

CASE NOTE

**CLARK v MACOURT\***

**DEFECTIVE SPERM AND  
PERFORMANCE SUBSTITUTES IN  
THE HIGH COURT OF AUSTRALIA**

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*In Clark v Macourt the High Court was required to determine the correct basis for quantifying the sum to which the innocent buyer of a fertility clinic sold by deed was entitled after the seller provided defective donor sperm as part of the assets of that business. In the unusual factual circumstances that arose, the Court's majority awarded the buyer the full cost of replacing the defective sperm at the date of breach even though this award left her in a significantly better financial position than she would have been in had the breach not occurred. This case note provides a qualified defence of this decision. A distinction between substitutionary and compensatory contractual money awards is proposed and certain implications of recognising this distinction, particularly in regard to the so-called 'avoided loss rule of mitigation', are outlined.*

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\* (2013) 304 ALR 220.

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## I INTRODUCTION

In *Robinson v Harman*, Parke B explained that when awarding 'damages' for breach of contract the aim is, so far as money can do it, to put the innocent party into 'the same situation ... as if the contract had been performed'.<sup>1</sup> Despite consistent confirmation that this is indeed the ruling principle in this context, courts continue to be confronted with factual scenarios that generate vigorous disagreements regarding its practical application. These disagreements often arise in cases involving claims for the cost of repairs,<sup>2</sup> but they can arise in other contexts as well. A notable example is the High Court of Australia's recent decision in *Clark v Macourt*,<sup>3</sup> where the meaning of Parke B's famous dictum was again the focus of intense scrutiny, albeit in circumstances that certainly could not be described as typical.

<sup>1</sup> (1848) 1 Ex 850, 855; 154 ER 363, 365, quoted in *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* (2009) 236 CLR 272, 286 [13] (French CJ, Gummow, Heydon, Crennan and Kiefel JJ) ('*Tabcorp*').

<sup>2</sup> See, eg, *Bellgrove v Eldridge* (1954) 90 CLR 613; *Tabcorp* (2009) 236 CLR 272. Two relatively recent and controversial decisions of the House of Lords concerned with claims for the cost of repair work are *Ruxley Electronics and Construction Ltd v Forsyth* [1996] 1 AC 344 and *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 AC 518.

<sup>3</sup> (2013) 304 ALR 220.

The claim was one for the cost of replacing defective donor sperm provided as part of the assets of a fertility clinic sold by deed. Against Gageler J's dissent, the Court's majority overturned a unanimous New South Wales Court of Appeal ('Court of Appeal') decision and awarded the disappointed purchaser the full cost of purchasing replacement sperm as at the date of breach. This sum was awarded even though it was considerably higher than the clinic's sale price under the deed, the purchaser recouped from her patients most of the costs she outlaid in acquiring contractually compliant sperm, and, as a registered medical practitioner, she was bound by ethical guidelines prohibiting her from profiting from the sale of donor sperm.

The contrast between the approaches taken by the Court of Appeal and the High Court in *Clark v Macourt* is striking. No doubt the case's atypical facts partially explain this divergence in reasoning, but they cannot completely account for it and it is contended that the decision highlights the indeterminacy, and corresponding need for clarification, of the *Robinson v Harman* principle. This case note seeks to use the decision to outline the precise nature of this indeterminacy and also to explain why the conclusion reached by the majority Justices was correct, even if certain aspects of their Honours' reasoning should not be supported.

Parts II and III of the case note respectively summarise the facts and the various High Court judgments. Part IV commences by observing the prima facie appeal of Gageler J's dissenting judgment, also noting that his Honour's reasoning might appear to derive indirect support from the House of Lords' controversial decision in *Golden Strait Corporation v Nippon Yusen Kubishika Kaisha; Golden Victory* ('*The Golden Victory*').<sup>4</sup> However, after interrogating the true basis for the 'market rule' of assessment, it is concluded that Gageler J's reasoning cannot be supported because it ignores the critical distinction between substitutionary and compensatory money awards in this context. Part V then explores the ambiguous terminology that pervades this area of the law, suggesting that it helps to explain why this distinction is often overlooked. Here too the precise nature of the distinction is made clear by explaining the existence of an analogous dichotomy in the law of 'equitable compensation'.

Finally, Part VI explores one significant implication of recognising the distinction between substitutionary and compensatory contractual money awards that was of particular relevance in *Clark v Macourt*: the status of the so-called 'avoided loss rule of mitigation'. The House of Lords' decision in

<sup>4</sup> [2007] 2 AC 353.

*British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd* ('British Westinghouse')<sup>5</sup> is generally considered to be the leading authority for this rule, which is said to preclude the innocent victim of a breach of contract or tort from recovering compensation for loss that, though appearing likely at the date of breach, was not in fact incurred due to the accrual of certain factual benefits in the innocent party's favour as a result of the breach. Recognising this, both Hayne J and Keane J went to significant lengths to explain why that decision did not preclude Clark's claim in the present case. It is shown, however, that the conventional understanding of *British Westinghouse* is incorrect and that the decision is not in fact authority for the proposition that it is often thought to establish. The explanation of that decision that is proposed is consistent with the result in *Clark v Macourt*, but also shows why the attempts of both Hayne J and Keane J to distinguish the two cases were largely unnecessary.

## II THE FACTS AND DECISIONS BELOW

Both the appellant (Dr Clark) and the respondent (Dr Macourt) were registered medical practitioners, specialising in providing Assisted Reproductive Technology ('ART') services. Both doctors, Macourt through St George Fertility Centre Pty Ltd ('SGFC'), ran fertility clinics providing medical and ART services. In the conduct of their respective practices, both doctors also were bound by ethical guidelines on ART published by the National Health and Medical Research Council, which prohibited, as 'ethically unacceptable', '[c]ommercial trading in gametes or embryos' and '[p]aying donors of gametes or embryos beyond reasonable expenses'.<sup>6</sup>

In 2002 Clark entered into a written deed with SGFC under which she agreed to buy certain of SGFC's assets (including 3513 'straws' of frozen donor

<sup>5</sup> [1912] AC 673.

<sup>6</sup> National Health and Medical Research Council, *Ethical Guidelines on Assisted Reproductive Technology* (1996) 15, quoted in *Clark v Macourt* (2013) 304 ALR 220, 230 [42] (Crennan and Bell JJ). These ethical prohibitions came later to be overlaid by a criminal prohibition in s 16 of the *Human Cloning for Reproduction and Other Prohibited Practices Act 2003* (NSW), inserted in 2007, making it an offence for a person intentionally to receive 'valuable consideration' from another person for the supply of a human egg, human sperm or a human embryo and defining 'valuable consideration' for this purpose to exclude 'the payment of reasonable expenses incurred by the person in connection with the supply'. Nothing turns on this later statutory development: see *Clark v Macourt* (2013) 304 ALR 220, 230 [42] (Gageler J).

sperm) for a sum to be calculated.<sup>7</sup> Macourt guaranteed SGFC's obligations. SGFC also warranted that the identification of sperm donors complied with certain specified guidelines. But due to breaches of these guidelines, only 504 straws were usable. Clark discarded the balance. Significantly, however, Gzell J held at trial that, even without SGFC's breaches, not all of the 3513 straws could have been usable because of the 'family limit rule' in [9.14] of the 2005 Reproductive Technology Accreditation Committee Code of Practice, which stipulated that an ART practice must have a policy limiting the number of children generated by any one donor to no more than 10.<sup>8</sup> On this basis it was found that Clark reasonably could have been expected to be able to use 'at least 2500' of the 3513 straws transferred, meaning that in substance the breach deprived Clark of 1996 usable straws.<sup>9</sup>

Following discovery of this breach, Clark was unable to purchase replacement sperm that complied with the relevant guidelines in Australia, but was able to acquire such sperm in the United States. Gzell J found that at the time that the contract was breached buying 1996 straws of replacement sperm from the American supplier ('Xytex') would have cost approximately A\$1.02 million. Clark accepted that ethically she could not charge any patient a fee for using donated sperm that was greater than the amount she had outlaid to acquire such sperm and did not in fact charge such fees. From time to time, Clark bought straws of sperm from Xytex and charged each patient a fee that substantially covered her costs in buying the straws used in treating that patient. When Clark refused to pay the outstanding balance (\$219 950.91) of the purchase price calculated (\$386 950.91), SGFC sued to recover this sum. Clark counterclaimed against both SGFC and Macourt, seeking damages for breach of warranty. In the trial on liability, Macready AsJ entered judgment for Clark against SGFC and against Macourt as guarantor, for a sum to be assessed.<sup>10</sup> Those orders were not appealed.

In separate proceedings concerned solely with the assessment of damages, Gzell J assessed the sum payable as the amount Clark would have had to pay Xytex to buy 1996 straws of replacement sperm at the time the contract was

<sup>7</sup> The purchase price was to be calculated by reference to a percentage of Clark's gross fee income in the years following the deed's creation: see *Clark v Macourt* (2013) 304 ALR 220, 236 [80] (Keane J).

<sup>8</sup> The purpose of this restriction is to avoid 'accidental consanguinity within the community': *St George Fertility Centre Pty Ltd v Clark* [2011] NSWSC 1276 (25 October 2011) [34].

<sup>9</sup> As explained below, in the appeal to the High Court, this figure was not challenged, with the dispute focussing on what 'damages' this deficiency in performance entitled Clark to recover.

<sup>10</sup> See *St George Fertility Centre Pty Ltd v Clark* [2011] NSWSC 1276 (25 October 2011) [4] (Gzell J).

breached. On appeal to the Court of Appeal, the Court (Beazley JA, Barrett JA and Tobias AJA) unanimously held that Clark should not recover anything for SGFC's breach of warranty. Tobias AJA, who delivered the leading judgment (and with whom Beazley JA and Barrett JA agreed), held that Macready AsJ had characterised the transaction incorrectly as a sale of goods rather than as one for the sale of the assets of a business.<sup>11</sup> The manner in which the deed had been drafted also made it difficult to determine what portion, if any, of the purchase price could be attributed to the straws of sperm, meaning that Clark had not demonstrated that the breach had caused her any 'loss'.<sup>12</sup> Finally, said the Court, to the extent that any loss had been suffered, Clark in fact avoided such loss by passing on the costs of acquiring any replacement sperm to her customers.<sup>13</sup>

### III THE DECISION IN THE HIGH COURT

Clark appealed to the High Court seeking orders reinstating the award made by the primary judge. A majority of the High Court held that the appeal should be allowed, reinstating Gzell J's award of the cost of purchasing replacement sperm from Xytex at the date of delivery.

#### A *The Majority Judgments*

There were three majority judgments. Keane J delivered the most detailed reasons. Bell and Crennan JJ delivered a joint judgment, substantially agreeing with Keane J's approach. Hayne J provided reasons of his own, which also substantially concurred with Keane J's analysis.

##### 1 *Keane J*

Keane J commenced by identifying the 'two broad strands of reasoning' in the Court of Appeal's decision.<sup>14</sup> The first revolved around characterising the Deed as a contract for the sale of a business, rather than as one for the sale of goods, and treating this difference as significant. For the Court of Appeal, Keane J explained, the method of calculation of the purchase price provided by cl 2a of the Deed made it 'extremely difficult ... to determine' what portion

<sup>11</sup> *Macourt v Clark* [2012] NSWCA 367 (9 November 2012) [66] (Tobias AJA).

<sup>12</sup> *Ibid* [67].

<sup>13</sup> *Ibid* [112]–[133].

<sup>14</sup> *Clark v Macourt* (2013) 304 ALR 220, 238 [94]; see also at 238–9 [94].

of the purchase price could be attributed to the sperm itself.<sup>15</sup> On this basis, the Court of Appeal concluded that Clark could not demonstrate that she had paid *anything* for the sperm under the terms of the Deed, and so could not prove that she had suffered ‘loss’.<sup>16</sup> In the High Court, Clark’s response to this was simply that, in the words of Keane J, ‘her claim did not require proof of the price paid ... *specifically* for the non-compliant sperm’.<sup>17</sup> Keane J accepted this argument because

where the purchaser has ‘received inferior goods of smaller value than those he ought to have received ... [h]e has lost the difference in the two values ... In truth ... the contract price does not directly enter into the calculation at all’.<sup>18</sup>

The second strand of reasoning Keane J identified in the Court of Appeal’s decision centred around the proposition that any initial loss Clark suffered as a result of SGFC’s breach was ‘fully mitigated’ because she recovered her expenditure on the Xytex stock from her patients in the course of providing ART treatments in the period between the contract’s completion and the trial’s commencement.<sup>19</sup> Keane J explained that Clark’s response to this in the High Court was that the Court of Appeal erred in treating her claim as if it were for the recovery of outlays incurred to obtain replacement stock in the course of her practice rather than one for the ‘value of the sperm which should have been delivered to her’, with ‘the amount paid to Xytex [merely] being *evidence* of that value’.<sup>20</sup>

<sup>15</sup> Ibid 239 [94], quoting *Macourt v Clark* [2012] NSWCA 367 (9 November 2012) [65] (Tobias AJA).

<sup>16</sup> *Clark v Macourt* (2013) 304 ALR 220, 238–9 [94].

<sup>17</sup> Ibid 240 [99] (emphasis added); see also at 240 [98], where Keane J noted that this was because SGFC’s breach ‘meant that the value of the sperm straws as assets acquired by the appellant under the deed was less than it would have been if [SGFC’s] promises had been kept ... [so that Clark] suffered that loss of value at the date of completion of the acquisition of the assets’.

<sup>18</sup> Ibid 243 [111], quoting *Slater v Hoyle & Smith Ltd* [1920] 2 KB 11, 18 (Warrington LJ), the leading English decision on the recovery of ‘damages’ following the delivery of defective goods. Note the similar views of Scrutton LJ: at 22–3. Cf the Court of Appeal’s inconsistent decision in *Bence Graphics International Ltd v Fasson UK Ltd* [1998] QB 87, discussed further below, which has been forcefully criticised: see Sir G H Treitel, ‘Damages for Breach of Warranty of Quality’ (1997) 113 *Law Quarterly Review* 188; Robert Stevens, ‘Damages and the Right to Performance: A *Golden Victory* or Not?’ in Jason W Neyers, Richard Bronaugh and Stephen G A Pitel (eds), *Exploring Contract Law* (Hart Publishing, 2009) 171, 180.

<sup>19</sup> See *Clark v Macourt* (2013) 304 ALR 220, 239 [95], 245 [125].

<sup>20</sup> Ibid 240 [100] (emphasis added). The claim is essentially that Clark was entitled to recover the monetary equivalent of the performance which SGFC failed to provide, with the cost of purchasing replacement sperm being the best available evidence of that amount.

In response, Macourt alleged that Clark's claim was not in fact 'for the value of the sperm to which she was entitled', but one 'for the costs and expenses associated with the "procurement of replacement sperm"'.<sup>21</sup> The 'forensic advantage' to Macourt of framing Clark's claim in this way, Keane J observed, was that it 'opened the way' for the argument, accepted by the Court of Appeal, that Clark 'recouped from her dealings with her patients the costs and expenses incurred by her in procuring replacement sperm'.<sup>22</sup> However, Keane J rejected Macourt's argument on the basis that Clark 'was entitled to frame her claim in the manner most advantageous to her'<sup>23</sup> and her claim was for an award giving her 'so far as money is capable of doing so, something equivalent to the value of the worthless Sperm delivered to her'.<sup>24</sup> His Honour explained that it was open to Macourt to adduce evidence that less expensive, guideline-compliant sperm was available, but in the absence of any such evidence, Clark's entitlement was clear.

Finally, Keane J considered Macourt's argument that, in accordance with the House of Lords' decision in *British Westinghouse*, Clark's award was subject to a discount for 'betterment' on the basis that the Xytex sperm was 'superior' to the sperm that would have been supplied had SGFC complied with the contract.<sup>25</sup> As his Honour noted, while the primary judge accepted that the information available concerning Xytex's donors was more extensive than that which would have been available if SGFC's sperm had been contractually compliant, Gzell J found that Macourt had failed to prove or quantify any factual benefit obtained by Clark in consequence of this.<sup>26</sup>

Keane J rejected this argument as well, holding that the present case 'is not analogous to *British Westinghouse*', where 'the cost of machines purchased as substitutes for defective machines was recoverable but subject to a reduction to take account of any extra profit to the buyer resulting from the replacement

<sup>21</sup> Ibid 240 [101].

<sup>22</sup> Ibid 240 [102]. This meant that Clark 'suffered no loss by reason of [SGFC's] breach'.

<sup>23</sup> Ibid 241 [103].

<sup>24</sup> Ibid; see also at 246–7 [128]–[129].

<sup>25</sup> See ibid 249–50 [139]–[143]. *Harbutt's 'Plasticine' Ltd v Wayne Tank and Pump Co Ltd* [1970] 1 QB 447, 473 (Widgery LJ) is often cited as an example of when 'betterment' is not taken into account so as to reduce an innocent party's monetary entitlement. In that case the Court refused to allow the breaching contracting party a deduction to take account of the fact that awarding the innocent party the full cost of building a new factory to replace the one destroyed as a result of the breach would put the latter into a superior factual position than it would have been in had the breach not occurred.

<sup>26</sup> *Clark v Macourt* (2013) 304 ALR 220, 249 [140], quoting *St George Fertility Centre Pty Ltd v Clark* [2011] NSWSC 1276 (25 October 2011) [79].



of the defective machines'.<sup>27</sup> By contrast, said Keane J, here it was 'not suggested [by Macourt] that the evidence established extra profitability attributable to the use of the Xytex sperm'.<sup>28</sup> Matters may have been different, his Honour said, if Macourt had advanced evidence that permitted a finding that Xytex's sperm was of a quality that would have commanded a higher price than contractually compliant SGFC sperm, but Macourt adduced no such evidence.<sup>29</sup>

## 2 *Crennan and Bell JJ*

Crennan and Bell JJ also upheld Clark's appeal, expressing agreement with the reasoning of Keane J. However, after citing Mason CJ and Dawson J's observation in *Commonwealth v Amann Aviation Pty Ltd* ('*Amann*') that it is a 'corollary' of the *Robinson v Harman* principle 'that a plaintiff ... [not] be placed in a superior position to that which he or she would have been in had the contract been performed',<sup>30</sup> their Honours also made two additional comments. The first was that recovering the replacement costs of non-compliant sperm was not precluded by the second limb of *Hadley v Baxendale*<sup>31</sup> because 'no facts or circumstances ... [were adduced that] displaced the application of the normal measure of contract damages put forward by the appellants'.<sup>32</sup>

Secondly, their Honours emphasised that the appeal did 'not turn on any distinction between a contract for the sale of goods and a contract for the sale

<sup>27</sup> *Clark v Macourt* (2013) 304 ALR 220, 249 [142]. In *British Westinghouse* [1912] AC 673, the buyer claimed the cost of buying substitute goods several years after the original delivery of the machines. On this basis, Keane J in *Clark v Macourt* (2013) 304 ALR 220, 249 [143] explained, 'the House of Lords held that the buyer's action "formed part of a continuous dealing with the situation in which [the buyer] found [itself], and was not an independent or disconnected transaction"'. The decision in *British Westinghouse* is discussed further below.

<sup>28</sup> *Clark v Macourt* (2013) 304 ALR 220, 249 [142].

<sup>29</sup> *Ibid.* For reasons explained in Part VI below, this aspect of his Honour's reasoning is not supported here.

<sup>30</sup> (1991) 174 CLR 64, 82, cited in *Clark v Macourt* (2013) 304 ALR 220, 227 [27]. Their Honours' reliance on this proposition makes clear that they understood 'position' here not to refer only to Clark's *factual* situation.

<sup>31</sup> (1854) 9 Ex 341; 156 ER 145.

<sup>32</sup> *Clark v Macourt* (2013) 304 ALR 220, 228 [30]. Macourt argued that the second limb of *Hadley v Baxendale* did preclude recovery of replacement costs here because it was understood that these costs would be (and were in fact) passed on to patients. A similar argument succeeded in the Court of Appeal's decision in *Bence Graphics International Ltd v Fasson UK Ltd* [1998] QB 87, but was criticised by Treitel, above n 18.

of a business'.<sup>33</sup> For Crennan and Bell JJ, the prima facie measure of damages for the breach of a contract for the sale of goods is explicable on the basis that '[i]t is the plaintiff's objectively determined expectation of recoupment of expenses which is protected'.<sup>34</sup> This, they explained, is the sum 'theoretically needed to put the promisee in the position which would have been achieved if the contract had been performed'.<sup>35</sup> For their Honours, the case could be resolved simply on the basis that Clark discharged her onus of proving that purchasing the Xytex sperm was 'necessary' to restore her to the position she would have been in absent SGFC's breach in combination with the fact that no attempt was made by Macourt to show that Clark 'could have obtained replacement sperm more cheaply than she acquired such sperm from Xytex'.<sup>36</sup>

### 3 Hayne J

Hayne J's analysis also generally accorded with that of Keane J, but certain aspects of his Honour's reasoning, and the way that reasoning was expressed, are independently noteworthy. In particular, his Honour observed that '[a]ny difficulty encountered in applying [the *Robinson v Harman* principle] stems ultimately from the failure, when speaking of "compensation" for "loss", to identify what "loss" is being compensated',<sup>37</sup> before proceeding to identify three different kinds of 'loss' that could be said to have been suffered here.<sup>38</sup>

<sup>33</sup> *Clark v Macourt* (2013) 304 ALR 220, 228 [30].

<sup>34</sup> *Ibid* 227 [28], citing *Amann* (1991) 174 CLR 64, 85 (Mason CJ and Dawson J), *Barrow v Arnaud* (1846) 8 Ad & El NS 604, 609–10; 115 ER 1004, 1006 (Tindal CJ for Tindal CJ, Coltman, Maule and Cresswell JJ and Alderson, Rolfe and Platt BB) and *Hussey v Eels* [1990] 2 QB 227.

<sup>35</sup> *Clark v Macourt* (2013) 304 ALR 220, 227 [28] (emphasis added), noting that it is the applicable measure, notwithstanding the circumstance that a buyer is a non-profit organisation, [citing *Diamond Cutting Works Federation Ltd v Triefus & Co Ltd* [1956] 1 LL Rep 216] or that the buyer is constrained in relation to market regulation and control as to the price at which the buyer could sell to a subsequent purchaser [citing *British Motor Trade Association v Gilbert* [1951] 2 All ER 641 and *Mouat v Betts Motors Ltd* [1959] AC 71].

<sup>36</sup> *Clark v Macourt* (2013) 304 ALR 220, 229 [37]. Thus, their Honours concluded, Macourt's submission "that "the cost of the acquisition of replacement Xytex sperm was not an appropriate proxy" for the value of the [SGFC] sperm must be rejected": at 230 [39], quoting David Macourt, 'Respondent's Submissions', Submission in *Clark v Macourt*, S95/2013, 5 July 2013, 15 [40(iv)].

<sup>37</sup> *Clark v Macourt* (2013) 304 ALR 220, 223 [8], also noting, in agreement with Keane J, but *contra* Gageler J, that the identification of Clark's loss 'does not depend (as much of the respondent's argument assumed) on whether the contract can be classified as a contract for the sale of goods'.

<sup>38</sup> *Ibid* 223 [9].

The first was loss ‘constituted by the amount by which the *promisee* is *worse off* because the promisor did not perform the contract ... [which] would include the value of whatever the promisee outlaid in reliance on the promise being fulfilled’.<sup>39</sup> Secondly, loss ‘might be assessed by looking not at the promisee’s position but at what the defaulting *promisor* *gained* by making the promise but not performing it’.<sup>40</sup> Finally, there was ‘loss of the value of what the *promisee* would have received if the promise had been performed’.<sup>41</sup> For Hayne J, subject to certain limitations inapplicable to the present case, it is this third kind of ‘loss’ that an award of damages for breach of contract normally is concerned with.<sup>42</sup>

His Honour’s analysis concluded by refuting the argument advanced by Macourt that Clark had in fact avoided any ‘loss’ caused by SGFC’s breach by purchasing replacement sperm from Xytex, which would have prevented recovery in accordance with *British Westinghouse*. For Hayne J, this argument failed for two reasons. The first was that the calculations upon which the argument was based quantified the sum ‘needed to put the appellant in the position she would have been in *if the contract had not been made* ... [rather than] *if the contract had been performed*’.<sup>43</sup> The second was that the argument misunderstood the so-called ‘avoided loss rule of mitigation’. According to his Honour, references to ‘mitigation’ in cases like the present are ‘apt to mislead’<sup>44</sup> because Clark ‘obtained no relevant benefit from her subsequent purchases of sperm’.<sup>45</sup> This appears to be a reference to the issue of ‘betterment’, which Keane J discussed in some detail in his reasons. But as both Hayne J and Keane J observed, here there was no evidence before the Court that Clark was made either better or worse off as a result of using the Xytex sperm, meaning that questions of ‘betterment’ (as well as those concerned with remoteness of ‘loss’) were irrelevant here.

<sup>39</sup> Ibid (emphasis in original).

<sup>40</sup> Ibid (emphasis in original). With respect, while this measure is a possible alternative basis for quantifying the sum payable to the innocent victim of contractual breach (see, eg, *A-G (UK) v Blake* [2001] 1 AC 268), it cannot be understood as a measure of the innocent party’s loss. This is a point expanded upon in Part V below.

<sup>41</sup> *Clark v Macourt* (2013) 304 ALR 220, 223 [9].

<sup>42</sup> Ibid 224 [10].

<sup>43</sup> Ibid 225 [15] (emphasis in original).

<sup>44</sup> Ibid 225 [16].

<sup>45</sup> Ibid 225 [19].

### B Gageler J's Dissent

For Gageler J, the 'unusual facts' of the present appeal gave rise to 'unusual difficulties',<sup>46</sup> and his Honour refused to allow Clark's claim for the cost of purchasing replacement sperm from Xytex.<sup>47</sup> Gageler J's reasons commenced with a classic statement of the 'compensatory principle' from *Haines v Bendall*, a case not concerned with a contractual claim, but with a claim for compensation for personal injury caused by negligence.<sup>48</sup> As Gageler J observed, the majority in that case (Mason CJ, Dawson, Toohey and Gaudron JJ) stated that the

settled principle governing the assessment of compensatory damages, whether in actions of tort or contract, is that the injured party should receive compensation in a sum which, so far as money can do, will put that party in the same position as he or she would have been in if the contract had been performed or the tort had not been committed ... Cognate with this concept is the rule, described ... as universal, that a plaintiff cannot recover more than he or she has lost.<sup>49</sup>

Following this, Gageler J moved on to consider how this 'compensatory principle' applied in the present case, acknowledging that following the delivery of defective goods the appropriate basis for quantifying the buyer's monetary award is normally the difference, as at the date of delivery, between the sum the buyer would have obtained in a hypothetical sale of the contractually non-compliant goods and the sum she would have paid in a hypothetical purchase to obtain contractually compliant goods from another seller. According to his Honour, this is because the value to the buyer

of having ownership of, and control over, contractually compliant goods that can be bought and sold in a market as at the time of delivery ordinarily equates to the market value of those goods at that date ... [and the] market value of goods is not ordinarily dependent on circumstances peculiar to an individual seller or individual buyer.<sup>50</sup>

<sup>46</sup> Ibid 230 [40].

<sup>47</sup> Ibid 235 [72]–[74].

<sup>48</sup> (1991) 172 CLR 60.

<sup>49</sup> *Clark v Macourt* (2013) 304 ALR 220, 232 [59], quoting *Haines v Bendall* (1991) 172 CLR 60, 63 (citations omitted).

<sup>50</sup> *Clark v Macourt* (2013) 304 ALR 220, 234 [67], citing *Tabcorp* (2009) 236 CLR 272, 285–6 [13] (French CJ, Gummow, Heydon, Crennan and Kiefel JJ), *Wertheim v Chicoutimi Pulp Co*

For this reason, Gageler J explained, ‘it ordinarily makes no difference why the buyer chose to purchase the goods or whether the buyer could be expected actually to realise the monetary equivalent of that value by reselling or otherwise disposing of the goods’.<sup>51</sup> Significantly, however, his Honour found that the present case ‘does not fit within that standard category’.<sup>52</sup> But this was not because the subject matter of the contract here was the sale of a business rather than a sale of goods or because of any difficulty that existed in allocating a part of the overall purchase price for the business to the donor sperm. The critical distinguishing feature of the case was, rather, ‘the limited value to the buyer ... of the performance of the contract by the seller ... given the peculiar nature of the asset ... which the company was obliged to deliver under the contract’.<sup>53</sup>

#### IV AN ASSESSMENT OF THE HIGH COURT’S DECISION

The dispute in *Clark v Macourt* raises a fundamental question of legal principle. It is also clear that, depending on the interpretation of the *Robinson v Harman* principle one adopts, either of the conclusions reached in the High Court is deducible. This Part commences by examining the logic underpinning Gageler J’s reasoning. It is argued that his Honour’s analysis is very persuasive according to one particular, and perhaps the most popular, interpretation of this principle. It is nevertheless argued that the majority’s approach is to be preferred on the basis that only it gives effect to the principle’s more preferable interpretation, which involves recognising an important (but often overlooked) distinction between money awards that substitute for performance and money awards that compensate for proven factual loss.

##### *A Support for Gageler J’s Approach*

Where a seller supplies defective goods under a contract of sale, the sum to which the buyer is entitled normally is measured by reference to the difference in market value at the date of breach between the goods promised and the

[1911] AC 301, 307–8 (Lord Atkinson for Lords Macnaghten, Atkinson, Shaw, Mersey and Robson) and *Slater v Hoyle & Smith Ltd* [1920] 2 KB 11.

<sup>51</sup> *Clark v Macourt* (2013) 304 ALR 220, 234 [67], citing *Diamond Cutting Works Federation Ltd v Triefus & Co Ltd* [1956] 1 LL Rep 216, 227 (Barry J).

<sup>52</sup> *Clark v Macourt* (2013) 304 ALR 220, 234 [68].

<sup>53</sup> *Ibid* 234–5 [68].

goods received.<sup>54</sup> Gageler J accepted that this principle of assessment, often called the ‘market rule’, normally provides the appropriate basis for quantifying a buyer’s monetary entitlement following the delivery of defective goods. As explained above, his Honour nevertheless held that this approach should not be applied in the present case because the value of contractually compliant goods to Clark lay only in her ‘gaining control over a stock of frozen sperm that she then could use for the treatment of her patients in the normal course of her practice’, but from which she could not profit directly.<sup>55</sup>

### 1 *The Prima Facie Appeal of Gageler J’s Analysis*

The basis for the market rule is controversial. The common view appears to be that the rule’s justification lies in its promotion of certain ‘policy’ objectives generally thought to be desirable in this context.<sup>56</sup> The most significant of these concerns is said usually to be commercial certainty.<sup>57</sup> Professor Bridge, for instance, has suggested that ‘[p]erhaps the most important benefit provided by the market rule lies in the way that it simplifies trials and leaves collateral issues and disputes to be worked out on their own terms’.<sup>58</sup> At least in the sale of goods context, where the market rule generally is applied, Bridge concludes that the rule

avoids uninformed speculation about whether sub-buyers will bring claims or acts in other ways injurious to their buyers ... [and] also avoids the difficulty of attaching particular contracts of sale to particular sub-sales in those cases where the buyer trades on a wide front, as in commodity trades.<sup>59</sup>

If the basis for the market rule truly lies in its promotion of ‘policy’ objectives such as these, Gageler J’s analysis is difficult to fault. As his Honour observed,

<sup>54</sup> See *Sale of Goods Act 1979* (UK) c 54, s 53(3). Equivalent legislation operates in Australia: see, eg, *Sale of Goods Act 1923* (NSW) s 54(3).

<sup>55</sup> *Clark v Macourt* (2013) 304 ALR 220, 235 [70].

<sup>56</sup> The term ‘policy’ is used here in the Dworkinian sense of a consideration concerned with broader social advancement and may be contrasted with a consideration of ‘principle’, which is normally understood as one concerned solely with the narrower question of interpersonal justice as between the two parties to the particular dispute. For elaboration, see Ronald M Dworkin, ‘Hard Cases’ (1975) 88 *Harvard Law Review* 1057, 1060. For an argument that this distinction ‘cannot withstand close scrutiny’, see Note, ‘Dworkin’s “Rights Thesis”’ (1976) 74 *Michigan Law Review* 1167, 1171.

<sup>57</sup> See, eg, *The Golden Victory* [2007] 2 AC 353, 367–8 [1] (Lord Bingham).

<sup>58</sup> Michael Bridge, ‘The Market Rule of Damages Assessment’ in Djahongir Saidov and Ralph Cunnington (eds), *Contract Damages: Domestic and International Perspectives* (Hart Publishing, 2008) 431, 454.

<sup>59</sup> *Ibid.*

the present case was not one in which the value to Clark of accurate performance was that of 'having dominion over contractually compliant goods of a nature which would be available to be resold by the buyer in a market at the time of delivery' since the only value that contractually compliant sperm had for Clark was in facilitating the treatment of her patients within the ethical constraints that bound her.<sup>60</sup> Thus, what Clark 'lost' in this case, said his Honour, was not the market value of compliant sperm but 'the benefit of being relieved of the need thereafter to source sperm' from elsewhere in order to treat her patients.<sup>61</sup> For this reason, the various policies said to underpin the market rule could not be said to apply here and so must yield to the 'compensatory principle'.<sup>62</sup>

## 2 *Comparison with The Golden Victory*

It may be thought that additional, albeit indirect, support for Gageler J's approach can be found in the House of Lords' controversial decision in *The Golden Victory*.<sup>63</sup> There a charterer renounced a seven-year charterparty by returning the ship when there were almost four years left to run on the charter. Three days later the owner accepted the repudiation and claimed the difference between the contract and market rates of hire for the remaining charter period. Significantly, however, the contract gave either party the right to cancel the charter if war broke out between two or more of a number of countries. On 20 March 2003, 14 months after the repudiation was accepted, the Second Gulf War commenced. This event would have enabled either party to cancel if the charter were still subsisting, and it was accepted that the charterer would have cancelled at this time if the charter had remained on foot.

On this basis the charterer argued that the owner's award should be limited to the difference between the contract and market rates of hire for the 14 months that elapsed between the contract's early termination and the Second Gulf War's commencement. Against forceful dissents from Lord Bingham and Lord Walker, the majority (comprising the separate judgments of Lord Scott, Lord Carswell and Lord Brown) held that the normal market rule should not be applied because it was in conflict with the 'overriding compensatory principle' that the victim of a breach of contract should not be

<sup>60</sup> *Clark v Macourt* (2013) 304 ALR 220, 235 [70].

<sup>61</sup> *Ibid.*

<sup>62</sup> *Ibid.*

<sup>63</sup> [2007] 2 AC 353.

placed in a better position than if the contract had been performed.<sup>64</sup> Lord Carswell characterised the dispute as a battle between ‘certainty in commercial transactions’, ‘finality’ and ‘ease of settlement’ on the one hand,<sup>65</sup> and the compensatory principle on the other, holding that in these circumstances the former must give way to the latter.<sup>66</sup>

*The Golden Victory* has provoked significant debate. Some commentators have praised the decision wholeheartedly,<sup>67</sup> while others have criticised it stridently.<sup>68</sup> This criticism, which has come from such notable figures as Professor Reynolds and Lord Mustill, has tended to argue that in the circumstances that there arose there was no reason to depart from the usual, and commercially certain, ‘market rule’ of ‘damages’ assessment, though Professor Reynolds also claims that there are a number of other deficiencies in the majority’s reasoning, including that ‘the law of damages ... is not always concerned to compensate for actual consequential loss, and it need not be inoperative if there is none’.<sup>69</sup>

In reasoning that the normal market rule should not be applied, *The Golden Victory* majority referred to earlier authorities that were said to support the proposition that a court called upon to assess compensation for the breach of a legal duty should not speculate about what might have happened when the true facts are known. The main authority relied upon to support this proposition was the House of Lords’ earlier decision in *The Bwllfa and Merthyr Dare Steam Collieries (1891) Ltd v The Pontypridd Waterworks Co* (‘*Bwllfa*’).<sup>70</sup> Owners of coalmines there claimed statutory compensation from a water undertaking that, pursuant to statutory authority, had prevented them from mining coal over a period during which the price of coal had risen. The question for the House of Lords was whether the coal should be valued as at

<sup>64</sup> Ibid 382 [35] (Lord Scott), 392 [65] (Lord Carswell), 396 [78] (Lord Brown).

<sup>65</sup> Ibid 389 [58]; cf at 378 [23] (Lord Bingham).

<sup>66</sup> Ibid 391 [63] (Lord Carswell).

<sup>67</sup> See David Capper, ‘A “*Golden Victory*” for Freedom of Contract’ (2008) 24 *Journal of Contract Law* 176; Qiao Liu, ‘The Date for Assessing Damages for Loss of Prospective Performance under a Contract’ [2007] *Lloyd’s Maritime and Commercial Law Quarterly* 273; J W Carter and Elisabeth Peden, ‘Damages Following Termination for Repudiation: Taking Account of Later Events’ (2008) 24 *Journal of Contract Law* 145.

<sup>68</sup> See Jonathan Morgan, ‘A Victory for “Justice” over Commercial Certainty’ (2007) 66 *Cambridge Law Journal* 263; Francis Reynolds, ‘*The Golden Victory* — A Misguided Decision’ (2008) 38 *Hong Kong Law Journal* 333; Lord Michael Mustill, ‘*The Golden Victory* — Some Reflections’ (2008) 124 *Law Quarterly Review* 569.

<sup>69</sup> Reynolds, above n 68, 344.

<sup>70</sup> [1903] AC 426.



the beginning of the period or by reference to its value during the currency of the period. Notably, their Lordships distinguished the case from one concerned with a sale of goods or a property transfer and upheld the latter measure on the basis that this ensured ‘full compensation’ for the coalmine owners.<sup>71</sup>

In his Lordship’s dissenting speech in *The Golden Victory*, Lord Bingham observed that he had ‘no doubt’ that the approach taken by the majority was ‘in many contexts a sound approach in law as in life, and ... that the principle has been judicially invoked in a number of cases’.<sup>72</sup> However, according to his Lordship, these cases, including *Bwllfa* itself, bore ‘little, if any, resemblance to the present ... [which involved the] repudiation of a commercial contract where there was an available market’.<sup>73</sup> In his comment on *The Golden Victory*, Lord Mustill expressed a similar view, observing that ‘[p]iling up cases which are not in point only serves to obscure’.<sup>74</sup>

Lord Scott’s speech in *The Golden Victory* did recognise the importance of certainty in commercial contracts, but his Lordship held that this ‘desideratum’ must give way to the overriding ‘principle’ that the innocent party should not be placed in a better position than it would have been in had the breach not occurred.<sup>75</sup> The emphasis that Lord Scott placed upon the ‘overriding compensatory principle’ in deciding *The Golden Victory* is similar to that which Gageler J placed upon it in *Clark v Macourt*. It is also noteworthy that, like Lord Scott, Gageler J commenced his reasons with a classic statement of this principle from a case not concerned with a breach of contract,<sup>76</sup> indicating that both judges were of the view that the governing principle is the same regardless of whether the claim arises in the contractual context or not.

There are nevertheless important differences between the two decisions that can explain the opposing results that were reached. While Gageler J was

<sup>71</sup> See *ibid* 428–9 (Earl of Halsbury LC), 431 (Lord Macnaghten), 432–3 (Lord Robertson).

<sup>72</sup> [2007] 2 AC 353, 371 [12]; see also at 371–2 [12], where his Lordship then cited, for example, *Bwllfa* [1903] AC 426, *Re Bradberry* [1943] Ch 35, *Carslogie Steamship Co Ltd v Norway* [1952] AC 292, *Re Thoars*; *Reid v Ramlort Ltd* [2003] 1 BCLC 499, *McKinnon v E Serv Ltd* [2003] EWHC 475 (Ch) (14 January 2003) and *Aitchison v Gordon Durham & Co Ltd* (Unreported, England and Wales Court of Appeal — Civil Division, Butler-Sloss, Aldous and Schiemann LJ), 30 June 1995).

<sup>73</sup> *The Golden Victory* [2007] 2 AC 353, 371–2 [12].

<sup>74</sup> Lord Mustill, above n 68, 583.

<sup>75</sup> [2007] 2 AC 353, 383–4 [38].

<sup>76</sup> See *Clark v Macourt* (2013) 304 ALR 220, 232 [59], citing *Haines v Bendall* (1991) 172 CLR 60, 63 (Mason CJ, Dawson, Toohey and Gaudron JJ), where, as noted earlier, the claim was for compensation for personal injury arising from negligence.

correct to hold that the policies that supposedly underpin the market rule were inapplicable to the claim in *Clark v Macourt*, it will be argued in the next section that these policies do not in fact provide the best explanation for this rule and that the majority's award was justified simply on the basis that in the circumstances Clark was entitled to a money award of the cost of substitute performance. By contrast, while the policy concerns that supposedly underpin the market rule were applicable to the circumstances that arose in *The Golden Victory*, the owners there were not entitled to a monetary substitute for performance because their right to prospective performance had not accrued unconditionally at the time when the charterers' repudiation was accepted, which meant that the owners were limited to a compensatory claim for prospective 'loss'.<sup>77</sup>

### B A Qualified Defence of the Majority's Approach

To recap, if the basis for the market rule lies in its promotion of commercial certainty and other 'policy' objectives, Gager J's reasoning in *Clark v Macourt* appears to be unimpeachable because the peculiar circumstances of the case rendered considerations of this kind generally inapplicable. It also might be said, as indeed *The Golden Victory* majority did say, that while 'policy' considerations are relevant in resolving a conflict between two competing arguments of 'principle', in any contest between 'policy' and 'principle' the latter always must triumph. The problem with both these claims is that the 'policy-based' explanation for the market rule is unconvincing and not just to those who reject the legitimacy of *any* form of 'policy-based' reasoning in private law.<sup>78</sup>

As Professor Stevens has observed, the sale of goods cases 'where the sub-sale is taken into account [in assessing damages] because the *consequential* loss the plaintiff suffers as a result of the terms of the sub-sale is higher than would normally have been suffered' show that the true justification for

<sup>77</sup> Note, however, that saying this leaves open the question of *when* this prospective loss should have been quantified and it is here that the various 'policy' considerations identified by Lord Bingham in *The Golden Victory* [2007] 2 AC 353, 377–8 [23] might be relevant. One important consequence of this analysis of *The Golden Victory* is that it is reconcilable with *either* of the approaches taken in the House of Lords, with the choice between them to be made on grounds other than whether the claim was substitutionary or compensatory. For further discussion, see David Winterton, *Money Awards in Contract Law* (Hart Publishing, 2015, forthcoming) ch 8.

<sup>78</sup> See, eg, Ernest J Weinrib, *The Idea of Private Law* (Harvard University Press, 1995); Allan Beever, *Rediscovering the Law of Negligence* (Hart Publishing, 2007).

the market rule is not the promotion of commercial certainty.<sup>79</sup> As Stevens explains, while ‘normally, in the case of generic goods for which there is a ready market there will be no consequential loss, as the buyer will be able to go into the market and fulfil the sub-sale contract ... this will not always be so’,<sup>80</sup> as the House of Lords’ decision in *Re R and H Hall Ltd and W H Pim (Junior) & Co’s Arbitration* (*‘Re R and H Hall’*) exemplifies.<sup>81</sup> It is unnecessary to detail the complicated facts of that decision here. However, while sub-sales are not taken into account when they reduce a buyer’s prima facie ‘loss’, the result in *Re R and H Hall* shows that sub-sales may be taken into account when they increase this loss, provided the additional loss caused is not ‘too remote’.<sup>82</sup>

### 1 *The Nature of the Claim That Clark Made*

Stevens himself has advanced a different explanation for the market rule, which relies upon a distinction between damages that substitute for the right infringed and damages that compensate for factual loss. According to Stevens, the innocent victim of a breach of contract (or a tort)<sup>83</sup> is always entitled to an award that substitutes for the primary right infringed, which in the contractual context is normally measured by reference to the difference in market value between the performance promised and that provided.<sup>84</sup> An alternative substitutionary analysis that applies only to claims based on the enforcement of *contractual* rights also distinguishes between substitutionary and compensatory awards, but views the purpose of the former as to substitute for performance itself rather than the *right* to performance.<sup>85</sup> In many instances, and most notably in all cases where the claim is one for the cost of market replacement, these two different substitutionary measures coincide. But in

<sup>79</sup> Stevens, ‘Damages and the Right to Performance’, above n 18, 177 (emphasis in original).

<sup>80</sup> *Ibid.*

<sup>81</sup> [1928] All ER Rep 763.

<sup>82</sup> For more detailed discussion, see Stevens, ‘Damages and the Right to Performance’, above n 18, 177–8; Winterton, *Money Awards in Contract Law*, above n 77, ch 2.

<sup>83</sup> See Robert Stevens, *Torts and Rights* (Oxford University Press, 2007) 59.

<sup>84</sup> See *ibid* 70; Stevens, ‘Damages and the Right to Performance’, above n 18, 171–2.

<sup>85</sup> For different versions of this kind of account, see Stephen A Smith, ‘Substitutionary Damages’ in Charles E F Rickett (ed), *Justifying Private Law Remedies* (Hart Publishing, 2008) 93; Brian Coote, ‘Contract Damages, *Ruxley*, and the Performance Interest’ (1997) 56 *Cambridge Law Journal* 537; Charlie Webb, ‘Performance and Compensation: An Analysis of Contract Damages and Contractual Obligation’ (2006) 26 *Oxford Journal of Legal Studies* 41; David Winterton, ‘Money Awards Substituting for Performance’ [2012] *Lloyd’s Maritime and Commercial Law Quarterly* 446.

some cases, specifically those involving claims for the cost of repairs, the two approaches may diverge.

In the present case Keane J explained that Macourt contended that Clark's claim was 'not for the value of the sperm to which she was entitled, but for the costs and expenses associated with the "procurement of replacement sperm"'.<sup>86</sup> Macourt, in other words, argued that Clark was making a claim for loss suffered and therefore was limited to a sum that made good the detrimental financial consequences attributable to SGFC's breach. While Macourt was correct to suggest that any *compensatory* claim for loss must be capped by reference to the 'costs and expenses ... incurred subsequent to the date of breach ... assessed at the date of trial',<sup>87</sup> he was mistaken in supposing that this was the only claim available to Clark. As Keane J also explained, Clark 'was entitled to frame her claim in the manner most advantageous to her',<sup>88</sup> and an alternative (and more advantageous) claim available to Clark was one for an award that, as [13(a)] of Clark's reply in the Supreme Court alleged,

gives her the benefit of her bargain under the Deed by giving her, so far as money is capable of doing so, something equivalent to the value of the worthless Sperm delivered to her, as opposed to damages to compensate her specifically for her outlay to Xytex.<sup>89</sup>

On this basis it is suggested that Clark's claim is best understood as one seeking a monetary substitute for SGFC's defective performance rather than as an award designed to make good the financial 'loss' she suffered as a result of SGFC's breach. This is true regardless of which of the two substitutionary accounts just outlined is preferred. On Stevens' account, the appropriate basis for what he calls a 'substitutive' award is the difference in market value between the goods promised and those received. On the available evidence, the market value of contractually compliant sperm was the approximately \$1.02 million it would have cost to purchase replacement sperm from Xytex at the date of breach. This is also the same sum generated by the distinct substitutionary analysis explained earlier in which the objective of a substitutionary award is to provide the innocent party with the closest monetary equivalent to specific performance.

<sup>86</sup> *Clark v Macourt* (2013) 304 ALR 220, 240 [101].

<sup>87</sup> *Ibid.*

<sup>88</sup> *Ibid* 241 [103].

<sup>89</sup> See *ibid.*

## 2 Some Unequivocal Examples of Substitutionary Court Orders

The availability of substitutionary court orders in the contractual context is not generally in dispute. The clearest instance of such an order is one for specific performance. A prohibitive injunction to restrain breach is obviously another example,<sup>90</sup> as is the order enforcing a contractual debt that is due.<sup>91</sup> The latter order demonstrates that the aim of a money award made following contractual breach is not limited to making good the detrimental factual consequences that breach has caused the innocent party because that party's entitlement to such an order is unaffected by how matters eventually turn out for that party.<sup>92</sup> As Millett LJ observed in *Jervis v Harris*, in an action to recover a debt that is due, the claimant 'need not prove anything beyond the occurrence of the event or condition on the occurrence of which the debt became due. He need prove no loss; the rules as to remoteness of damage and mitigation of loss are irrelevant'.<sup>93</sup>

One of course might reject the relevance of the substitutionary nature of such orders in assessing 'damages' awards for contractual breach. Any such claim presumably would be based on the historical distinction between 'debt' actions and actions in 'assumpsit' to recover 'damages' for failing to perform one's promise.<sup>94</sup> However, because in earlier times 'damages' awards were wholly at the discretion of the jury, the development of legal principles to govern quantification emerged fairly late (and arguably much work remains to be done). In any event, it is not clear that the sums juries awarded were limited to making good the detrimental factual consequences that breach had

<sup>90</sup> The latter kind of order is also more easily obtainable than one for specific performance. As Dixon J stated in *J C Williamson Ltd v Lukey* (1931) 45 CLR 282, 299, if 'a clear legal duty is imposed by contract to refrain from some act, then, prima facie, an injunction should go to restrain the doing of that act'.

<sup>91</sup> For a defence of this view, see H K Lucke, 'Specific Performance at Common Law: History and Present Nature of the Action for Money Due upon Simple Contract' (1965) 2 *University of Tasmania Law Review* 125. This order is also the one made most frequently following the occurrence of a breach of contract: see Rafal Zakrzewski, *Remedies Reclassified* (Oxford University Press, 2005) 67.

<sup>92</sup> For recent, unequivocal judicial support for this proposition, see *Jervis v Harris* [1996] Ch 195, 202 (Millett LJ).

<sup>93</sup> *Ibid* 202.

<sup>94</sup> The development of the action in 'assumpsit' out of 'trespass on the case' is traced in J H Baker, *An Introduction to English Legal History* (Butterworths LexisNexis, 4<sup>th</sup> ed, 2002) ch 19.

for the claimant.<sup>95</sup> Moreover, even when it later became time for judges to quantify such awards, it is apparent that sometimes a claimant was awarded the monetary equivalent of the promised performance rather than just a sum aiming to make good their factual loss.<sup>96</sup>

An alternative basis for rejecting as irrelevant in the present context the substitutionary nature of orders to pay contractual debts might exist if there were a compelling reason to treat this kind of promise differently from one to perform some other kind of act (such as to construct an object or deliver goods). But while the distinction between these two kinds of promises clearly had significance in earlier times, in light of the different forms of action available in relation to their enforcement, it is difficult to identify any principled reason for distinguishing between the two kinds of promise today. This might suggest the need for a re-examination of the present law with a view to removing any remaining differences between the two areas that are not soundly based in reason. But, to the extent that this is required, it is clearly a task for another day. For the moment it is sufficient to note that, regardless of the historical differences just described, the modern law of contract does not limit the availability of substitutionary money awards to the enforcement of promises to pay money.

One particularly striking example of such an award is the one made by the Canadian Supreme Court in *Semelhago v Paramadevan*.<sup>97</sup> The defendant there failed to convey land to the claimant under a contract of sale. In principle, specific performance was available but the claimant was limited to a monetary award in lieu of this order because the land had been conveyed to a third party. The value of the land rose between breach and trial during which time the claimant retained possession of property he had planned to sell upon settlement. The defendant argued that any award made should take account of the rise in value of the claimant's property on the basis that, had the defendant performed, the claimant would have sold this asset earlier and not acquired this increase in value. In rejecting this argument and awarding the claimant the full value of the promised land, the Supreme Court made clear that the aim of awarding money in lieu of specific performance is not to put the

<sup>95</sup> See *ibid*; D J Ibbetson, *A Historical Introduction to the Law of Obligations* (Oxford University Press, 1999) 131–2, citing *Shipton v Dogge* (1442) 51 SS 97 ('Doigé's Case'), *Strete v Yardley* (1528) 121 SS 313 and *Pykeryng v Thurgoode* (1532) 93 SS 4.

<sup>96</sup> See, eg, *Thornton v Place* (1832) 1 Mood & R 218, 219; 174 ER 74, 74 (Parke J); *Pell v Shearman* (1855) 10 Ex 766, 769; 156 ER 650, 651 (Parke B).

<sup>97</sup> [1996] 2 SCR 415. These awards are made under the *Chancery Amendment Act 1858*, 21 & 22 Vict, c 27, commonly referred to as *Lord Cairns' Act*.

relevant party into the same factual position he or she would have been in had the breach not occurred but 'to be a true equivalent of specific performance'.<sup>98</sup>

### 3 *Substitutionary Awards and the Market Rule*

The award made to the innocent purchaser in *Semelhago v Paramadevan* is analogous to the award upheld by the High Court in *Clark v Macourt*. Again, one might attempt to diminish the significance of the former award on the ground that its jurisdictional basis lies in the courts of equity rather than common law. However, the availability of substitutionary awards at common law is not limited to orders for the payment of money due under a contract (or deed).<sup>99</sup> Such awards also are provided following the defective performance of contracts for the provision of goods or services.

Taking services cases first, there are many cases where the victim of a breach of contract has received a substantial award that exceeds the factual loss it can attribute causally to the breach.<sup>100</sup> Perhaps the most important recent English decision in this regard is *Alfred McAlpine Construction Ltd v Panatown Ltd* ('Panatown'), where both Lord Goff and Lord Millett held,<sup>101</sup> and Lord Browne-Wilkinson was prepared to 'assume',<sup>102</sup> that the victim of a breach of contract is entitled to substantial 'damages' simply because they have failed to receive the performance that was promised, regardless of what consequences in fact result. The contract in *Panatown* was made for the benefit of a third party, but more recently a similar award was made in the two-party context in *Giedo Van Der Garde BV v Force India Formula One Team Ltd* ('Force India'), where Stadlen J held that the view expressed by Lord

<sup>98</sup> *Semelhago v Paramadevan* [1996] 2 SCR 415, 428 [19] (Sopinka J for Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ). For an analogous English decision, see *Wroth v Tyler* [1974] Ch 30, but note that Megarry J there reasoned that different principles govern the assessment of 'damages' at common law and in equity: at 58–9. Significantly, in *Southcott Estates Inc v Toronto Catholic District School Board* [2012] 2 SCR 675, the Canadian Supreme Court appeared to retreat from recognising this distinction. There a disappointed purchaser of land was denied an alternative 'damages' claim for lost profits following its failure to obtain specific performance of the contract of sale. For further discussion, see David Winterton, 'The Relationship between Specific Performance and Mitigation and the Distinction between Substitution and Compensation in Contract Law' (2013) 7 *Journal of Equity* 287.

<sup>99</sup> That is, the order made following a successful action for an agreed sum.

<sup>100</sup> See, eg, *Miles v Wakefield Metropolitan District Council* [1987] 1 AC 539; *National Coal Board v Galley* [1957] 1 WLR 16; *Joyner v Weeks* [1891] 2 QB 31, approved by the High Court of Australia in *Graham v The Markets Hotel Pty Ltd* (1943) 67 CLR 567.

<sup>101</sup> [2001] 1 AC 518, 547 (Lord Goff), 593 (Lord Millett).

<sup>102</sup> *Ibid* 577.

Goff and Lord Millett should be taken to constitute the majority view in *Panatown*.<sup>103</sup>

Turning to goods, it has been noted already that, where there is an available market, s 53(3) of the *Sale of Goods Act 1979* (UK) c 54 provides that the buyer's award is 'prima facie the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had fulfilled the warranty'. This provision is not a statutory modification of the common law since it simply enshrines the previous common law position.<sup>104</sup> The Court of Appeal's decision in *Slater v Hoyle & Smith Ltd* ('*Slater*'),<sup>105</sup> to which Keane J referred, demonstrates that the availability of such awards is unaffected by the innocent party's ability to minimise the detrimental factual consequences of the relevant breach. In *Slater* the innocent buyer contracted to buy unbleached cotton cloth that turned out to be inferior in quality to that warranted. The buyer nevertheless bleached the cloth and used it to fulfil a previously formed contract with a third party. The buyer claimed 'damages' and recovered the difference in market value at the date of delivery between the cloth warranted and that delivered. It was irrelevant that the buyer was not made factually worse off by the breach.

The award in *Slater*, just like the House of Lords' earlier award in *Williams Brothers v Ed T Agius Ltd* in the context of a claim for non-delivery,<sup>106</sup> is inconsistent with the view that contractual money awards are only concerned with making good factual loss. It might be alleged that *Slater* has been superseded by the English Court of Appeal's more recent decision in *Bence Graphics International Ltd v Fasson UK Ltd* ('*Bence*'),<sup>107</sup> where *Hadley v Baxendale* was invoked to deny recovery in circumstances almost identical to those occurring in *Slater*. However, *Bence* has been criticised heavily on the basis that principles of 'remoteness' are inapplicable to the kind of claim there made,<sup>108</sup> and because the Court's majority failed to provide any convincing

<sup>103</sup> *Force India* [2010] EWHC 2373 (QB) (24 September 2010) [484].

<sup>104</sup> See, eg, *Jones v Just* (1868) LR 3 QB 197; *Wertheim v Chicoutimi Pulp Co* [1911] AC 301, 307–8 (Lord Atkinson for Lords Macnaghten, Atkinson, Shaw, Mersey and Robson). As noted earlier, equivalent legislation operates in Australia: see above n 54.

<sup>105</sup> [1920] 2 KB 11.

<sup>106</sup> [1914] AC 510. See also *Ströms Bruks AB v Hutchinson* [1905] AC 515, 526 (Lord Macnaghten).

<sup>107</sup> [1998] QB 87.

<sup>108</sup> See Treitel, above n 18 (expressing a preference for Thorpe LJ's dissenting speech); Stevens, 'Damages and the Right to Performance', above n 18, 180.



reason for distinguishing the case from *Slater*.<sup>109</sup> It therefore is suggested that it is actually *Bence* that should be marginalised. Notable academic support for this view can be found in the work of Sir Günter Treitel.<sup>110</sup> Doctrinal support may be found in the rejection of *Bence*'s reasoning in a subsequent decision concerned with a contract for the sale of note-issued distressed debt.<sup>111</sup>

#### 4 *When Do the Opposing Substitutionary Analyses Diverge?*

It is important to appreciate that the sale of goods decisions just discussed can be seen as 'substitutionary' according to either of the two distinct substitutionary analyses of the law explained above.<sup>112</sup> Where the two accounts may diverge, however, is in circumstances where the innocent party makes a claim for the cost of repairs, as occurred in the High Court's decisions in *Bellgrove v Eldridge* ('*Bellgrove*')<sup>113</sup> and in *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd*.<sup>114</sup> According to Professor Stevens, awards of this kind are available only to 'compensate' for proven factual loss because the appropriate measure for a 'substitutive' award in all but the most exceptional circumstances is the difference in market value between the performance promised and that provided rather than the monetary equivalent of specific performance.

One important consequence of Stevens' view that awards of the cost of repairs are compensatory rather than substitutionary is that such claims can succeed only when the innocent party has undertaken the repairs necessary to ensure conformity with the contract or has demonstrated an intention, proved on the balance of probabilities, to undertake such repairs in the future. By contrast, on the alternative substitutionary analysis proposed here, awards of the cost of repairs may be available even where the innocent party does not intend to carry out the work necessary to ensure conformity. The availability of such awards in these circumstances was confirmed in *Bellgrove* itself where the possibility that Eldridge might not undertake the repairs required to fix her house's defective foundations was considered 'quite immaterial' in

<sup>109</sup> Stevens, 'Damages and the Right to Performance', above n 18, 180.

<sup>110</sup> Treitel, above n 18. See also Stevens, 'Damages and the Right to Performance', above n 18, 180.

<sup>111</sup> See *Bear Stearns Bank plc v Forum Global Equity Ltd* [2007] EWHC 1576 (Comm) (5 July 2007).

<sup>112</sup> This because the 'difference in (market) value' measure corresponds to minimum 'cost of cure' whenever it is cheaper to sell defective goods on the market and purchase replacement goods than it is to pay for the defective goods themselves to be repaired.

<sup>113</sup> (1954) 90 CLR 613.

<sup>114</sup> (2009) 236 CLR 272.

concluding that she was entitled to an award of the cost of undertaking this work.<sup>115</sup>

## V TERMINOLOGY AND THE RELEVANCE OF EQUITY

The preceding discussion may lead one to ask why the distinction between substitution and compensation is not appreciated more widely. This Part suggests that the principal reason for this is the ambiguous terminology that pervades this area of the law, and attempts to clarify at least some of the present uncertainty. Following this, the understanding of contractual awards proposed here is buttressed by noting the existence of an analogous distinction in the law of ‘equitable compensation’ and it is suggested that this provides further, admittedly indirect, support for the result in *Clark v Macourt*.

### A *The Uncertain Meaning of ‘Loss’ and ‘Compensation’*

As Hayne J observed, much of the confusion in this area of law stems from the uncertain meaning of the word ‘loss’.<sup>116</sup> Given the orthodox view that it is necessary for the innocent party to prove ‘loss’ before any entitlement to a substantial money award arises, the expression’s frequent use in this context is entirely understandable, but at the same time the source of significant confusion.<sup>117</sup> Generally, ‘loss’ is used in a limited (but sensible) way to denote

<sup>115</sup> (1954) 90 CLR 613, 620 (Dixon CJ, Webb and Taylor JJ). In *Bellgrove*, the Court held the entitlement to an award of the cost of repairs is qualified by the requirement that rectification is ‘reasonable’ in the circumstances: at 617–18. The existence of this restriction on awards of the cost of repairs was confirmed in *Tabcorp* (2009) 236 CLR 272, 288–9 [17] (French CJ, Gummow, Heydon, Crennan and Kiefel JJ) and by the House of Lords in *Ruxley Electronics and Construction Ltd v Forsyth* [1996] 1 AC 344; see especially at 361–75 (Lord Lloyd). More recent English case law has held that the availability of an award of the cost of repairs is not dependent on the claimant demonstrating an intention to undertake the repairs in the future, which supports a substitutionary analysis of such awards: see, eg, *Force India* [2010] EWHC 2373 (QB) (24 September 2010); *De Beers UK Ltd v Atos Origin IT Services UK Ltd* [2010] EWHC 3276 (TCC) (16 December 2010) [345] (Edwards-Stuart J).

<sup>116</sup> In this context it is noteworthy that all the judges described their task in terms of assessing the ‘loss’ Clark suffered due to SGFC’s breach. For example, Keane J remarked that there were two competing approaches, one which is focused on ‘the loss to the purchaser of the value of the stock at the date of completion of the purchase, and one which is focused on the [financial] expense incurred by the purchaser to acquire substitute stock in the ongoing conduct of her business’: *Clark v Macourt* (2013) 304 ALR 220, 236 [75].

<sup>117</sup> This use of ‘loss’ also has the potential to cause serious conceptual errors, such as the application of principles of remoteness (or mitigation) in circumstances where they are

only detrimental factual consequences. However, sometimes the term is used in a broader sense to refer to the failure in performance entailed by breach itself, or even to describe the *gain* the breaching party made as a result of the wrong.<sup>118</sup> While this second usage is never appropriate, the illegitimacy of the first is less clear. This, for instance, was how Lord Nicholls used the word ‘loss’ in *Attorney-General (UK) v Blake* in stating that on breach the innocent party suffers a ‘loss’ because ‘[h]e fails to obtain the benefit promised by the other party to the contract’.<sup>119</sup>

The ambiguous meaning of the word ‘loss’ in the contractual context is not, however, the sole reason for the law’s present uncertainty. The ambiguous meaning of other important terms commonly employed in this context, such as ‘harm’, ‘damages’ and ‘injury’, also contributes. But perhaps the greatest source of uncertainty in this context is the word ‘compensation’. The centrality of this concept in this area of law is noted often, with Gageler J observing in the present case that it ‘is the cardinal concept’ in assessing contractual damages.<sup>120</sup> In a sense this is true, but in the absence of a clear definition of precisely what one means by invoking this expression, saying this does not clarify matters much because it is a term that can be understood at various different levels of specificity.

Probably the broadest available interpretation of ‘compensation’ understands the word as encompassing *any* sum of money awarded by a court. On this view, which may reflect common usage, the expression is wide enough to capture awards that strip gains made by a wrongdoer and also perhaps punitive awards or those enforcing debts. According to a narrower and preferable interpretation of ‘compensation’, its use is limited to describing awards making good the ‘loss’ that breach has caused the victim of a civil wrong. Recall, however, that in the present case Hayne J stated that ‘loss might be assessed by looking not at the promisee’s position but at what the default-

inapplicable. This mistake was made by the Court of Appeal in *Bence* [1998] QB 87, as observed by Treitel, above n 18, 189.

<sup>118</sup> See, eg, *Clark v Macourt* (2013) 304 ALR 220, 223 [9] (Hayne J).

<sup>119</sup> [2001] 1 AC 268, 282. For similar usage, see *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85, 97, where Lord Griffith held that a person who enters a contract but does not get what was bargained for suffers financial ‘loss’ merely ‘because he has to spend money [in entering the contract] to give him the benefit of the bargain which the defendant had promised but failed to deliver’. This so-called ‘broad ground’ of recovery was accepted and adopted in *Panatown* [2001] 1 AC 518, 545–6 (Lord Goff), 585–92 (Lord Millett).

<sup>120</sup> *Clark v Macourt* (2013) 304 ALR 220, 232 [59], quoting *Haines v Bendall* (1991) 172 CLR 60, 63 (Mason CJ, Dawson, Toohey and Gaudron JJ).

ing *promisor gained* by making the promise but not performing it'.<sup>121</sup> If this interpretation of 'loss' is permissible, the narrower conception of 'compensation' simply collapses into the broader conception just outlined. As already explained, however, the gains made by the promisor via breach simply cannot be understood as a basis for measuring the 'loss' the promisee has suffered as a result of that breach. This remains true even if one believes that stripping the promisee of such gains is justifiable in certain exceptional cases.

But even the exclusion of gains from the possible meaning of 'loss' does not make sufficiently clear the meaning of 'compensation' because there remain two further important distinctions to appreciate in this context. As noted earlier, according to the usual and best definition of 'loss', the term refers only to detrimental factual consequences. One possible interpretation of 'compensation' is accordingly that it refers only to awards that make good the factual detriment caused by breach. Even here, however, it is possible to distinguish between pecuniary and non-pecuniary detriment so that 'compensation' (and 'loss' for that matter) could be defined so narrowly as to exclude awards designed to make good the *non-pecuniary* consequences of breach (for example, for 'distress and disappointment'). While there may be good reason to distinguish awards for pecuniary and non-pecuniary harm — because, for instance, money is incommensurable with the latter — it seems doubtful that much is to be gained by excluding altogether awards for non-pecuniary harm from the definition of 'compensation'.

There is, however, a definition of 'loss' that is both broader than one concerned only with detrimental factual consequences — whether pecuniary or non-pecuniary — but narrower than one broad enough to include the breaching party's gains. This is the interpretation noted earlier, which includes within it the deprivation entailed by breach itself. The significance of this distinction — between 'loss' meaning factual detriment and 'loss' meaning deficiency in performance — is not always appreciated and often awards that are in truth directed towards the latter phenomenon are described as 'compensatory'. There is nothing necessarily wrong with this, but for obvious reasons employing the same word to describe two different phenomena tends to obscure the differences between these phenomena. For this reason it may be preferable to use different expressions to describe the two different kinds of award.

<sup>121</sup> *Clark v Macourt* (2013) 304 ALR 220, 223 [9] (emphasis in original).

### B Equity's Approach to the Enforcement of Fiduciary Undertakings

The distinction between 'compensation' meaning an award substituting for a deficiency in performance and 'compensation' meaning an award making good factual loss has been recognised in the law governing the quantification of awards for a fiduciary's misapplication of trust property. In an unpublished doctoral thesis, Elliott carefully distinguishes between the two different measures that equity uses in this context, which he describes respectively as 'substitutive' and 'reparative' compensation.<sup>122</sup> Notably, an award of the former type was made by the High Court of Australia in *Youyang Pty Ltd v Minter Ellison Morris Fletcher*,<sup>123</sup> where the Court held that the fact that Youyang would have ended up in the same factual position 'but for' the defendant's breach did not affect the defendant's liability to restore the trust money it had paid out in breach of its primary duty.<sup>124</sup> The distinction also received favourable judicial consideration recently in *Agricultural Land Management Ltd v Jackson [No 2]*.<sup>125</sup>

According to Professor Edelman, as his Honour then was, the traditional method of enforcing promissory undertakings in equity was to require the fiduciary to pay the cost of performing the promise.<sup>126</sup> In this context issues of remoteness and mitigation were irrelevant because the claim was unconcerned with loss. In contrast, says Edelman, the common law generally restricted the victim of a breach of a primary duty to a compensatory claim for loss proved on the balance of probabilities,<sup>127</sup> limited by relevant principles

<sup>122</sup> Steven Ballantyne Elliott, *Compensation Claims against Trustees* (DPhil Thesis, University of Oxford, 2002). See also James Edelman and Steven Elliott, 'Money Remedies against Trustees' (2004) 18 *Trust Law International* 116.

<sup>123</sup> (2003) 212 CLR 484. For academic discussion, see Justice R P Meagher, Justice J D Heydon and M J Leeming, *Meagher, Gummow and Lehane's Equity Doctrines & Remedies* (Butterworths LexisNexis, 4<sup>th</sup> ed, 2002) 837–41 [23-020].

<sup>124</sup> For academic support for such an analysis, see Steven Elliott and James Edelman, 'Target Holdings Considered in Australia' (2003) 119 *Law Quarterly Review* 545; Lionel Smith, 'The Measurement of Compensation Claims against Trustees and Fiduciaries' in Elise Bant and Matthew Harding (eds), *Exploring Private Law* (Cambridge University Press, 2010) 363, 369, criticising the Supreme Court of Canada for not adopting this approach in *Canson Enterprises Ltd v Boughton & Co* [1991] 3 SCR 534.

<sup>125</sup> (2014) 285 FLR 121, 183 [333] (Edelman J).

<sup>126</sup> See James Edelman, 'Money Awards of the Cost of Performance' (2010) 4 *Journal of Equity* 122. For more detailed discussion, see Elliott, above n 122; Edelman and Elliott, above n 122.

<sup>127</sup> That the contractual position is in fact closer to the position in relation to claims for 'equitable compensation' than is generally supposed of course the main thrust of this case note. Edelman's own view actually may be quite similar to that proposed here since in a judicial capacity his Honour has observed that, at least in regard to a tenant's promise to keep

of remoteness and mitigation. But Edelman also suggests that in England the positions at common law and in equity moved closer together in 1995 due to two decisions of the House of Lords: *Ruxley Electronics and Construction Ltd v Forsyth*,<sup>128</sup> and *Target Holdings Ltd v Redfern*.<sup>129</sup> In the former case, the possibility of substitutionary claims at common law was made clear, while in the latter case the availability of such claims in equity was restricted to cases where the relevant trust was not being used in a commercial or conveyancing transaction.<sup>130</sup>

### C Present Relevance

One might claim that the recognition of this distinction in equity is of little relevance to a claim for ‘damages’ for breach of contract.<sup>131</sup> But regardless of one’s view on this, the preceding discussion does demonstrate that ‘loss’ and ‘compensation’ are expressions that can be understood at different levels of specificity. While these terms may be used respectively to refer only to the detrimental factual consequences of a breach of duty and an award designed to make good such consequences, they alternatively might be used in a broader sense that denotes a deficiency in the performance of that duty and its rectification, irrespective of what consequences in fact result. In the contractual context, such an award is in effect one for the monetary equivalent of specific performance. That both kinds of awards can be described as ‘compensation’, even when this term is understood to refer only to an award concerned

leased premises in good repair, if specific performance or a mandatory injunction is not ordered as a response to breach, ‘the plaintiff is ordinarily entitled to the reasonable cost of obtaining the promised performance as a substitute for obtaining that performance’: *Pourzand v Telstra Corporation Ltd* [2012] WASC 210 (19 June 2012) [203].

<sup>128</sup> [1996] 1 AC 344.

<sup>129</sup> [1996] 1 AC 421.

<sup>130</sup> *Ibid* 435 (Lord Browne-Wilkinson). The imposition of this restriction on these equitable claims is controversial. For two different academic views of the decision, see Matthew Conaglen, ‘Explaining *Target Holdings v Redfern*’ (2010) 4 *Journal of Equity* 288; Edelman, above n 126, 127–30. For the United Kingdom Supreme Court’s most recent consideration of the issue, see *AIB Group (UK) plc v Mark Redler & Co Solicitors* [2014] 3 WLR 1367. Regardless of this debate, however, it is clear that in certain circumstances both the common law and equity recognise that, following a promisor’s failure to perform, the innocent promisee is entitled to an award of the cost of performing the unperformed promise, irrespective of what factual detriment the innocent promisee suffers in consequence.

<sup>131</sup> Any argument to this effect also would be fortified by the fact that the condition attaching to the availability of the two different kinds of substitutionary claims (that is, ‘contractual’ and ‘equitable’) are quite distinct.

to make good 'loss', is a function of the inherent indeterminacy of the latter expression.

Recognition of the existence of the different levels of specificity at which the terms 'compensation' and 'loss' may be understood demonstrates why characterising *Clark v Macourt* as concerned only with the assessment of 'compensation' does not resolve the central issue that there arose. The existence of the distinction is commonly overlooked, not only due to the law's ambiguous terminology but also because substitutionary money awards often also have the effect of making good the detrimental factual consequences that breach has caused the innocent party. That the two measures occasionally diverge, however, does highlight the existence of the distinction and the need for the law, both through its terminology and its reasoning, to delineate clearly the two kinds of claim.

#### VI THE SIGNIFICANCE OF *BRITISH WESTINGHOUSE* AND THE STATUS OF THE 'AVOIDED LOSS RULE OF MITIGATION'

The characterisation of certain awards for the cost of replacement or rectification as substitutionary rather than compensatory has important implications. One is that a party's entitlement to a substantial money award following breach does not depend upon proof, on the balance of probabilities, that the breach had detrimental factual consequences for that party. Generally speaking, however, the recovery of such an award will depend, amongst other things, on the promisee tendering its own essential counter-performance under the contract (or deed),<sup>132</sup> as indeed appeared to be the case in *Clark v Macourt*.<sup>133</sup> The significance of this requirement cannot be over-emphasised since it provides the key to understanding certain important decisions, such as *The Golden Victory*, which otherwise might appear to be in conflict with views advanced here.<sup>134</sup>

<sup>132</sup> Two other important restrictions on the availability of an award of the cost of substitute performance are that it is 'reasonable' in the circumstances for the claimant to insist upon receiving the promised performance and that it remains possible to 'cure' the breach. These claims are outlined in greater depth in Winterton, *Money Awards in Contract Law*, above n 77; Winterton, 'Money Awards Substituting for Performance', above n 85.

<sup>133</sup> Thus, Clark's recovery of the cost of procuring replacement sperm appeared to be conditional upon it paying the balance of the purchase price due under the Deed or, more accurately, on the balance due under the Deed being deducted from the award that Macourt prima facie was liable to pay. This is normally the position under a contract of sale.

<sup>134</sup> As mentioned earlier, the reason that *The Golden Victory* [2007] 2 AC 353 is consistent with the account proposed here is that a substitutionary claim was not possible there because the

Recognition of the proposed distinction also produces a clearer picture of the nature and scope of the different restrictions applicable to the respective kinds of awards. In this regard one major source of confusion germane to the present case concerns the significance of the House of Lords' decision in *British Westinghouse* and the status of the so-called 'avoided loss rule of mitigation'. Albeit understandably, given the law's conventional interpretation, there is a tendency to exaggerate the importance of this decision and to misunderstand the scope of the principle that it enunciated. The discussion that follows attempts to clarify matters via a close analysis of *British Westinghouse* before explaining precisely what aspects of the case are relevant in resolving the critical issue that called for determination in *Clark v Macourt*.

#### A *What Did British Westinghouse Decide?*

The facts of *British Westinghouse* are well known. In 1902, London Underground ('LU') entered into a £250 000 contract with British Westinghouse ('BW') for the purchase of eight steam turbines for electricity generation. The turbines were defective, requiring significantly more coal than they should have to run. In using the machines over the next six years, LU spent approximately £43 000 more on coal than should have been necessary. In 1908, LU purchased and installed new turbines ('Parsons machines') at an estimated cost of £78 186. These machines were so efficient that even if BW's original turbines had complied with the contractual specifications, it still would have been cheaper for LU to replace BW's machines with the Parsons machines as soon as the latter became available on the market. When BW claimed the unpaid balance, LU counterclaimed for an award assessed by reference to the additional costs incurred over the period in which it had used BW's machines before replacing them (that is, the cost of the extra coal and other expenses), plus the cost of purchasing the Parsons machines.<sup>135</sup> LU's entitlement to the former sum was undisputed, but the House of Lords refused to award the latter amount.

owners' right to future payments of hire was conditional, at least, upon them continuing to make the ship available to the charterers which, by accepting the ship's redelivery, they did not do. Thus, because the owners' right to future payments never accrued unconditionally, they were correctly limited to a compensatory claim for prospective loss.

<sup>135</sup> LU initially in fact pleaded an additional 'damages' claim in the alternative for upwards of £280 000 for losses it estimated that it would be caused by this excessive coal consumption over the expected life of the original machines, but this claim was eventually abandoned on appeal. For a fuller account of the proceedings, see Andrew Dyson, '*British Westinghouse Revisited*' [2012] *Lloyd's Maritime and Commercial Law Quarterly* 412.



Generally speaking, *British Westinghouse* is regarded as the leading authority for the ‘avoided loss rule of mitigation’, which is said to preclude the innocent victim of a breach of contract (or a tort) from recovering compensation for loss that, though likely at the date of breach, was avoided by post-breach conduct, even if such conduct went beyond what the ‘avoidable loss rule of mitigation’ required.<sup>136</sup> The origins of this rule are said to reside in certain statements by Viscount Haldane LC in *British Westinghouse* itself as well as the earlier authorities to which he there referred. After discussing *Erie County Natural Gas and Fuel Co Ltd v Carroll*,<sup>137</sup> and *Wertheim v Chicoutimi Pulp Co*,<sup>138</sup> the Lord Chancellor observed that the subsequent transaction will be taken into account in reducing the sum recoverable only if it is one ‘arising out of the consequences of the breach and in the ordinary course of business’.<sup>139</sup> Similarly, after discussing *Staniforth v Lyall*,<sup>140</sup> he said that this case illustrates the principle that when estimating the quantum of damage that a breach has caused the innocent party, one may look at all the facts

provided the course taken to protect himself by the plaintiff in such action was one which a reasonable and prudent person might in the ordinary conduct of business properly have taken, and in fact did take whether bound to or not.<sup>141</sup>

One notable commentator has described the ‘avoided loss rule of mitigation’ as ‘[o]ne of the most intractable areas of the law relating to the assessment of damages’.<sup>142</sup> A major reason for this is the important qualification on the basic

<sup>136</sup> In reality, the ‘avoidable loss rule of mitigation’ does not ‘require’ any conduct because, in contrast to common perceptions to the contrary, there is in fact no ‘duty’ to mitigate. However, this rule does prevent the victim of a breach of contract (or tort) from recovering compensation for loss that could have been avoided by taking reasonable post-breach action. For discussion, see Harvey McGregor, *McGregor on Damages* (Sweet & Maxwell, 18<sup>th</sup> ed, 2009) 239–84 [7-015]–[7-090].

<sup>137</sup> [1911] AC 105.

<sup>138</sup> [1911] AC 301.

<sup>139</sup> *British Westinghouse* [1912] AC 673, 690.

<sup>140</sup> (1830) 7 Bing 169; 131 ER 65.

<sup>141</sup> *British Westinghouse* [1912] AC 673, 690; see also at 689, where the Lord Chancellor stated that while the plaintiff is under no obligation to do more than what is

reasonable and prudent ... when in the course of his business he has taken action arising out of the transaction, which action has diminished his loss, the effect in actual diminution of the loss he has suffered may be taken into account even though there was no duty on him to act.

<sup>142</sup> David McLauchlan, ‘Expectation Damages: Avoided Loss, Offsetting Gains and Subsequent Events’ in Djakhongir Saidov and Ralph Cunnington (eds), *Contract Damages: Domestic and International Perspectives* (Hart Publishing, 2008) 349, 360. See also Harvey McGregor,

rule that was noted in the preceding paragraph (that is, that a factual benefit accruing to the victim of a wrong only reduces the compensation payable if it arises 'out of the consequences of the breach'). If the benefit cannot be so characterised, it is said to be 'collateral',<sup>143</sup> 'indirect',<sup>144</sup> or '*res inter alios acta*'.<sup>145</sup> However, precisely what makes a benefit 'collateral' or 'indirect' in this context is not clear and there are many decisions that are difficult to reconcile with Viscount Haldane LC's statements in *British Westinghouse*.

One notable example of such a case is *Hussey v Eels*,<sup>146</sup> which was cited with approval by Crennan and Bell JJ in *Clark v Macourt*.<sup>147</sup> The claimants there bought a house from the defendant. Upon discovering that the house was prone to subsidence, they demolished it (because repair was uneconomic) and sold the land along with the planning permission to rebuild that they had acquired following the breach. The financial benefit the claimants obtained as a result of these actions was not taken into account in assessing their award even though, as McGregor himself has observed, 'it is difficult to see why those acts did not arise from the consequences of the wrong'.<sup>148</sup>

Commentators have considered the difficulties just referred to fairly extensively. But there is another problem with the orthodox understanding of *British Westinghouse* that generally is not appreciated. Andrew Dyson has shown that there was in fact 'no need to invoke the avoided loss rule (as conventionally understood) ... to justify the result' in the House of Lords because 'contrary to the finding of the arbitrator ... [LU in fact] did no more than it was reasonably expected to do by replacing the Westinghouse turbines'.<sup>149</sup>

'The Role of Mitigation in the Assessment of Damages' in Djakhongir Saidov and Ralph Cunnington (eds), *Contract Damages: Domestic and International Perspectives* (Hart Publishing, 2008) 329, 336, describing the area as 'of great difficulty'.

<sup>143</sup> McGregor, *McGregor on Damages*, above n 136, 288 [7-097]. This term was also used in this context by Lord Denning MR in *Lavarack v Woods of Colchester Ltd* [1967] 1 QB 278, 290-1.

<sup>144</sup> Andrew Burrows, *Remedies for Torts and Breach of Contract* (Oxford University Press, 3<sup>rd</sup> ed, 2004) 157.

<sup>145</sup> *British Westinghouse* [1912] AC 673, 691 (Viscount Haldane LC).

<sup>146</sup> [1990] 2 QB 227.

<sup>147</sup> (2013) 304 ALR 220, 227 [28].

<sup>148</sup> McGregor, 'Mitigation in the Assessment of Damages', above n 142, 339.

<sup>149</sup> Dyson, above n 135, 423. That is, the most reasonable course of action for LU to pursue in 1908 was to replace the defective Westinghouse machines with the significantly more efficient Parsons machines, meaning that, in accordance with the reasonable expenses rule, the costs incurred in doing this were recoverable.

Given the rate at which steam turbine efficiency was advancing in the early 1900s and that one could expect to have to replace even non-defective machines every five years or so,<sup>150</sup> it simply could not have been reasonable for LU to continue to use the Westinghouse turbines, even if those machines had complied with the contractual specifications, until they wore out.<sup>151</sup> As Dyson explains, this means that while *British Westinghouse* ‘is not a good illustration of the avoided loss rule, for which it is currently best known’, it is ‘a good — albeit complicated — illustration of the reasonable expenses rule’,<sup>152</sup> as indeed Lord Hoffmann himself observed in *Dimond v Lovell*.<sup>153</sup>

### B Application to the Present Case

As just explained, the applicability of the ‘avoided loss rule of mitigation’ depends upon whether the relevant post-breach conduct or event that reduces the innocent party’s loss is sufficiently closely connected to the contractual transaction that the benefit accruing to that party therefrom cannot be considered ‘collateral’ to the breach.<sup>154</sup> This aspect of the rule seems to underpin Hayne J’s finding in the present case that Clark’s ‘subsequent purchases and use of replacement sperm left her neither better nor worse off than she was before she undertook those transactions’.<sup>155</sup> Alternatively, his Honour may be referring to the related but distinct issue of ‘betterment’.<sup>156</sup> Unfortunately, the authorities in this area are hopelessly confused and may be impossible to reconcile. The potential to create some order out of the present chaos provides a further reason to prefer the account proposed here.

Hayne J’s conclusion on this issue is supported by the analysis that this case note has advanced. His Honour’s explanation nevertheless obscures the

<sup>150</sup> Ibid 413, 422.

<sup>151</sup> As Dyson notes, LU in fact decided to replace the Parsons turbines as early as 1913 (five years after they were purchased), even though these machines ‘had met or even slightly improved upon their guaranteed efficiency’: ibid 422–3.

<sup>152</sup> Ibid 423. There is no dispute about the existence of this rule. As Dyson observes, ‘[i]t is trite law that expenses reasonably incurred in mitigation [of loss] are recoverable’. However, these expenses must be offset against any benefits that accrue from taking such action. See also McGregor, *McGregor on Damages*, above n 136, 284–8 [7-091]–[7-096].

<sup>153</sup> [2002] 1 AC 384, 401–2, where the claim for damages was for negligence rather than breach of contract.

<sup>154</sup> Thus, according to Professor Burrows, ‘[d]irectness ... plays an analogous but reverse role to remoteness and intervening cause’: Burrows, above n 144, 157.

<sup>155</sup> *Clark v Macourt* (2013) 304 ALR 220, 225 [19].

<sup>156</sup> See above n 25 and accompanying text.

true reason why *British Westinghouse* did not determine the outcome of the present appeal. The critical point in *Clark v Macourt* was that Clark was seeking the cost of substitute performance rather than compensation for factual loss. This meant that the monetary award to which she was entitled was unaffected by her eventual factual position, including any benefit that may have accrued to her as a result of receiving the Xytex sperm instead of that which SGFC promised to deliver. By contrast, LU's claim in *British Westinghouse* was one for compensation for the losses it in fact incurred in making good BW's defective performance, which meant that any award made to LU was liable to be reduced to take account of any relevant benefits that accrued to it as a result of BW's breach.

Keane J considered the question of 'mitigation' in more detail, making a number of noteworthy observations. With regard to the 'avoided loss rule', his Honour essentially agreed with Hayne J's reasoning, but expressed matters more in accordance with the view proposed here.<sup>157</sup> Following this, Keane J considered the applicability of *British Westinghouse* in the context of Macourt's claim that he was entitled to a discount on the basis that purchasing the Xytex sperm had resulted in 'betterment' for Clark. To this argument his Honour responded that the present case 'is not analogous to *British Westinghouse* ... [since Macourt did not suggest that] the evidence established extra profitability [to Clark] attributable to the use of the Xytex sperm'.<sup>158</sup> On the view advanced here, any factual benefits accruing to Clark from use of the Xytex sperm could not have been offset against an award for the cost of substitute performance. But such benefits could have reduced a *compensatory* award for loss consequent on breach provided the recovery of such loss was not precluded by principles of remoteness and the 'avoidable loss rule of mitigation', which prevents a victim of breach recovering compensation for loss that could have been avoided by reasonable post-breach conduct, and also that the relevant benefits accruing to Clark were not 'collateral'.

Keane J's final noteworthy observation in relation to the 'mitigation' argument advanced by Macourt was his finding that *British Westinghouse* is 'irrelevant' to the present case because the buyer there 'did not claim the difference between the actual value of the goods at the time of delivery and the value they would have had if they had complied with the seller's contrac-

<sup>157</sup> See *Clark v Macourt* (2013) 304 ALR 220, 246 [128], where Keane J stated that: 'To say that in the conduct of the appellant's practice she was able to recover the cost to her of the Xytex sperm ... after acquiring the assets is to fail to address the claim which the appellant actually made.'

<sup>158</sup> *Ibid* 249 [142].

tual obligations'.<sup>159</sup> Professor Stevens has made a similar claim,<sup>160</sup> but strictly speaking it is not correct. Dyson has shown that LU in fact did make a 'difference in value' claim in the House of Lords, albeit not in the original pleadings.<sup>161</sup> This raises the question of why this aspect of LU's claim was denied. The principled answer must be that, as Stevens himself notes, an innocent party can recover *either* the difference in value between the goods promised and those supplied *or* the cost of curing the breach, but not both.<sup>162</sup> To award the innocent party both the 'difference in value' and the 'cost of cure' (whether the latter award is claimed on a substitutionary or compensatory basis) would amount to double recovery.<sup>163</sup>

The effect of *British Westinghouse*, therefore, can be summarised as follows. In 1908, LU had two claims available to it. One involved claiming, on a substitutionary basis, the minimum cost of *replacing* BW's defective turbines at or within a reasonable time of the breach. As explained already, whenever there is an available market for the subject goods, this is the difference in market value between the goods promised and those provided at this time. Pursuing this option would have meant that LU could not recover any loss incurred directly in curing the breach because, as just explained, an innocent party cannot recover both the difference in value between what was promised

<sup>159</sup> Ibid 249 [143], noting that F Dawson, 'The Remedies of the Buyer' in M Bridge (ed), *Benjamin's Sale of Goods* (Sweet & Maxwell, 8<sup>th</sup> ed, 2010) 1034 [17-001], 1079–80 [17-056] states that if the buyer in *British Westinghouse* had claimed the difference between the value of the goods and the value of compliant goods at the time of delivery, that claim 'could not be reduced by reference to the rules of mitigation'.

<sup>160</sup> See Stevens, 'Damages and the Right to Performance', above n 18, 181. Part of the reason that *British Westinghouse* has caused so much confusion is that there the costs involved in curing the breach corresponded with the losses LU actually incurred (that is, the costs involved in making up for the machines' inefficiency from 1902–08).

<sup>161</sup> Dyson, above n 135, 424, quoting *British Westinghouse* [1912] AC 673, 680, where Dyson notes that counsel is reported as arguing: 'the respondents' position is that being defective the machines are worth so much less than the contract price, and that that is a proper consideration for the arbitrator'; see also at 685–6 (Viscount Haldane LC).

<sup>162</sup> Stevens, 'Damages and the Right to Performance', above n 18, 181.

<sup>163</sup> At least *prima facie*, it would seem that in *British Westinghouse* LU could have claimed the cost of curing BW's breach on *either* a substitutionary or compensatory basis. However, normally a *substitutionary* claim for the 'cost of cure' is one for the cost of *repairing* the defect in order to ensure conformity with the contract rather than one for the costs associated with *neutralising* the defect. Expenses of this kind are normally claimed as compensation to make good the actual costs incurred. To the extent that a substitutionary claim of this kind is possible, the expenses actually incurred would be relevant only as *evidence* of the reasonable cost of ensuring substitute performance, but even for a proponent of the substitutionary analysis like the present author, it does seem more natural to treat a claim for additional expenses incurred in neutralising the breach as compensatory.

and what was received *and* the expense in fact incurred in making good this deficiency.<sup>164</sup> However, this would not prevent this party from recovering any further *consequential* losses in fact incurred as a result of the breach, provided such losses were not ‘too remote’ or that the recovery of these losses was not precluded by either the ‘avoidable loss’ or ‘reasonable expenses’ rules of mitigation.<sup>165</sup>

LU’s second option, and ultimately the one it pursued, was to claim, on a *compensatory* basis, the costs it incurred in neutralising (that is, making good) the detrimental effect of the defective machines up until the time it became ‘unreasonable’ to keep incurring these costs because the only prudent course of action available to it (in order to minimise the *loss* caused to it by BW’s breach) was to purchase new machines.<sup>166</sup> Prima facie, the costs incurred in purchasing the new machines also were recoverable on a compensatory basis via the reasonable expenses rule of mitigation. However, as Dyson explains, these costs needed to be offset against any factual benefits that accrued to LU by taking this action, because calculating the expenses sustained by the innocent party in taking reasonable action to mitigate loss ‘involves an assessment of the net expenses [incurred], taking into account the losses and gains that actually accrued to the claimant’.<sup>167</sup>

<sup>164</sup> As Stevens explains, ‘[r]ecovering the former means that the latter loss is, to that extent, not incurred’: Stevens, ‘Damages and the Right to Performance’, above n 18, 181.

<sup>165</sup> In this context, direct loss means loss within the first limb of *Hadley v Baxendale* (1854) 9 Ex 341, 345; 156 ER 145, 147 (that is, loss arising in the usual course of events), while the term ‘consequential loss’ potentially includes everything else.

<sup>166</sup> As explained in above n 163, a possible alternative explanation of LU’s claim for the expenses incurred in neutralising the effects of BW’s breach is as a substitutionary claim for the ‘cost of curing’ this breach. Although this characterisation would be consistent with the fact that the benefits LU obtained from the new Parsons machines were not set off against these expenses, it is unnecessary to characterise the claim for these expenses as substitutionary in order to explain this as this benefit was clearly ‘collateral’ to the original transaction on any understanding of that term. In addition, characterising LU’s claim for the expenses it incurred in neutralising the breach as substitutionary faces the difficulty, explained in above n 163, that the normal way of quantifying a substitutionary claim for the ‘cost of cure’ is the reasonable cost of *repairing* the breach rather than the reasonable cost of neutralising it, making this characterisation appear to be somewhat artificial. For this reason, it is submitted that Dyson’s explanation of the decision, which notably accords with Lord Hoffmann’s account in *Dimond v Lovell* [2002] 1 AC 384, 401–2, is the most convincing.

<sup>167</sup> Dyson, ‘*British Westinghouse Revisited*’, above n 135, 423.

## VII CONCLUSION

In *Robinson v Harman*, Parke B stated that the object of awarding damages for breach of contract is to put the innocent party 'in the same situation ... as if the contract had been performed'.<sup>168</sup> The reference to 'situation' in this statement is ambiguous. It could be that only the innocent party's factual (or simply financial) position is relevant in quantifying the sum of money payable following breach. Alternatively, the objective of such awards may be to provide the innocent party with a monetary substitute for the promised performance, in addition to making good any further losses caused by the breach that fall within the limits defined by the relevant rules of remoteness and mitigation. Although the former interpretation often is assumed to be correct, this case note has argued that the latter interpretation is preferable. The major significance of the High Court's decision in *Clark v Macourt* lies in its strong endorsement of this view.

The substantive analysis in this case note commenced by examining the logic of Gageler J's reasoning in the High Court from within the orthodox 'policy-based' understanding of the market rule of assessment. This was compared with the superficially similar approach that a majority of the House of Lords adopted in *The Golden Victory* and it was suggested that, on the rule's orthodox understanding, the justification for departing from it here initially may appear stronger than it was in *The Golden Victory*. Despite this, the approach adopted by the majority in *Clark v Macourt* was defended principally on the basis that the market rule is best explained as a simple application of the principled distinction between substitutionary and compensatory money awards rather than because it may promote the various 'policy' objectives often cited in the rule's defence. Additionally, it was shown that adopting the market rule in *Clark v Macourt* is consistent with either of the two main kinds of substitutionary analyses that have been advanced in the relevant academic literature.

It was explained also that the common failure to recognise the distinction between substitutionary and compensatory money awards is attributable to two main factors. One is the confusing terminology typically employed in this area of the law, in particular the fact that 'loss' and 'compensation' are expressions that can be understood at different levels of specificity. The other is that very often awards that substitute for performance also have the *effect* of making good some or all of the detrimental factual consequences that a breach has caused, which means that often a substitutionary award may be

<sup>168</sup> (1848) 1 Ex 850, 855; 154 ER 363, 365.

characterised alternatively as one that compensates for loss. But the fact that on occasion a contracting party is entitled to a sum of money that puts him or her into a superior factual position than he or she would have occupied had the contract been performed demonstrates the need for the distinction implicitly recognised by the High Court in *Clark v Macourt*.

Recognising this distinction has important implications. One of particular relevance to the present case is the potential to rationalise and simplify the notoriously difficult case law concerning the 'avoided loss rule of mitigation'. *British Westinghouse* is often cited for the proposition that, when the victim of a civil wrong has taken action 'arising out of the consequences of the breach',<sup>169</sup> this party cannot recover for loss avoided by this action, even if it went beyond that required by the 'avoidable loss rule of mitigation', unless this reduction can be described as 'collateral'. It was argued, however, that a preferable interpretation of *British Westinghouse* is that LU was entitled to recover the expenses incurred in rectifying BW's breach on a compensatory basis but only up until 1908 when it became unreasonable to keep incurring these costs as the only prudent course available to LU was to purchase new machines. The reason that the cost of purchasing these new machines was not itself recoverable as 'loss' via the reasonable expenses rule of mitigation is that, when quantifying an innocent party's compensatory entitlement, any losses this party incurs must be offset against any factual benefits that accrue to this party as a result of the actions taken in mitigation.

<sup>169</sup> *British Westinghouse* [1912] AC 673, 690 (Viscount Haldane LC).