (1996) 10 JCL 189, 194-203; Ren, 'Measure of Damages for Defective Building Work' (n) and Winterton, *Money Awards* (n 47) chapter 5.

value of that performance at the date it was due,[61] albeit that cost of cure awards can be assessed at the date of trial or the date at which the repairs should reasonably have been completed.[62]

Each of the damages awards just identified also have other salient features. In particular, such 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 the limits of a defendant's compensatory liability.[63] As noted, if the formation of a valid contract creates reciprocal legal rights to performance, this is justified by reference to the idea that any "secondary right" arising upon breach should be directed to achieving "next-best" conformity with the primary right infringed,[64] and on the basis that such "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 availability of an action for the agreed sum, is not dependent on 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.[65]

The correctness of this final proposition was unequivocally confirmed by the High Court of Australia in its leading decision in *Clark v Macourt*.[66] The Court there awarded Dr Clark approximately $1 million following a breach of warranty, under a contract for the sale of a business, that identification of the donors of 3513 straws of sperm complied with certain specified guidelines. Significantly, that sum was awarded despite the fact that it greatly exceeded the extent to which Dr Clark could prove[67] that she was financially worse off in consequence of

[61] See e.g., *Millett v Van Heek & Co* [1921] 2 KB 369, 376 (Atkin LJ).
[62] Again, this has led some (plausibly) to claim that such awards are better understood as compensating for consequential loss: see Stevens, 'Damages and the Right to Performance' (n 13) 187–192. However, cases where a plaintiff reasonably delayed taking remedial action can also be seen as adding further (recoverable) consequential loss to the quantum claimed.
[63] *Moore* (n 34) [67].
[64] See, e.g., see Stevens, 'Damages and the Right to Performance' (n 13) and J Gardner, *Torts and Other Wrongs* (OUP 2019) 336–41, noting that legal responses to a breach of contract, like those to a tort, are 'primarily reparative' and attempt to achieve 'primarily corrective justice'.
[65] See, e.g., *Clark* (n 20) and *MDW* (n 27). Compare Stevens (n 13) 189, arguing that the 'reasonableness' restriction on 'cost of cure' awards is best understood as an application of the avoidable loss rule of mitigation
[66] *Clark* (n 20).
[67] As Keane J pointed out *Clark* (n 20), Dr 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).

the breach since she apparently passed on to her clients most of the costs that she had incurred in acquiring replacement sperm.

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.[68] It is also significant, however, that this legislation merely codifies the common law position that proceeded it.[69] Relevantly, damages are recoverable irrespective of whether the plaintiff avoided any initial balance-sheet losses suffered by passing on the subject goods via a sub-sale.[70] 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.[71]

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.[72] The position advocated here is that, when awarded for breach of contract, such damages are "compensatory",[73] but only in the specific sense that the other kinds of substitutionary damages we have identified can be similarly described because they do not attempt to redress or nullify ultimate balance-sheet deterioration; otherwise referred to as (financial) "consequential loss".[74] 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

[68] See, e.g., *Sale of Goods Act 1979* (UK), s 53(3); *Sale of Goods Act 1923* (NSW), s 54(3). Notably, while it is relatively common for additional damages for non-remote consequential loss to be awarded, this prima facie measure is generally not reduced. The clearest example of this approach is evidence in the decision in the House of Lords' decision in *Re (R & H) Hall Ltd and Pim (WH) (Jnr) and Co's Arbitration* (1928) 33 Com Cas 324, discussed in Stevens 'Damages and the Right to Performance' (n 13) 176-178.

[69] See, e.g., *Barrow v Arnaud* (1846) 8 QB 595; 115 ER 1000 and *Jones v Just* (1868) LR 3 QB 197.

[70] See, e.g., *Williams Bros* (n 51) and *Slater v Hoyle & Smith Ltd* [1920] 2 KB 11 (CA); cf *Bence Graphics International Ltd v Fasson UK Ltd* [1998] QB 87.

[71] For recent confirmation in the context of breach of warranty under a share sale, see *MDW* (n 27).

[72] For analysis, see below Part IV.

[73] 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 of this article. Consider, e.g., *Bunnings Group Ltd v CHEP Australia Ltd* [2011] NSWCA 342; (2011) 82 NSWLR 420 (*Bunnings*).

[74] Consequential loss can also be non-financial.

duty rather than any contingent deterioration in the plaintiff's financial (or factual) position.[75] 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)[76] performance.

Obviously, negotiating damages can also be termed "substitutive",[77] or "substitutionary",[78] in that they provide a monetary equivalent (i.e., substitute) for contractual performance.[79] While we have no objections to the use of either label — and might reasonably be accused of belabouring the point — 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.[80] 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. 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 the Republic of Singapore in *Turf Club*, who observed that negotiating damages are:

> "compensating the plaintiff for the loss of the value of the lost performance (i.e., the primary right to performance of the defendant's obligations) which he has been deprived of due to the defendant's breach of contract"[81]

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

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[75] Hugh Beale (ed) *Chitty on Contract* (34th ed, Sweet & Maxwell 2021), [32—172]. *McGregor* (n 2) [3-001] & [14-003].
[76] 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.
[77] See Stevens, *Torts and Rights* (n 18) chapter 4 and 'Damages and the Right to Performance' (n 13).
[78] Smith, 'Substitutionary Damages' (n 49) D Winterton, 'Claims for the Value of the Lost Contractual Performance (n 54).
[79] See, e.g., M McInnes, 'Gain, Loss and the User Principle' [2006] RLR 76; Stevens, 'Damages and the Right to Performance' (n 13) 192–194; Winterton, *Money Awards* (n 47) 201–213.
[80] Andrew Burrows (ed) *A Restatement of the English Law of Contract* (OUP 2016); Josias Senu, 'Negotiating Damages and the Compensatory Principle' (2020) 40 OJLS 110, 118; K Barker, 'Damages Without Loss: Can Hohfeld Help?' (2014) 34 OJLS 631–658.
[81] *Turf Club* (n 3) [205], [215].

negotiating damages by using the hypothetical fee that the reasonable plaintiff would have accepted in order to have released the defendant from 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) Negotiation fee damages are assessed at the date of breach, which is the point in time at which the defendant failed to perform his 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* (e.g. 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 partes' contract,[82] it cannot plausibly be suggested that the availability of negotiating damages is precluded by rules of remoteness. 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.[83] Put simply, the loss of the promised performance is always necessarily a "loss" that is within the reasonable contemplation of the parties at contract formation, and is therefore not 'too remote.
4) Consistent with point 3 above, since the principles of mitigation are also concerned with restricting recovery of causally attributable consequential loss, those principles will never be operative to limit the availability of a claim for negotiating damages.
5) In the context of the law of torts, infringement of intellectual property rights, and *Lord Cairns Act* damages (i.e. damages awarded in lieu of an injunction or specific performance via s 2 of the *Chancery Amendment Act* and its modern equivalents) equivalent awards are also best conceptualised as compensatory in the substitutionary sense.[84]

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

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

[83] The clearest example of this is the decision in *Re (R & H) Hall Ltd and Pim (WH) (Jnr) and Co's Arbitration* (1928) 33 Com Cas 324 (HL), which can be usefully contrasted with *Williams Bros v Agius* (n 51).

[84] See, e.g., *Bunnings* (n 73) [173]–[177] (Allsop P with whom Macfarlan JA agreed); *One-Step* (n 1) [95]; *Fuller v Albert (No 3)* [2021] NSWCA 226 [23] (the Court). See too the discussion in Peel (n 2) 217–224.

> "[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".[85]

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. Rather, 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. Although exceptionally the defendant may be able to establish that the promised performance would have been lost anyway,[86] 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 is usually 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, as we have been at pains to explain, "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

The nature of negotiating damages has proven to be a source of great academic interest.[87] The focus on this article is on breach of contract and so there is no need to account for the availability of such awards in every potential context where such damages may be awarded.

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[85] Barker, 'Damages Without Loss: Can Hohfeld Help?' (n 80) 636–637.

[86] 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 further, *Lewis* (n 18); *Bunge* (n 30) [16]–[21] (Lord Sumption) and the discussion of *Clark* (n 20) in Winterton 'Limiting the Recovery of Damages for Breach of Contract in Australia' (n 32) 64–66.

[87] For useful summaries see A Burrows, 'Are 'Damages on the *Wrotham Park* Basis' Compensatory, Restitutionary or Neither?' in R Cunnington and D Saidov (eds), *Contract Damages: Domestic and International Perspectives* (Hart 2008) 165 and Barker, 'Damages Without Loss: Can Hohfeld Help?' (n 80) 637.

Nonetheless, the view advanced here is (broadly) consistent with the scholarship,[88] and case law,[89] that characterises all instances of negotiating damages as being awarded to compensate for the infringements of primary rights *simpliciter*[90] or, stated more accurately, to compensate for the loss of some valuable aspect of a legal entitlement. While such a view appears to be gaining ascendancy 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 briefly to consider — and refute — the three main alternative accounts as to the nature of negotiating damages that others have advanced.

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".[91] The fundamental difficulty with this account is its artificiality.[92] As others have observed, if negotiating damages did compensate for the lost opportunity for the plaintiff to bargain with the defendant for a release, the objective sums that courts have awarded would be manifestly unrealistic.[93] 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 non-applicability of limiting principles such as remoteness and mitigation and 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.[94] Notable proponents of this view include Professor Edelman,[95] and Professor Barnett.[96] Professor Burrows also once advocated a version of this view.[97] But, following the *One Step* decision, he now appears to have accepted that it is

[88] See Peel (n 2).
[89] See (n 82).
[90] For seminal discussion, see Stevens, *Torts and Rights* (n 18) chapter 4.
[91] R Sharpe & S Waddams, 'Damages for Lost Opportunity to Bargain' (1982) 2 OJLS 290.
[92] Burrows (n 2); Jason Fee, 'Wrotham Park Damages in Singapore: One Small Step' [2018] LMCLQ 500. A view also noted by James Edelman, *Gain-based Damages* (Hart 2002), a good example being *Attorney General v Blake* [2001] 1 AC 268.
[93] C Rotherham, '*Wrotham Park* Damages and Accounts of Profits: Compensation or Restitution?' [2008] LMCLQ 25, 32. See too Senu (n 80) 118.
[94] *Chitty* (n 2)[32-172]; *McGregor* (n 2) [14-017].
[95] James Edelman, *Gain-based Damages* (Hart 2002), Chapters 3 and 5.
[96] See Katy Barnett, *Accounting for Profit for Breach of Contract: Theory and Practice* (Hart 2012).
[97] Burrows, 'Are 'Damages on the *Wrotham Park* Basis' Compensatory, Restitutionary or Neither?' (n 85) 165.

untenable, at least in the contractual context.[98] One motivation for the adoption of this characterisation of negotiating damages is the artificiality, averted 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 which, in particular, stand out:

1) The view of the world upon which this account is based is fundamentally misconceived, making the common mistake of failing to appreciate the distinction between damages concerned with substituting for, or valuing, the lost performance and damages concerned with compensating for consequential loss. As has been set out in this article, the negotiating damages award is being used as a proxy to affix a value on the right to performance. The *value* of the right to performance does not depend on whether the plaintiff intends to enforce that right.
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 in consequence of the breach.[99] The second is that the gain-based view of negotiation awards do not account for the way in which judges themselves frame such awards. As Stephen Smith explained, one important — arguably, very important — criterion for assessing the persuasiveness of (at least) "interpretive theories" of a particular area of law is the extent to which it can account for the reasons that judges actually give for their decisions.[100]

Ultimately, the essential flaw underpinning both the "consequential loss", and "consequential gain", based accounts is that each fails properly to recognise the fundamental distinction between the results of an action — here, the loss of the promised performance — and the consequences that may contingently follow from such an action — here, the financial (or non-financial) deterioration in the plaintiff's position that may (or may not) result.[101] The fundamental distinction between these two phenomena, and the importance of keeping them conceptually

[98] See Andrew Burrows 'Negotiating damages in the Supreme Court' in J Eldridge and T Pilkington (eds) *Australian Contract Law in the 21st Century* (Federation Press 2021) 42.
[99] *Pell Frischmann Engineering Ltd v Bow Valley Iran Ltd* [2009] UKPC 45; [2011] 1 WLR 2370 (*Pell Frischmann*), is the best example in the breach of contract context, but *Inverugie Investments Ltd v Hackett* [1995] 3 All ER 841 provides another notable example in the context of a claim for trespass. This point is developed in greater depth in D Winterton, 'Contract Theory and Gain-Based Recovery' (2013) 76 *Modern Law Review* 1129, 1136–1138; and Barker, 'Damages Without Loss: Can Hohfeld Help?' (n 80) 643.
[100] See Smith, *Contract Theory* (n 38) 24c25.
[101] This distinction is explored, using the same terminology, in J Gardner, 'Obligations and Outcomes in the Law of Torts' in P Cane and J Gardner (eds), *Relating to Responsibility: Essays for Tony Honoré* (Oxford: Hart 2001) [tba].

distinct, is well-accepted amongst philosophers.[102] Although the law clearly recognises this distinction, not all lawyers (or legal commentators) appear to have appreciated this.[103]

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.[104] According to this account, negotiating damages are best understood as compensating a plaintiff for the loss of a Hohfeldian power to obtain an injunction. 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, prior to breach, a *quia timet* injunction (or order for specific performance).[105] However, although constituting a valiant (and somewhat ingenious) attempt to salvage a consequence-focussed view of "negotiating damages" from the deficiencies already identified with both the "consequential loss" and "consequential gain" based views, this account is also ultimately unpersuasive.

The essential problem with Barker's account is that it amounts to a form of conceptual overkill. Fundamentally, this approach simply collapses into a version of the "substitutionary" account we have advanced here because 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 payable. But for reasons already provided, we reject this view as misconceived. Put another way, 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.

V. WHEN *SHOULD* NEGOTIATING DAMAGES FOR BREACH OF CONTRACT BE AVAILABLE IN AUSTRALIA?

a. The Case for a Broad View of Availability

[102] See G von Wright, *Norm and Action* (Routledge and Kegan Paul 1961) 39. See also A Kenny, *Will, Freedom and Power* (Oxford 1975) 54.
[103] For notable exceptions, see Stevens, Torts and Rights (n 18) and Donal Nolan, 'Rights, Damage and Loss' (2017) 37 OJLS 255.
[104] Barker, 'Damages Without Loss: Can Hohfeld Help?' (n 80).
[105] See, e.g., *Hasham v Zenab* [1960] AC 316 (PC).

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 also arguable that the cost of curing the breach, which is the monetary equivalent of specific performance, also constitutes the most appropriate way to substitute for the lost performance. As outlined, the use of these measures is justified, and 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 purposes 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.[106]

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 (i) the value of the lost performance; or (ii) consequential losses. 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, demanding "next-best conformity".[107] Generally speaking, an award of "substitutionary" damages is the most appropriate way of achieving this. However, at least where the relevant contractual right is objectively valuable,[108] when a plaintiff does not obtain specific relief and 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, which is essentially just another way of asking what price the contractual obligation breached would fetch if sold in any (hypothetically) available market.[109]

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[106] As noted, the possibility of a more restrictive view is considered below. 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.

[107] See Gardner (n 65) and Stevens (n 13).

[108] See Part VI below.

[109] As noted earlier, this will 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 performance of the contract. Claims of the latter kind are properly

To put the matter another way, ("substitutionary") damages compensating a plaintiff for her lost performance ought not to depend upon the contingency of 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.[110] 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 as 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 the contingencies of whether the breach happened to be reversible and 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,[111] the breach of an exclusivity agreement,[112] the breach of a confidentiality agreement,[113] the breach of a restraint of trade clause.[114] 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.[115]

b. Vale Nominal Damages?

Where a plaintiff suffers no compensable loss following a contractual breach it is trite law that they are still entitled to nominal damages.[116] If it is correct that negotiating damages ought to be more readily available, would such a proposition of law effectively prevent the award of nominal damages? That is to say, is it the case that in every breach of contract case that a defendant will be entitled to a substantive negotiating damages award? The short answer is no. First, a plaintiff

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understood as concerned to make good 'consequential loss' and are therefore circumscribed by rules of remoteness and mitigation.

[110] This claim is subject to the qualification, considered below in Part V.e, that there *may* be a justified restriction on the availability of such awards.

[111] See, e.g., *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 1 WLR 79.

[112] See, e.g., *Pell Frischmann* (n 97).

[113] See, e.g., *Vercoe v Rutland* [2010] EWHC 424 (Ch), [2010] Bus LR D141.

[114] See, e.g., *Morris-Garner v One Step (Support) Ltd* [2016] EWCA Civ 180, [2017] QB 1, [116]–[122] reversed by *One Step* (n 1). For a forceful critique of both the reasoning and result in *One-Step*, see PS Davies, 'One Step Backwards: Restricting Negotiating Damages for Breach of Contract' [2018] LMCLQ 433.

[115] 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. 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.

[116] *Tramways Advertising Pty Ltd v Luna Park (NSW) Ltd* (1938) 61 CLR 286.

will still need to persuade[117] the trier of fact as to the value of the negotiating damages award. A plaintiff will, therefore, be limited to nominal damages where she fails to adduce relevant and probative evidence as to the value of the reasonable fee for releasing the defendant from performance.

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*[118] provides one notable example of the infringement of a valueless right, at least according to the reasoning of the majority. Another example of this phenomenon, this time in the contractual context, is the decision in *Bunge v Nidera*, 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 prior to the due date for delivery in any event.[119] Thirdly, *Clark v Macourt* itself also demonstrates the possibility that the contractual right infringed, or some part of this entitlement, may be valueless. This is because, although 3009 of the straws there transferred to Clark were defective, she only recovered the value of 1996 straws since it was found that some of the straws would have been unusable anyway due to the operation of the "family limit rule".[120] 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 (with whom Baroness Hale, Lord Wilson and Lord Carnwath agreed) there held that:

> "negotiating 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

[117] See *Briginshaw v Briginshaw* (1938) 60 CLR 336, 361 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".
[118] *Lewis* (n 15).
[119] *Bunge* (n 30) [11] (Lord Sumption).
[120] This aspect of the case is discussed in D Winterton, 'Limiting the Recovery of Damages for Breach of Contract in Australia: Some Important Unresolved Questions' in Eldridge and Pilkington (eds) *Australian Contract Law in the 21st Century* (n 95) 54, 64–66.

> 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."[121]

We argue that Australian courts should not follow this approach to the availability of negotiating damages and should instead look for guidance to the Court of Appeal of the Republic of Singapore's decision in *Turf Club* in developing the relevant Australian law. Notably, however, Lord Reed's analysis in *One Step* does come close to recognising that negotiating damages compensate for performance. For example, his Lordship notes elsewhere in his reasons that damages for breach of contract are "a substitute for performance",[122] and also holds that negotiating damages are compensatory.[123] Lord Reed nevertheless then attempts to ringfence the availability of such damages by reference to the plaintiff being "deprived of a valuable asset". While perhaps understandable in view of his Lordship's broader judicial philosophy and noting that it may even be possible to provide a principled explanation for the denial of an award of negotiating damages in *One-Step* (and *Turf Club*),[124] we contend that there are various reasons why this particular basis for restriction is problematic.

The first 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".[125] This criterion cannot therefore be applied with a high degree of certainty. The basis for Lord Reed'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, in which negotiating damages are commonly awarded. Again, while his Lordship's cautious approach is somewhat understandable, a convincing explanation for restricting the availability of negotiating damages 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.

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[121] *One Step* (n 1), [95] (Lord Reed).
[122] *One Step* (n 1) [35] (Lord Reed).
[123] *One Step* (n 1) [95] (Lord Reed). For example, could goodwill protected by a negative covenant be seen as an asset? Man Yip and Alvin WL See, 'One Step away from *Morris-Garner*: *Wrotham Park* damages in Singapore' (2018) 135 LQR 36; Davies, 'One Step Backwards' (n 112) 439.
[124] See Xu (n 7) and text at n 137.
[125] Burrows (n 2); Yip & See (n 121); Peel (n 2) 233.

A second 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. The Court affirmed the view that *Lord Cairns' Act* damages compensate for the loss of coercive relief.[126] Such awards can be calculated on the negotiating damages basis.[127] Importantly, the prevailing view is that Lord Cairns Act damages can be claimed for breach of contract provided coercive relief is *possible*[128] at the time when proceedings are commenced. This means that a plaintiff in a breach of contract case can simply seek an injunction or specific performance as an indirect means to claiming negotiating damages. Such a strategy is, however, (i) unlikely to be available to unsophisticated parties; and (ii) will be unavailable to parties where coercive relief is not possible at the point in time at which proceedings are commenced.[129]

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 the Republic 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)."[130]

In general, we support the formulation of the Court of Appeal in *Turf Club* and suggest that it constitutes a useful starting point for 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:

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[126] *One Step* (n 1), [62], [84], [95].
[127] *One Step* (n 1),[95].
[128] *Mills v Ruthol Pty Ltd* (2004) 61 NSWLR 1, [61] (Palmer J).
[129] Indeed, this may be the case where a defendant has concealed the existence of her wrong, as noted by Davies, 'One Step Backwards' (n 112) 440.
[130] *Turf Club* (n 3) [177] (emphasis added).

1) Further guidance is needed as to whether there is in fact a "remedial lacuna" in a breach of contract claim.[131] To resort to a spatial metaphor and concluding that there is a "gap" or "lacuna" in the law does not say whether or not that "gap" is desirable or not. The thesis defended here provides clearer guidance as to *when* and *why* there is a lacuna in the law. Subject to possible qualification considered immediately below,[132] it is not justifiable to allow compensation 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 a plaintiff for the value of the lost performance where such a calculation is not possible. In both cases a plaintiff should be compensated in money 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.[133]
3) The decision in *Turf Club* focuses on negative covenants as being the paradigm example of where there will be a remedial lacuna in the law. We agree with this observation, but only because a breach of such an obligation: (i) is generally irreversible (such that substantive performance is impossible); and (ii) concerns a subject matter that (at least generally) is not traded on an open market. Accordingly, it would be a mistake to read *Turf Club* as drawing a principled distinction between the availability of negotiating damages for negative and positive contractual obligations. Rather, that distinction provides a useful "rule of thumb" for when it is *more likely* to be appropriate to award negotiating damages.[134] It is nevertheless important to appreciate that there is nothing in

[131] See too Jason Fee, '*Wrotham Park* Damages in Singapore: One Small Step' [2018] LMCLQ 500, 506.
[132] See the text below from (n 137).
[133] Precisely what constitutes 'double recovery' is explained in Stevens, 'Damages and the Right to Performance (n 13), where the author correctly observes that the claim in, for example, *British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd* [1912] AC 673 (HL) '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' (emphasis in original).
[134] See too Yip & See (n 121); Jason Fee, '*Wrotham Park* Damages in Singapore: One Small Step' [2018] LMCLQ 500, 506.

principle to prevent negotiating damages being available following the breach of a positive obligation.

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. For example, Professor Peel 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 on "the proper construction of the contractual right in question".[135] This suggestion might be just an alternative way of describing the distinct restriction on recovery considered next. 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 is why no expectation of a price also arises when the right, even though bargained for, merely possesses subjective value to the plaintiff. 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,[136] which notably is consistent with the result in *One-Step* has been proposed by Professor Stevens,[137] drawing upon Leggatt J's earlier judgment in *Marathon Asset Management LLP v Seddon*.[138] 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,[139] the relevant contractual duty breached must not merely be a means by which to achieve some further end.[140] Notably, Xu has advanced a similar analysis, arguing that this restriction on availability is consistent with *Turf Club*, alongside most, if not all, of the relevant

[135] Peel (n 2) 241.
[136] See Stevens, *The Laws of Restitution* (n 7) 338-339.
[137] Significantly, it might even be claimed that, read charitably, this is what Lord Reed really meant: see *One-Step* (n 1) [93(9)].
[138] See *Marathon Asset* (n 7) [217].
[139] Stevens, *The Laws of Restitution* (n 7) 338.
[140] ibid 339.

earlier English authorities.[141] As noted, Leggatt J earlier proposed essentially the same view in *Marathon Asset*, 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".[142]

While Xu's claim that this restriction on availability is capable of being reconciled with all of the earlier English decisions is debatable,[143] what is hereafter referred to as 'the mere means restriction' does seem to provide an alternative rationalisation for the results in *One-Step* and *Turf Club*.[144] As foreshadowed above, perhaps the simplest way to understand this restriction is that it attempts to distinguish between contractual rights that possess only subjective value to the particular plaintiff and those rights that possess at least *some* objective value in the sense that there are other people that would be willing to exchange valuable consideration for it. Consider *Wrotham Park* itself, for example. As Stevens explains, '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'.[145] This is an entitlement that existing or prospective homeowners within the Wrotham Park estate would be willing to pay for.

This observation reveals the plausible justification for this restriction.[146] 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* these awards are only available in response to the breach of contractual rights possessing some 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", there is, at least arguably, no justification for giving the plaintiff a choice between framing his claim as one for any contingent consequential commercial loss suffered by

[141] See Xu, 'Negotiation Damages' (n 7) 571–575.
[142] See *Marathon Asset* (n 7) [217]. Notably, however, Stevens, Xu and Leggatt J all appear to leave open the possibility that negotiation damages may be available where the relevant obligation breached was solely to secure some further *non-economic* end.
[143] See, for example, *Pell Frischmann* (n 97), discussed by Xu (n 7) 574.
[144] Arguably, it can also explain another case decided in the aftermath of *One-Step* where negotiation damages for breach of contract were denied on the basis of Lord Reed's "valuable asset" restriction: *Priyanka Shipping Ltd v Glory Bulk Carriers PTE Limited* [2019] EWHC 2804 (Comm).
[145] Stevens, *The Laws of Restitution* (n 7) 339.
[146] For further discussion, see Xu, 'Negotiation Damages' (n 7) 575–579.

the particular plaintiff that is causally attributable to the breach and one seeking the objective value of the promised performance.

Expressing the matter thusly 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 claimed that it is arguable that this is not the case given the possibility of 'substitutionary' cost of cure awards and, notably, the argument for this understanding of cost of cure awards is probably stronger in Australia than 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.

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 seems justified. 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 its (objective) purpose, the mere means restriction is unjustifiable. While all this indicates the need for further academic and judicial consideration of the mere means restriction, we are content to advocate its adoption by Australian courts on a provisional basis if, by removing one possible objection, it makes more likely the award of negotiating damages for breach of contract when, at least according to the account presented here, they are incontestably justified.

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 suggested by Professor Goh, which were broadly endorsed by the Court of Appeal of the Republic of Singapore in *Turf Club*,[147] provide a sensible starting point for the law's further development. As observed in *Turf Club*, such "damages are to be measured by such a sum of money as might

[147] See *Turf Club* (n 3) [243].

reasonably have been demanded as a *quid pro quo* for relaxing the covenant" and "the calculation is by reference to a hypothetical bargain rather than the actual conduct and position of the parties".[148] Notably, the Court also expressed support for Professor Goh's more "specific submissions on the assessment of *Wrotham Park* damages"[149] 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".[150]
>
> (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.
>
> (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."

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, and notably this point was in fact expressly acknowledged by the Singaporean

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[148] ibid [98].
[149] ibid [99], [243].
[150] Note that while we agree, as explained in *MDW* (n 27) [48] that such evidence of "an event which was contingent at the date of assessment" is irrelevant the assessment of substitutionary damages, this does no, as we explained, 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 *MDW* (n 27) [48].

Court of Appeal.[151] 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". 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)[152] an "evidentiary" onus to raise possible alternative explanations for the occurrence of the loss.[153]

VII. CONCLUSION

Negotiating damages for breach of contract are best understood as an appropriate award compensating — or substituting — for (the value of) the contractually promised performance that the plaintiff has been denied by the relevant breach. Given the law's recognition of the existence of a legal right to performance and the availability of other substitutionary awards, such damages should be more readily available for breach of contract than is presently recognised by Australian law. Most importantly, negotiating damages are generally appropriate when other monetary substitutes for 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 denied for some other reason, such as, for example, when awarding the cost of cure is "unreasonable" in the relevant sense.[154]

As we have shown, recognising the availability of such awards in the aforementioned circumstances is consistent with the broader Australian law permitting the recovery of damages awards that aim to provide a monetary substitute for the promised performance. In addition, the article had various other important objectives. One was to outline the significant explanatory difficulties faced by the various alternative attempts to explain the nature of negotiating damages, and to make clear why the account proposed here is superior to these alternatives. Another was to demonstrate the serious conceptual and practical difficulties that attend the particular limitation on the availability of negotiating damages that was imposed by the Supreme Court of

[151] See *Turf Club* (n 3) [248].
[152] 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 40); *Bunge* (n 30).
[153] Notably, this approach is broadly consistent with the views expressed by Gageler and Edelman JJ in *Berry v CCL Secure Pty Ltd* [2020] HCA 27; (2020) 271 CLR 151 [65]–[66], 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.
[154] This might even constitute the preferable explanation for the £2,500 award made in *Ruxley* (n 58). See, e.g., *Ruxley* 374 (Lord Lloyd). The alternative explanation, and more generally accepted explanation, favoured by Lord Mustill (at 360) is that the award was compensation for the non-pecuniary 'loss of amenity' suffered by the plaintiff in not obtaining the pool contracted for.

the United Kingdom in *One Step* and to explain why Australian courts should not endorse any such restriction. A third important objective was briefly to outline the main principles that should govern the quantification of negotiating damages for breach of contract.

The final objective of the article was to consider, albeit relatively briefly, the plausibility of certain alternative limitations on the availability of negotiating damages as a response to contractual breach that have been proposed as a preferable explanation for *One-Step* and *Turf Club*. As noted, the most promising of these proposals 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".[155] No definitive position as to the justifiability of this restriction was proposed. But the fact that this restriction appears to be consistent with much of the decided case law and, depending on the true justification for substitutionary damages awards, is plausibly justifiable was recognised. In view of this, we suggested that its adoption on a preliminary basis is probably appropriate in order to facilitate increased recognition of the appropriateness of awarding negotiating damages for breach of contract in those circumstance where, so we have argued, they are indisputably justified. Notably, adopting this restriction is also consistent with the characterisation of negotiating damages for breach of contract in *Turf Club* as being compensatory in the specific sense of providing the best available means by which to identify the market value of the plaintiff's (objectively valuable) contractual performance by providing the *next* "next-best" (monetary) substitute for such performance.

[155] See *Marathon Asset* (n 7) [217] (Leggatt J).