CLAIMS FOR THE VALUE OF THE LOST CONTRACTUAL PERFORMANCE

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It is often said that contractual damages awards compensate the promisee for loss caused by breach. Statements like this are indeterminate because they leave unspecified whether such awards aim merely to make good some of the eventual deterioration in the promisee's balance sheet position attributable to breach or instead redress the immediate loss of performance entailed by the breach itself. This article demonstrates that Anglo-Australian law recognises both of these claims and defends the High Court's emphatic recognition of this proposition in Clark v Macourt.

I INTRODUCTION

It is commonly claimed that damages awards for breach of contract aim to compensate the promisee for loss suffered in consequence of the promisor's breach. But statements of this kind mask an ambiguity as regards the underlying purpose of such awards. In particular, it is not clear whether such awards aim merely to make good the ultimate deterioration in the promisee's balance sheet position that is causally attributable to the promisor's breach or whether they instead aim to enforce (or 'vindicate') the promisee's contractual right to performance by providing a monetary substitute for what was promised, but not provided, where the award's availability does not depend upon any quantifiable deterioration in the promisee's ultimate balance sheet position.

This basic ambiguity regarding the purpose of awarding contractual damages is starkly illustrated by the High Court's decision in *Clark v Macourt*.[1] The majority there awarded the purchaser of a fertility clinic by deed the full cost of replacing, as at the date of breach, the worthless donor sperm provided to her by the vendor as part of the assets of that business. Significantly, this sum was awarded even though: (1) it was considerably higher than the sale price of the business under the deed, (2) the purchaser substantially recouped the costs she incurred in acquiring contractually compliant sperm to replace what she received, and (3) as a registered medical practitioner, she was ethically bound by certain guidelines prohibiting her from selling donor sperm for profit.

The High Court's decision in *Clark* is controversial, provoking strident criticism. The principal concern appears to be that Clark's award significantly augmented the balance sheet position she would otherwise have occupied 'but for' the breach's occurrence; a result alleged to offend 'the compensatory principle' said

[1] (2013) 253 CLR 1; [2013] HCA 56 ('*Clark*').

to underpin contractual damages assessment.[2] This concern is misconceived, relying upon an impoverished interpretation of Parke B's famous dictum in *Robinson v Harman* (the '*Robinson v Harman* principle').[3] The true position, as Keane J held in *Clark*, is that the common law recognises at least two different kinds of claims for 'damages' following a contractual breach. One claim aims to make good certain detrimental financial consequences that the promisee eventually suffers and can causally attribute to the breach; the other aims to provide the promisee with a monetary substitute for what was promised, but not provided.

The existence of more than one kind of monetary claim upholding the *Robinson v Harman* principle is, however, not always appreciated; it being commonly said that *all* awards giving effect to this principle aim simply to make good certain detrimental consequences that the promisee can causally attribute to the breach. Moreover, even amongst those who reject this monistic view of contractual damages awards there is disagreement regarding precisely how to quantify an award that substitutes for the undelivered performance. One view is that the market value of the lost contractual performance should be awarded;[4] another is that the sum necessary to obtain a close substitute for what was promised from elsewhere provides the correct measure.[5] One possibility is that the former approach is apt in some scenarios, while the latter is appropriate in others. Regardless of this, the award made in *Clark* is consistent with either 'substitutionary' measure. This means that support for the decision does not necessitate a choice between them, though the High Court's reasoning does undoubtedly more closely accord with the former approach.

What is most critical to appreciate though, is that endorsing *Clark* requires rejecting the commonly held view that all awards upholding the *Robinson v Harman* principle are concerned merely with making good (certain of) the eventual balance sheet deterioration that the promisee can causally attribute to the breach. The better view is that making good such deterioration is simply part of the law's process for achieving next-best conformity with the primary duty breached. Uncertainty regarding the meaning of key terms used in this area of the law, such as 'loss' and 'compensation', is undoubtedly part of the explanation for why

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[2] See J Carter, G Tolhurst and W Courtney, 'Issues of Principle in the Assessment of Damages', (2014) 31 Journal of Contract Law 171 and K Barnett, 'Contractual expectations and goods' (2014) 130 LQR 387.

[3] (1848) 1 Exch 850 at 855; 154 ER 363 at 365.

[4] See R Stevens 'Damages and the Right to Performance: A Golden Victory or Not?' in Neyers, Bronaugh and Pitel (eds) in Exploring Contract Law, Hart, 2009 at 171.

[5] For different versions of this view, see B Coote, Contract Damages, Ruxley, and the Performance Interest' (1997) 56 CLJ 537, S Smith, 'Substitutionary Damages', in C Rickett (ed), Justifying Private Law Remedies, Hart, 2008 at 93, C Webb, 'Performance and Compensation: An Analysis of Contract Damages and Contractual Obligation' (2006) 26 OJLS 41 and D Winterton, Money Awards in Contract Law (Hart 2015).

confusion persists.[6] While 'loss' clearly connotes deprivation, it is not always clear whether usage of the term denotes the deterioration in balance sheet position that eventually – and only contingently – accrues to the particular promisee following breach ('consequential loss')[7] or rather the loss of *performance* necessarily entailed by the breach itself, a phenomenon which may or may not eventually produce deleterious consequences for the promisee. Although it is possible to describe both phenomena as 'loss', doing so tends to produce a conflation of the two different kinds of claim outlined above and, accordingly, to the incorrect application of principles concerned with limiting recoverable 'consequential loss' (eg 'remoteness' and 'mitigation') to claims designed to redress what might instead be called 'direct loss'.[8]

This article seeks to demonstrate that Anglo-Australian law recognises the general availability of a claim for the market value of the lost contractual performance and, in consequence, to defend the correctness of the High Court's decision in *Clark*. Parts II and III provide necessary background for the arguments that follow, explaining the basic indeterminacy in the *Robinson v Harman* principle and demonstrating that, in both Australia and the United Kingdom, claims for the market value of the undelivered performance are generally available following the provision of defective goods or services. Finally, Part IV provides a comprehensive defence of *Clark* from the various academic criticisms commentators have levelled against it.

II THE INDETERMINACY OF THE *ROBINSON V HARMAN* PRINCIPLE

As is well known, the principle generally understood to govern the assessment of contractual damages awards was propounded by Parke B in *Robinson v Harman*. There his Honour explained that:

> where a party sustains loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation… as if the contract had been performed.[9]

The conventional interpretation of this principle is that it defines the appropriate baseline against which to measure the financial loss the promisee is entitled to

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[6] This is why some have advocated the use of different terminology. See, for example, Stevens 'Damages and the Right to Performance: (n 4) and Winterton, *Money Awards in Contract Law* (n 5) Chapter 3.

[7] This distinction essentially replicates the well-known philosophical distinction between the *results* of an action and its *consequences*. See G von Wright, *Norm and Action*, Routledge and Kegan Paul, 1961 at 39ff. See also A Kenny, *Will, Freedom and Power*, Oxford, 1975 at 54ff.

[8] This was the error into which the Court of Appeal fell in *Bence Graphics International Ltd v Fasson UK Ltd* [1998] QB 87; criticised on this basis by Sir Günter Treitel in 'Damages for breach of warranty of quality' (1997) 113 *LQR* 188.

[9] (1848) 1 Exch 850 at 855; 154 ER 363 at 365.

recover in an action for breach of contract;[10] recovery for non-financial loss being permitted only in certain exceptional circumstances.[11] This interpretation understandably leads to the view that such awards should be quantified by comparing the promisee's hypothetical financial position had the contract been performed with the financial position she now occupies due to breach, subject to applicable limiting principles.[12] Accordingly, in *White Arrow Express v Lamey*, Sir Thomas Bingham MR observed that the *Robinson v Harman* formulation:

> assumes that the breach has injured… [the claimant's] financial position: if he cannot show that it has, he will recover nominal damages only.[13]

But notice that this form of expression is indeterminate because it leaves unspecified whether it is the breach's immediate result or how matters eventually turn out for the promisee that matters. In this regard it is noteworthy that in White Arrow itself Lord Bingham MR clarified that a party who contracted for goods or services of a certain quality but received something inferior did suffer a *prima facie* financial loss even though its balance sheet position may ultimately be unaffected by the breach. The measure of this 'financial loss' is 'the difference between the price paid (or, if it is lower, the market value of what was contracted for) and the market value of what was obtained'.[14] In order to recover this difference in market value, however, the complaining party must plead and prove its existence, which the claimant in White Arrow did not do.

As just noted, precisely what Parke B's dictum means depends critically upon exactly *when* the promisee's situation is considered. While in one sense a breach of contract always produces an immediate deterioration in the promisee's balance sheet position, this initial deterioration may be eliminated or reduced by subsequent events. A simple example that demonstrates this point is the supply of goods to a café owner that are inferior to those promised (and paid for), which does not end up negatively affecting the café owner's balance sheet because it does not produce any difference in the profits made. The question arises as to whether damages are nevertheless payable. The generally accepted view is that the café owner is entitled to an award measured by reference to the difference in market value between the

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[10] See, for example, Viscount Haldane's observation in *British Westinghouse Electric & Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd* above [1912] AC 673 (HL), 689 that the 'fundamental basis [for awarding damages for breach of contract] is... compensation for pecuniary loss naturally flowing from the breach', cited with approval in *Ruxley Electronics & Construction Ltd v Forsyth* [1996] AC 344 at 366 per Lord Lloyd and in *The Golden Victory* [2007] UKHL 12; [2007] 2 AC 353 at [9] per Lord Bingham.

[11] See, for example, *Baltic Shipping v Dillon* (1993) 176 CLR 344.

[12] This, for example, is the basic approach to damages quantification advocated in A Kramer, *The Law of Contract Damages*, Hart, 2014.

[13] [1995] CLC 1251 at 1254.

[14] Ibid 1255.

goods promised and those received.[16] But the significance of this rule, and the appropriateness of extending it to other cases, is contentious.

One view is that, even if it occasionally produces an award exceeding any deterioration in the buyer's balance sheet position, this 'market rule' is simply an easily applicable and commercial certain way of achieving the *Robinson v Harman* principle's objective in a way that treats buyers and sellers even-handedly.[17] A competing and, for reasons advanced below, preferable view is that the rule has greater significance because it demonstrates that the underlying purpose of awarding damages is not merely to make good the relevant breach's detrimental financial consequences, but rather to achieve 'the "next-best" position to the wrong not having been committed' in the first place.[18] Thus, while an exclusively consequence-focused interpretation of *Robinson v Harman* awards is often assumed, Parke B's famous dictum is open to a quite different interpretation according to which the primary aim of such awards might be described as enforcing (or 'vindicating') the promisee's legal right to performance rather than simply making good certain negative consequences eventually accruing to the promisee following breach.[19]

Significantly, Parke B himself appeared to prefer a 'performance-oriented' interpretation of his famous dictum,[20] and the High Court has consistently affirmed the correctness of this interpretation.[21] But, as noted earlier, it is important to appreciate that proponents of this view disagree about precisely what 'substituting for performance' entails. One view, most prominently associated with Professor Stevens,[22] is that such awards are measured by reference to the market value of that aspect of the performance denied by the relevant breach. A competing view, which often (but not always) produces the same quantum, is that 'substitutionary' awards provide a sum of money sufficient to obtain a close substitute for what was

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[16] See *Jones v Just* (1868) LR 3 QB 197; *Slater v Hoyle & Smith Ltd* [1920] 2 KB 11 (CA); *Bear Stearns Bank Plc v Forum Global Equity Ltd* [2007] EWHC 1576 (Comm). Compare *Bence Graphics International Ltd v Fasson UK Ltd* [1998] QB 87, forcefully criticised in GH Treitel, 'Damages for Breach of Warranty of Quality' (1997) 113 *LQR* 188.

[17] See, for example, M Bridge, 'The Market Rule of Damages Assessment' in D Saidov and R Cunnington (eds), *Contract Damages: Domestic and International Perspectives* (Hart Publishing, 2008) 431, 454.

[18] See R 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, 174.

[19] For seminal analysis, see D Friedmann, 'The Performance Interest in Contract Damages' (1995) *LQR* 628.

[20] As noted by Professor Coote in 'Contract Damages, *Ruxley*, and the Performance Interest' (n 5) 540, citing *Thornton v Place* (1832) 1 Mood & R 217 at 219 and *Pell v Shearman* (1855) 10 Ex 766 at 769.

[21] See *Bellgrove v Eldridge* [1954] HCA 36; (1954) 90 CLR 613; *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* (2009) 236 CLR 272; [2009] HCA 8 (*Tabcorp*) at [13] and *Clark* (n 1), discussed further below.

[22] See, for example Stevens, above (n 18). For a similar, but not identical, view, see F Reynolds, '*The Golden Victory* – A Misguided Decision' (2008) 38 *Hong Kong University Law Journal* 333.

promised from elsewhere; an award that might alternatively be described as one for the monetary equivalent of specific performance.[23] Notably, both approaches also recognise the necessity of making good certain detrimental consequences of non-performance not made good by the applicable 'substitutionary' award.

In a standard case involving the breach of a contract for the provision of goods or services these two approaches produce identical results. On either view a disappointed buyer recovers the difference between the market price of the goods or services promised and those received, possibly alongside a further amount making good certain additional deleterious consequences attributable to the breach not made good by the 'substitutionary' award.[24] The principal situation where the two approaches diverge is when the promisee claims the cost of *repairing*, rather than replacing, the defective performance received. On Stevens' approach, the basic 'difference in value' measure, accompanied by an award to make good any further recoverable 'consequential loss', is again appropriate.[25] On the alternative approach, 'vindicating' the promisee's legal right to performance requires awarding an amount necessary to repair the defective performance received, at least where repairing the breach is considered 'reasonable'. Powerful support for this second approach in the repair context can be found in the High Court's decisions in *Bellgrove v Eldridge*,[26] and *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd*.[27]

III 'SUBSTITUTIONARY' CLAIMS FOR THE VALUE OF GOODS OR SERVICES NOT PROVIDED

The previous section outlined a critical indeterminacy in the *Robinson v Harman* principle. Parke B's famous words do not make clear whether awards upholding this principle aim simply to make good the eventual deterioration in the promisee's final balance sheet position attributable to breach or instead aim to enforce the promisee's legal right to performance by providing a monetary substitute for what has not been provided. Additionally, proponents of the second of these views disagree amongst themselves about whether 'substituting for performance' entails

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[23] For different versions of this view, see Coote, (n 20), S Smith, 'Substitutionary Damages', in C Rickett (ed), *Justifying Private Law Remedies*, Hart, 2008 at 93, C Webb, 'Performance and Compensation: An Analysis of Contract Damages and Contractual Obligation' (2006) 26 *OJLS* 41 and Winterton, above (n 5).

[24] Note, however, that as Professor Stevens explains, a 'plaintiff cannot recover *both* the difference in value between what it was promised and what it received, and the expense it in fact incurs in making good the defective performance. Recovering the former means that the latter loss is, to that extent, not incurred' (emphasis in original). See above (n 18) at 181.

[25] According to Professor Stevens, this can include a further sum to cover the cost of repair should an intention to repair be proven on the balance of probabilities and undertaking such repairs be found to be a reasonable way to *mitigate* this 'consequential loss'.

[26] [1954] HCA 36; (1954) 90 CLR 613.

[27] (2009) 236 CLR 272; [2009] HCA 8.

awarding the market value of the performance not provided or awarding a sufficient sum of money to obtain a close substitute for what was promised. While awards of damages *in lieu* of specific performance and certain awards for the cost of repairs are probably best understood as examples of the latter approach,[28] awards of the market value of the undelivered goods or services may be best rationalised as instances of the former.[29] The second of these claims is now defended.

A *'Substitutionary' Claims for the Value of Contractually Promised Goods*

The traditional common law position is that, in a damages claim for breach of contract following the failure to deliver goods in accordance with the contractual specifications, the buyer is entitled to the difference between the market value of the goods promised and the market value of the goods received at the date of the breach, at least where there is an 'available market'.[30] Authority for this proposition in non-delivery cases can be found in *Barrow v Arnaud*,[31] and for cases of defective delivery in *Jones v Just*.[32] In the latter case, Jones contracted to buy first quality hemp but received hemp that was inferior. Between breach and trial the market price of what he received rose and Jones sold it on at substantially the same price at which the first quality hemp had stood at the time of delivery. In the Court of Appeal, Cockburn CJ, Blackburn and Mellor JJ approved the trial judge's jury direction that damages should be measured by reference to the difference between the market value of the hemp promised and that received at the date of delivery.

This so-called 'market rule' of assessment in the sale of goods context has long been legislatively enshrined in the United Kingdom. Sections 51(3) and 53(3) of the current legislation, the Sale of Goods Act 1979 UK, respectively provide that where there is an available market for the goods promised and a seller fails to deliver, or delivers goods that fail to conform to the contractual specifications, the buyer's measure of damages are *prima facie* to be ascertained by reference to the difference between the contract price and the market or current price of the goods' at the date of breach.[33] Analogous provisions can be found in each of the various Australian jurisdictions.[34] Additionally, where delay is a ground for rejection, and the right to reject is exercised, the buyer's damages are generally assessed in a similar fashion.[35]

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[28] For a defence of this view, see Winterton, *Money Awards in Contract Law* (n 5) Chapters 7 and 8.
[29] Compare the more expansive thesis advanced in Winterton, *Money Awards in Contract Law* (n 5).
[30] This means goods that can be freely bought or sold at a price fixed by supply and demand. See E Peel (ed), *Treitel's Law of Contract* (12th edn, Sweet & Maxwell 2010) [20-044].
[31] (1846) 8 QB 595; 115 ER 1000.
[32] (1868) LR 3 QB 197.
[33] These provisions replace those previously found in the *Sale of Goods Act 1897* UK.
[34] See, for example, Sections 52 and 53 of the *Sale of Goods Act 1923* NSW.
[35] See E Peel (ed), *Treitel's Law of Contract* (12th edn, Sweet & Maxwell 2010) 1018.

It is commonly said that such awards are simply a measure of the buyer's financial loss at the date of breach.[36] Now if the buyer does go into the market to purchase substitute goods at the prevailing price at or around the date of breach, this 'market rule' generally accurately measures (at least some of) the financial loss this party suffers due to the breach.[37] In other cases, however, events subsequent to breach may reduce or eliminate any initial deterioration in the promisee's balance sheet position. The conventional 'loss-based' orthodoxy suggests that this should be reflected in the amount awarded. However, as earlier explained, the 'market rule' will not normally be displaced by demonstrating that on the particular facts the buyer was left no worse off as a result of the seller's breach,[38] which undermines the conventional view. It is also true that a buyer whose financial position deteriorates to a greater extent than the sum produced by the 'difference in (market) value' measure can recover for such loss provided it is within the scope of recovery permitted by other limiting principles (eg 'remoteness' and 'mitigation').[39]

A better understanding of these awards is therefore that they substitute for the promised, but undelivered, performance. As already explained, however, there are two competing views regarding precisely what this entails: first, awarding the market value of the performance not provided and secondly, awarding the sum necessary to obtain a close substitute for what was promised from elsewhere. As also noted above, when contractually promised goods or services are not provided these approaches produce the same quantum. While this makes it unnecessary to decide between these competing interpretations, it is certainly true that that the majority's reasoning in Clark indicates a preference for the former approach. The decision is accordingly best understood as recognising the availability of a claim for the value of the lost contractual performance following a failure to deliver a specific asset promised under a contract for the sale of a business.

B *'Substitutionary' Claims for the Value of Contractually Promised Services*

Perhaps more controversially, the principles outlined above in relation to the sale of goods also generally apply to the defective provision of contractually promised services. Recall that in *White Arrow Express* Lord Bingham MR held that a party who contracted for services of a certain quality but received something inferior is *prima facie* entitled to 'the difference between the price paid (or, if it is

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[36] See, for example, A Burrows, *Remedies for Torts and Breach of Contract* (3rd edn, OUP, 2004) 209.
[37] The buyer is generally also able to recover for any additional financial loss caused by the breach that is within the limits imposed by the applicable principles of 'remoteness' and 'mitigation'.
[38] See *Williams Bros v ET Agius Ltd* [1914] AC 510 (HL) for a case of non-delivery and *Slater* (n 16) for a case of defective delivery.
[39] See *Re (R & H) Hall Ltd and Pim (WH) (Jnr) and Co's Arbitration* (1928) 33 Com Cas 324 (HL), explained on this basis by Stevens in 'Damages and the Right to Performance' (n 4) at 177.

lower, the market value of what was contracted for) and the market value of what was obtained',[40] provided that this difference in market value is pleaded and proved. The claimant in *White Arrow* failed to do this, instead framing its claim as one for the recovery of a portion of the price paid. This 'restitutionary' claim failed due to the requirement that any purported 'failure of consideration' be 'total'.

A similar view was expressed, albeit in *obiter*, by Lord Nicholls in *Attorney-General v Blake*.[41] However, perhaps the most significant source of support for the availability of such a claim comes from the House of Lords' decision in *Alfred McAlpine Construction Ltd v Panatown Ltd*.[42] In the course of upholding Panatown's claim for substantial 'damages' following McAlpine's failure to perform the work contracted for, Lord Goff and Lord Millett held,[43] and Lord Browne-Wilkinson was 'prepared to assume',[44] that a promisee suffers 'loss' whenever services contracted for are not provided. The fact that the contract there was to construct a building rather than provide a 'pure service', which Kramer defines as something failing to leave 'a marketable residue' arguably reduces the decision's significance in this regard.[45] But in the more recent first instance decision in *Giedo Van der Garde BV v Force India Formula One Team Limited ('Force India')*,[46] Stadlen J endorsed the reasoning of Lord Goff and Lord Millett in *Panatown* in the context of a claim for breach following the failure to provide a 'pure service'.

The claimant in *Force India* was an aspiring Formula One driver whom the defendant, in return for $3 million, promised to allow to drive a Formula One car in testing, practicing or racing for 6,000 kilometres. When the defendant failed to permit the claimant to drive for the agreed distance, he sought financial recompense on various bases. Relevantly, the claimant successfully recovered, as 'performance interest damages',[47] the market value of the kilometres and associated benefits the defendant promised, but failed, to provide. Stadlen J upheld the claim on the basis that it was not inconsistent with any authority brought to his attention and was supported by analogy to the approach to 'damages' assessment for the non-delivery of goods in section 51(3) of the *Sale of Goods Act* 1979 UK, as well as the old common law authorities this section reflects.[48] His Lordship also held that the

[40] [1995] CLC 1251 (CA), 1255.
[41] [2001] AC 268 (HL) 286.
[42] [2001] 1 AC 518 (HL).
[43] ibid 547 (Lord Goff) and 593 (Lord Millett).
[44] ibid 577.
[45] See A Kramer, *The Law of Contract Damages* (2nd edition, Hart 2017) 2-01. The significance of this distinction is obviously that the existence of a marketable residue arguably makes the contract more analogous to one for the sale of goods rather than one for the provision of 'pure services'.
[46] [2010] EWHC 2373 (QB).
[47] ibid [498].
[48] ibid [486].

award was consistent with the approach in various cases involving the failure to perform work under an employment contract (i.e. *Miles v Wakefield MDC*,[49] *National Coal Board v Galley*,[50] and *Royle v Trafford*)[51] and was analogous to the approach articulated by Lord Bingham MR in *White Arrow Express*.[52]

A similar approach was also taken in the recent Australian Federal Court decision in *Zomojo Pty Ltd v Hurd (No 4)*.[53] The defendant there was the managing director of the claimant company and breached his contract of employment by spending time on other ventures instead of directing his full attention to working for his employer. Relying on *Force India* as well as *National Coal Board v Galley* and *Miles v Wakefield MDC*,[54] Jessup J held that the defendant was required to pay the relevant fraction of his monthly salary as damages on the basis that these authorities:

> are consistent in holding that, where an employee fails or refuses to work for the full time for which he or she has been contracted, the employer's damages may be measured (at least) by reference to the value of the employee's remuneration in respect of the period of the failure or refusal.[55]

Significantly, his Honour also held that:

> The employer does not, as a general rule, have to establish some loss of production or output, it being presumed that the value to the employer of the employee's work is no less than what the employer was paying for it.[56]

C *Brief Word Regarding 'Negotiating Damages'*

Finally, following the UK Supreme Court's recent decision in *Morris-Garner v One Step (Support) Ltd*,[57] the place of 'negotiating damages' within the picture presented here should be briefly explained. In *Morris-Garner*, the Supreme Court held that 'negotiating damages' are available following a contractual breach only 'where the breach… results in the loss of a valuable asset created or protected by the right… infringed'.[58] It might be wondered whether this undermines the central thesis of this article. It does not because, even interpreting *Morris-Garner* restrictively, its effect is merely to limit the availability of a particular kind of

[49] [1987] AC 539 (HL).
[50] [1958] 1 WLR 16 (CA).
[51] [1984] IRLR 184.
[52] [1995] CLC 1251 (CA).
[53] [2014] FCA 441.
[54] ibid [9]-[14].
[55] ibid [15].
[56] ibid.
[57] [2018] UKSC 20.
[58] ibid [92].

'substitutionary' claim (i.e. one based on a 'hypothetical release bargain') to cases where the breach deprives the promisee of a 'valuable asset created or protected by the right… infringed'.[59] The decision does not limit the availability of a 'substitutionary' claim in the more typical circumstance where there is a *positive* obligation to provide services (or goods) and the value of what was not provided can be quantified directly by reference to the relevant market.[60]

IV THE SIGNIFICANCE OF *CLARK V MACOURT*

Although the Australian case law is less extensive than that emanating from the UK, the previous section demonstrated that, following a failure to deliver goods or services conforming to the contractual specifications, both jurisdictions recognise that the buyer is normally entitled to recover the market value of that aspect of the performance denied by the relevant breach. This brings us to a consideration of *Clark v Macourt*. The decision's principal significance lies in its recognition of the general availability of such a claim following the failure to deliver a specific asset under a contract for the sale of a business even in circumstances where the purchaser substantially recouped from her patients the costs incurred in acquiring a replacement asset and was ethically bound not to profit from selling this asset.

A *The Decision:*

The decision in *Clark* starkly illustrates the contrast between a 'substitutionary' approach to damages assessment and one focusing only upon what detrimental consequences are ultimately suffered by the promisee. A brief overview of the case is now offered in order to provide necessary background for the argument that follows.

1 *Relevant Background to the Appeal*

The facts in *Clark* were appropriately described by Gageler J as 'unusual'.[61] Both Clark and Macourt were registered medical practitioners operating fertility

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[59] Note that it is not clear precisely what this includes. *Morris-Garner* itself makes clear that it does not include non-compete and non-solicitation clauses, but the availability of 'negotiating damages' for the breach of an intellectual property… [or] confidentiality agreement' was specifically approved in the majority opinion, ibid [92] (Lord Reed).

[60] Note that the availability of 'negotiating damages' for contractual breach under Australian law appears to be even more limited as such awards have generally been confined to tortious claims. See, for example, *Immer (No 155) Pty Ltd v Houghton* (Supreme Court (NSW), Cowdroy AJ, 13 November 1996, unrep), discussing *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 1 WLR 798 in relation to assessing damages for wrongful use of common property and *Bunnings Group Ltd v CHEP Australia Ltd* [2011] NSWCA 342; (2011) 82 NSWLR 420 considering damages assessment for conversion or detinue of goods, discussed at [172]-[175], [177]-[178].

[61] *Clark* above n 1 at [40].

clinics providing Assisted Reproductive Technology (ART) services. Both doctors were bound by ethical guidelines prohibiting '[c]ommercial trading in gametes or embryos' and '[p]aying donors of gametes or embryos beyond reasonable expenses'.[62] In 2002, Macourt's fertility clinic (St George) agreed via deed to sell Clark its ART practice along with certain 'assets' used in, or attached to, this practice for a price to be calculated by reference to a percentage of Clark's gross fee income in the years following the sale. These 'assets' relevantly included 3,513 'straws' of frozen donor sperm, with Macourt warranting that the identification of sperm donors complied with certain guidelines and Macourt guaranteeing St George's obligations.

Due to certain breaches of these guidelines, in combination with the 'family limit rule' in [9.14] of the RTAC Code of Practice,[63] it was held that Clark was effectively deprived of 1,996 usable straws.[64] It was further held that Clark was unable to purchase replacement sperm in Australia complying with the relevant guidelines and that the cost of market replacement at the date of breach via an American supplier called Xytex was approximately AU $1.02 million. From time to time Clark bought replacement sperm from Xytex and charged each patient a fee that substantially covered her costs in buying the straws used to treat them. When Clark refused to pay the outstanding balance due, St George sued to recover this sum. Clark counterclaimed, seeking damages for breach of warranty. Macourt was found liable and, in separate proceedings, ordered to pay the cost of replacement at the date of breach, which was found to be AU $1.02 million. The decision was reversed by the New South Wales Court of Appeal,[65] after which Clark successfully appealed to the High Court.

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[62] 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* above n 1 at [42] per Gageler J.

[63] This clause stipulated that an ART practice must have a policy limiting the number of children generated by any one donor to no more than ten in order to avoid 'accidental consanguinity within the community': *St George Fertility Centre Pty Ltd v Clark* [2011] NSWSC 1276 (*St George*) at [34] per Gzell J and RTAC stands for the Reproductive Technology Accreditation Committee of the Fertility Society of Australia (Clause 18.1 of the Deed).

[64] This figure was not challenged in the appeal to the High Court, with the dispute focusing on what 'damages' this deficiency in performance entitled Clark to recover.

[65] *Macourt v Clark* [2012] NSWCA 367 (Beazley P, Barrett JA and Tobias AJA). The Court reasoned that the judge had characterised the transaction incorrectly as a sale of goods rather than as one for the sale of the assets of a business [66]; that 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, so Clark could not demonstrate that the breach had caused her any 'loss' [67]; and that, to the extent that any loss had in fact been suffered, Clark had avoided such loss by passing on the costs of acquiring any replacement sperm to her customers [112]-[113].

2 *The Majority's Reasoning*

The High Court decision to uphold Clark's appeal essentially rested on three findings. The first was that the Court of Appeal's focus on characterising the deed as a contract for the sale of a business, rather than as for the sale of goods, was misplaced. According to Crennan and Bell JJ, the appeal did 'not turn on any distinction between a contract for the sale of goods and… [one] for the sale of a business',[66] and the case could be resolved simply on the basis that Clark discharged her onus of showing that purchasing Xytex sperm was 'necessary' to restore her to the position she would have been in absent the breach with Macourt making no attempt to show that Clark 'could have obtained replacement sperm more cheaply' elsewhere.[67] Keane J agreed, rejecting the Court of Appeal's reasoning on the basis that whenever:

> a 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 ... [so that, in truth] the contract price does not directly enter into the calculation at all.".'[68]

The second key finding in the High Court was that the Court of Appeal erred in holding that any 'loss' initially suffered by Clark due to the 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 contract formation and trial.[69] According to Keane J, such reasoning was incorrect because Clark's claim was not for the costs and expenses associated with procuring replacement sperm,[70] but for a sum giving her 'so far as money is capable of doing so, something equivalent to the value of the worthless Sperm delivered to her'.[71] Hayne J broadly agreed with this reasoning, finding that the argument that Clark's 'loss' had been avoided was misconceived both because it misunderstands the so-called "avoided loss rule" of mitigation (as Clark 'obtained no relevant benefit from her subsequent purchases of sperm') and because the measure Macourt proposed

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[66] *Clark* above n 1 at [30].
[67] *Clark* above n 1 at [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 St George sperm must be rejected', at [39].
[68] See *Clark* 1 at [111], quoting Warrington LJ's speech in the leading English decision on the recovery of damages following the delivery of defective goods, *Slater v Hoyle & Smith Ltd* [1920] 2 KB 11 at 18. Note the similar views of Scrutton LJ at 22-23, but compare the Court of Appeal's apparently inconsistent decision in *Bence Graphics International Ltd v Fasson UK Ltd* [1998] QB 87 (CA), forcefully criticised in GH Treitel, 'Damages for breach of warranty of quality', above n **8** and in Stevens, 'Damages and the Right to Performance', above n **6** at 180.
[69] See *Clark* above n 1 at [125] and [95].
[70] *Clark* above n 1 at [101].
[71] *Clark* above n 1 at [103] and [128]-[129].

would have put Clark 'in the position she would have been in *if the contract had not been made*… [rather than] *if the contract had been performed*'.[72]

Finally, Keane J also rejected Macourt's argument that Clark's award was subject to a discount for 'betterment' on the basis that the Xytex sperm was 'superior' to that which would have been supplied had the contract been performed. His Honour found the present case distinguishable from *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 of the defective machines',[73] because it was 'not suggested that the evidence established extra profitability attributable to the use of the Xytex sperm'.[74] Matters may have been different, said his Honour, if Macourt advanced evidence permitting a finding that Xytex's sperm would have commanded a higher price than contractually compliant sperm, but he did not.[75]

3 *Gageler J's Dissent*

Gageler J refused to allow Clark's claim for the cost of purchasing replacement sperm from Xytex.[76] His Honour's starting point was an earlier statement by the High Court in *Haines v Bendall*,[77] where the Court's majority said:

> [The] settled principle governing the assessment of compensatory damages… is that the injured party should receive… 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.[78]

The meaning of this principle obviously depends critically upon what interpretation is given to the word 'position' and perhaps even more critically on precisely *when* the relevant counterfactual comparison is undertaken. Although his Honour did not expressly define what 'position' means in this context, he did hold that a corollary of the aforementioned principle is that 'a plaintiff cannot recover more than he or she has lost', making the central question in the appeal the proper identification of Clark's 'loss'.[79] Gageler J then acknowledged that, following the delivery of defective goods, the appropriate basis for quantifying the buyer's award

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[72] See *Clark* above n 1 at [15] (emphasis in original).
[73] *Clark* above n 1 at [142]. In that case the buyer claimed the cost of buying substitute goods several years after the original delivery of the machines. On this basis, Keane J explained (at [142]), '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".'
[74] *Clark* above n 1 at [142].
[75] *Clark* above n 1 at [142].
[76] *Clark* above n 1 at [40].
[77] (1991) 172 CLR 60; [1991] HCA 15.
[78] *Clark* above n 1 at [59], citing Mason CJ, Dawson, Toohey and Gaudron JJ in *Haines* ibid at 63.
[79] *Clark* above n 1 at [59].

is normally the difference, 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.

Significantly, though, his Honour then held that this rule was inapplicable here because of a special feature of the present case, which was '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'.[80] For Gageler J, this meant that the benefit Clark was deprived of – and thus her relevant 'loss' – was not the sperm's market value, but rather that of 'being relieved of the need thereafter to source sperm from somewhere else… to treat her patients'.[81] Notably, his Honour emphasized that his conclusions were not dependent on the contract being one for the sale of a business rather than for the sale of goods or because of any difficulty in allocating a part of the overall purchase price for the business to the donor sperm,[82] but rather on the fact that the value *to Clark* of the undelivered sperm was less than its market value.

B *Defence of the Decision:*

The principal significance of *Clark* is its recognition of the general availability of a claim for the market value of the lost contractual performance, irrespective of the extent to which the innocent promisee's balance sheet position is ultimately affected by the breach. The decision has, however, provoked significant criticism. Professors Carter, Courtenay and Tolhurst ('Carter et al'), in particular, raise four objections against the majority's reasoning, arguing that the award was based on questionable evidence of market value, relied upon an incorrect 'characterisation' of the contract, was inconsistent with evidence of the purchaser's 'mitigation', and was contrary to the parties' intentions at contract formation. The object of what follows is to explain why each of these criticisms is unconvincing.

1 *Assessment Based on Questionable Evidence of Market Value?*

Carter et al's first objection to the majority's approach is that it 'involved upholding an assessment based on questionable evidence of market value', which effectively enabled the claimant, rather than the court, to choose the basis for quantifying her award.[83] According to the authors, the problem with this approach is twofold: first, it is inconsistent with the holding in *Commonwealth of Australia v*

[80] See *Clark* above n 1 at [68].
[81] *Clark* above n 1 at [70].
[82] ibid. As explained above in n 65, both of these arguments found favour in the NSWCA's decision.
[83] See Carter, Courtney and Tolhurst, above n 2 at 177.

Amann Aviation Pty Ltd [84] that the 'choice [of measure of damages]… is a matter for the court';[85] and secondly it 'enables purchasers to pick and choose between assets irrespective of whether they made good or bad bargains' following a vendor's breach of warranty.[86]

Neither of these bases for criticism is persuasive. The claim that *Clark* and *Amann* are inconsistent entails adopting a misleading interpretation of the latter decision.[87] The holding there that the 'choice of basis' for measuring damages is a matter for the court was made in the context of a dispute about whether Amann was entitled to recoup expenditure incurred in preparing for the performance of its contract or was limited to an award for proven lost profits.[88] Even if *Amann* may legitimately be regarded as authority for the view that the availability of an award for 'wasted expenditure' is a matter for the court rather than the claimant,[89] clearly the case is not authority for the proposition that the choice between claiming for 'consequential loss' or for the value of the lost performance is also a matter for the court.[90]

The second reason that the authors advance in support of the aforementioned objection to *Clark* is that the High Court's approach enables purchasers 'to pick and choose between assets irrespective of whether they made good or bad bargains'. [91] This concern is worthy of serious consideration, but is also misconceived. The simplest and most fundamental response to it is '*pacta sunt servanda*', as the High Court made clear in *Tabcorp* when holding that 'the 'doctrine of efficient breach'… misunderstands the common law in relation to damages for breach of contract'.[92] But Carter et al's objection is also unconvincing on its own terms. Although the High Court's approach does indeed create the

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[84] (1991) 174 CLR 64 (*Amann*).
[85] See Carter, Courtney and Tolhurst, above n 2 at 177.
[86] Carter, Courtney and Tolhurst, above n 2 at 197.
[87] Carter, Courtney and Tolhurst also cite *McRae v Commonwealth Disposals Commission* (1951) 84 CLR 377 in support of their argument, a case similarly about the availability of a claim for reasonable wasted expenditure, which in fact offers little assistance in resolving a case like *Clark*.
[88] *Amman* of course raises other issues, such as the extent to (and way in) which unknown contingencies are accounted for when quantifying such an award and the significance of the fact that both parties were in serious breach of the contract at the time it was terminated, but neither of these issues was raised by *Clark* either.
[89] In *Amann*, it was accepted that the justification for making awards for reasonable wasted expenditure is that they provide an *indirect* method of putting a promisee into this position where the promisee cannot prove that performance of the contract would have put it into a better position than before the contract was made.
[90] Of course, there are decisions holding that the court must decide what is required to put the promisee into the situation as if the contract had been performed, but these are cases concerned with claims for the cost of repairs rather than replacement. See, for example, *Bellgrove*, above n 26 and *Tabcorp*, above n 21.
[91] See Carter, Courtney and Tolhurst, above n 2 at 197.
[92] See *Tabcorp* above n 21 at [13]. As Lord Bingham observed in *The Golden Victory*, one important consequence of this is that it 'may prove disadvantageous to break a contract instead of performing it': above n 10 at [22].

potential for the purchaser of a business making a claim for breach of warranty in relation to the provision of a particular asset to recover more in damages than she originally promised to pay for the business as a whole, this is not something about which the law should be concerned because it is simply a function of the parties' allocation of the risks of their bargain.

In further explaining this observation, two scenarios should be distinguished. The first is where the purchaser has made a good bargain in buying the entire business for less than the market value of the relevant asset. Whilst undoubtedly rare, the attainment of this asset in such situations may have been the dominant or even sole reason for the purchaser's entry into the contract, so to deny her claim for its market value upon the vendor's failure to deliver it would rob her entirely of the benefit arising from the advantageous bargain she struck and be contrary to the common law's general principle of freedom of contract, while also reducing the incentive parties have to take due regard for their own interests at contract formation.

The other relevant scenario is where the uncontradicted evidence the purchaser adduces of the asset's market value establishes its value as higher than its 'true' market value. The authors suggest this may have occurred here,[93] so that Clark recovered more than the sperm's actual market value. The basis for this claim is the suggestion that at trial Gzell J assessed the sperm's market value incorrectly. However, although the authors provide good reasons to doubt whether Gzell J's assessment was accurate,[94] this was surely a matter to be established on appeal. Instead, Macourt choose to reject entirely Clark's entitlement to recover the market value of the undelivered sperm. Accordingly, any supposed error in the judge's valuation does not provide a legitimate basis for criticism of the High Court's decision.

2 *Characterisation and Prima Facie Measures*

A second objection Carter et al raise against the majority's approach is that their Honours wrongly characterised the contract as one for the sale of goods rather than as one for the sale of a business, and consequently adopted the wrong *prima facie* measure of damages.[95] The first point to make here is that Gageler J himself expressly rejected the notion that the 'critical' distinguishing feature of the present case was that the subject matter of the contract was the sale of a business rather than a sale of goods.[96] The discussion that follows explains why his Honour and the

[93] See Carter, Courtney and Tolhurst, above n 2 at 195-200.
[94] See Carter, Courtney and Tolhurst, above n 2 at 174, where the authors note that Gzell J himself described his approach as 'robust'.
[95] See Carter, Courtney and Tolhurst, above n 2 at 185-197.
[96] See *Clark* above n 1 at [68].

other High Court Justices were correct to so hold and why a focus on this aspect of the case is misplaced.

The authors commence their discussion of 'Characterisation' by observing that '[o]ne reason why damages for breach is a difficult area of law is that an exceptionally large number of distinctions can be found' with undoubtedly 'more distinctions than there are principles to apply them'.[97] While there is some truth to this observation, the preferable solution to this proliferation of distinctions is not to use a different *prima facie* measure for each kind of contract and then have the appropriate measure of damages determined by how the transaction is characterised,[98] but rather to replace these numerous (and largely unprincipled) distinctions with the principled dichotomy between awards substituting for the lost performance and awards making good consequential loss.[99]

According to Carter et al, 'in *Clark v Macourt* there was a very obvious *prima facie* measure [available], namely, the difference between the warranted value of the business and its actual value'.[100] If Clark had claimed for 'consequential loss', this *may* have been the appropriate measure.[101] However, as Keane J explained, such an analysis fails to address the claim Clark actually made,[102] (i.e. an award to substitute for 'the benefit of her bargain under the Deed').[103] This misplaced focus on *prima facie* measures also led Carter et al to criticise the majority for failing to consider some earlier High Court authorities, which were actually largely irrelevant to the appeal. The reason why *Amann* was immaterial here was explained above, but the same can be said for *TC Industrial Plant Pty Ltd v Robert's Queensland Pty Ltd*,[104] which the authors also invoke.

The authors also describe 'the failure to mention *Toteff v Antonas*' as 'peculiar'.[105] This case involved a damages claim in deceit by the purchaser of a café business induced to enter the contract by the vendor's fraud where the High Court assessed the purchaser's award as the difference between the price paid for the café and its fair market value. For those authors, *Toteff* is 'a clear authority on application of a *prima facie* measure where there is a sale of a business by a transfer

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[97] See Carter, Courtney and Tolhurst, above n 2 at 189.
[98] Carter, Courtney and Tolhurst, above n 2 at 189.
[99] This is not to reject altogether the use of 'prima facie' measures in the assessment of damages. They may, for example, provide a useful starting point in assisting the promisee to establish the value of performance or perhaps even the 'consequential loss' that was caused by the breach.
[100] See Carter, Courtney and Tolhurst, above n 2 at 189-190.
[101] There was also a competing measure of consequential loss available too, namely the out-of-pocket expenses that Clark could attribute to Macourt's failure to provide the sperm as promised. This was the measure awarded by Gageler J and the NSWCA.
[102] *Clark* above n 1 at [128] per Keane J.
[103] *Clark* above n 1 at [103].
[104] (1963) 180 CLR 130. See Carter, Courtney and Tolhurst, above n 2 at 191.
[105] (1952) 87 CLR 647. See Carter, Courtney and Tolhurst, above n 2 at 192.

of assets'.[106] But as Lord Hoffmann has explained,[107] a claim in deceit is not the same as one to substitute for the non-performance of a contractual promise. Unless the relevant deceptive statement was also a contractual warranty, the victim of a deceit has no entitlement to be put into the position as if the wrongdoer's statement was correct. The duty that the promisor has breached in those circumstances is the duty not to deceive rather than the duty to perform a promise. Accordingly, a wrongdoer's liability in deceit extends only to making good certain causally attributable consequences of the deception.

3 *Award Inconsistent with Evidence of Clark's 'Mitigation'?*

A third criticism raised by Carter et al is that Clark's award was inconsistent with evidence of her 'mitigation'. While admitting the complexity of this issue and being somewhat equivocal in their criticism, those authors ultimately appear to endorse Macourt's argument that 'the subsequent acquisitions [of replacement straws by Clark from Xytex] served to mitigate her loss because she recouped … the cost of acquisitions made to replace the straws of sperm which could not be used'.[108] the authors here invoke the principle that 'avoided loss' is irrecoverable,[109] a 'rule' commonly said to preclude recovery for 'loss' apparently initially incurred but eventually avoided due to a post-breach event arising 'out of the consequences of the breach… in the ordinary course of business'.[110]

(a) *The Limited Scope of the 'Avoided Loss Rule'*

The opposing view advanced here that Clark's acts of 'mitigation' were entirely irrelevant to the assessment of her award is not self-evident and so requires explanation. First, note that, as Hayne J observed,[111] describing rules governing the giving of credit for financial benefits obtained as a result of a civil wrong as an 'aspect of mitigation' is not ideal.[112] Despite McGregor's description of this 'rule' in these terms, the task of drawing a line between post-breach benefits that are taken into account when quantifying damages and those which are not is, as Professor Burrows has explained, more closely analogous to that of identifying when the detrimental consequences of a breach are 'too remote' to admit recovery in an

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[106] Carter, Courtney and Tolhurst, above n 2 at 193.
[107] See *South Australia Asset Management Corporation v York Montague Ltd* [1997] AC 191 (HL) 216.
[108] See Carter, Courtney and Tolhurst, above n 2 at 200-204.
[109] See, for example, H McGregor, *McGregor on Damages*, (20th edn, Sweet & Maxwell, 2018 at [9-006]).
[110] This was the phrase Viscount Haldane used in *British Westinghouse*, above n 10 at 690, often cited as the leading authority for this 'rule'.
[111] See *Clark* above n 1 at [16].
[112] According to Carter, Courtney and Tolhurst, 'One aspect of mitigation is giving credit for benefits obtained by reason of the promisor's breach of contract', above n 2 at 200.

action against the wrongdoer.[113] This is not merely a matter of semantics either because a proper characterisation of the issue is critical to identifying the appropriate legal principle to resolve it.

All this being said, the common law clearly sometimes does preclude recovery for 'loss' apparently initially incurred, which is in fact avoided due to events occurring subsequent to breach. The scope of this 'rule' is, however, notoriously uncertain due to the difficulty involved in articulating precisely when a post-breach benefit arises 'out of the consequences of the breach'.[114] Although to some extent the answer clearly depends upon how 'direct' a consequence of the wrong the resulting benefit is and what options were available to the claimant following the breach, stating the applicable principles more precisely is exceedingly difficult.[115]

A notable recent decision that exemplifies this difficulty in the contractual context is The New Flamenco,[116] where ship owners claimed for profits lost following early redelivery by the charterer of the subject vessel. Framed in this way, the claim appears to be one for 'consequential loss'. The central question for the UK's Supreme Court was whether the substantially higher sale price obtained for the ship in October 2007, as compared to what would have been obtained had the sale had occurred in November 2009 when the charterparty was due to end, needed to be brought into account when assessing damages; it being held that it did not.[117]

The difficulty in explaining such results is reduced, but certainly not eliminated,[118] by distinguishing between awards that substitute for performance and awards making good 'consequential loss'. Properly understood, the 'rule' that avoided losses cannot be recovered is simply inapplicable to awards of the former

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[113] Burrows, *Remedies for Torts and Breach of Contract* (n 36) 157, explaining the role of the doctrine as the 'reverse' of 'remoteness and intervening cause'.

[114] This has been recognised by a number of commentators, including Carter, Courtney and Tolhurst, above n 2 at 200-204. See also D McLauchlan, 'Expectation Damages: Avoided Loss, Offsetting Gains and Subsequent Events' in Saidov and Cunnington (eds) *Contract Damages: Domestic and International Perspectives*, Hart, 2008 at 349-388 and H McGregor, 'Mitigation in the Assessment of Damages', same volume, at 329.

[115] For recent discussion, see *Lowick Rose LLP (in liquidation) v Swynson and another* [2017] UKSC 32, where Lord Sumption stated that 'it is difficult to identify a single principle underlying every case… [though] the critical factor is not the source of the benefit but its character' at [11].

[116] *Globalia Business Travel SAU of Spain v Fulton Shipping Inc of Panama* [2017] UKSC 43. For a non-contractual example, see *Hussey v Eels* [1990] 2 QB 227, cited by Crennan and Bell JJ in *Clark*, above n 1 at [28], which McGregor describes as difficult to reconcile with 'the avoided loss rule', above n 114 at 339.

[117] Compare the Court of Appeal's decision reaching the opposite conclusion in *Fulton Shipping Inc of Panama v Globalia Business Travel SAU* [2015] EWCA Civ 1299, overturning Popplewell J's at first instance decision in *Fulton Shipping Inc of Panama v Globalia Business Travel SAU* [2014] EWHC 1547 (Comm).

[118] This is because even if the 'avoided loss' rule's application is quarantined to awards making good 'consequential loss', there still remains the problem of explaining, in relation to such claims, precisely which benefits arise 'out of the consequences of the breach'.

kind because they are, by definition, not concerned with responding to the breach's eventual detrimental consequences. This might be what Hayne J meant in saying that Clark's 'subsequent purchases and use of replacement sperm left her neither better nor worse off than before she undertook those transactions'.[119] However, given his Honour's other comments, it seems more likely that he was just expressing a conclusion that the benefit to Clark of substantially recouping her costs was not sufficiently closely connected to Macourt's breach to be relevant in quantifying her award. But if this is indeed what was meant, a fuller explanation for this conclusion was probably called for. A possible explanation for why this benefit was not sufficiently closely connected to Macourt's breach, suggested by Keane J, is that Clark:

> may have been able to charge fees for her services in the conduct of her practice which were within the market range but returned her a greater profit because she was not obliged to incur the extra cost of replacement sperm.[120]

The suggestion made here seems to be that while the breach enabled Clark to charge her patients more for the *sperm* than she otherwise could have, this probably also affected the amount she could charge for her *services* – as well as perhaps as the extent of her customer base – so that Macourt's breach was not a necessary condition of (at least some of) Clark's eventual profits. As his Honour then proceeded to explain, however, the more fundamental reason why Clark's substantial recoupment of her expenses was irrelevant was that:

> To say that in the conduct of … [Clark's] practice she was able to recover the cost to her of the Xytex sperm incurred in the course of her practice after acquiring the assets is to fail to address the claim which… [she] actually made.[121]

(b) *The Difficulties with Views to the Contrary*

The contrary view advanced by the authors that Clark's award should have been reduced to reflect her acts of 'mitigation' was also expressed by Barnett in her comment on the High Court's decision.[122] Barnett's central claim there was that the 'problem with the [Court's] approach … [is that the purchaser] was put in a better pecuniary position than if the contract had been performed… [via] transactions…

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[119] *Clark* above n 1 at [19].
[120] *Clark* above n 1 at [129].
[121] *Clark* above n 1 at [128]. Note, however, that Hayne J seems to have taken a different view since his Honour appeared to contemplate the possibility that even a claim for the value of (or cost of replacing) the promised sperm could be reduced due to the occurrence of a beneficial post-breach event. However, due to Crennan and Bell JJ's concurrence with the reasoning of Keane J, the ratio of the decision is to be found in his Honour's judgment.
[122] See Barnett, above n 2.

clearly linked' to Macourt's breach.[123] If these various authors are correct that Clark's claim was liable to reduction on the ground that her loss was avoided, it is indeed difficult to explain why these subsequent transactions were ignored because, in responding to Macourt's breach, Clark acted precisely how 'a reasonable and prudent' businessperson would have been expected to, in accordance with the principle articulated by Viscount Haldane in British Westinghouse.[124] That these transactions were nonetheless disregarded therefore provides powerful support for the view that claims for the value of the lost contractual performance are not subject to restriction via principles of 'mitigation'.

The opposing view favoured by Barnett and Carter et al does appear to derive support from the Privy Council's decision in Erie County Natural Gas and Fuel Co Ltd v Carroll,[125] where a damages claim for non-delivery based on the market price prevailing at the date of breach was rejected on the basis that, by the time the action was brought, the breach's detrimental financial consequences were entirely eliminated by the claimant's post-breach conduct.[126] Erie is a difficult case and further discussion of it by the High Court was clearly warranted. A possible explanation for the result is that the claim was framed as one for 'consequential loss' rather than as one to substitute for the lost contractual performance.[127] There are nevertheless other decisions not discussed by the aforementioned authors that conflict with their views. Three notable examples are Jamal v Moalla Dawood Sons & Co,[128] Campbell Mostyn (Provisions) Ltd v Barnett Trading Co,[129] and the Privy Council's earlier decision in Jebsen v East and West Indian Dock Company,[130] where in each case benefits accruing to the claimant following breach were disregarded when assessing damages.

An alternative means by which Clark's ethical prohibition on profiting from the sale of donor sperm might be deemed relevant to her entitlement to damages – one not precluded by decisions like Jamal, Campbell and Jebsen – is via the adoption of Gageler J's approach in Clark, which focusses on identifying the value of the lost performance to the promisee given her specific situation. Recall that for his Honour, the relevant loss Clark suffered was not the promised sperm's market

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[123] Barnett, above n 2 at 390 (emphasis in original).
[124] See n 10, 689.
[125] [1911] AC 105.
[126] See Carter, Courtney and Tolhurst, above n 2 at 200, where those authors cite *Erie* for the proposition that 'a prima facie measure may be displaced by the circumstances'.
[127] This suggestion is made by Stevens, 'Damages and the Right to Performance' above n 6 at 181.
[128] [1916] 1 AC 175.
[129] [1954] 1 Lloyd's Rep 65.
[130] (1875) LR 10 CP 300. In *British Westinghouse*, Viscount Haldane attempted to distinguish *Jebsen* on the (spurious) basis that the benefit 'did not arise out of the transactions the subject matter of the contract', above n 10 at 691. However, McGregor claims that 'all aspects of… [Viscount Haldane's] own tests were satisfied' in *Jebsen*, so that, according to his worldview, damages should have been reduced, above n 114 at 339.

value, but rather the benefit of 'being relieved of the need… to source sperm from [elsewhere]… to treat her patients'.[131] This approach does seem to offer a legitimate basis upon which to defend the NSWCA's decision to deny Clark's claim since one might contend that claims for the market value of the lost contractual performance should be available only where the disappointed buyer purchases goods or services in circumstances where her (objectively understood) purpose is to engage in profitable trading activity in the relevant market, particularly since almost all cases applying the 'market rule' exhibit such facts.

One apparent example of this sort of approach is the English Court of Appeal's decision in Sealace Shipping Co Ltd v Oceanvoice Ltd.[132] There, following the delivery of a ship without the promised spare propeller, the Court awarded as damages only the propeller's value as 'scrap' rather than the cost of replacement. But while in neither Clark nor Oceanvoice did the claimant intend to trade for profit the undelivered contractual subject matter, only in Clark was there a market for this subject matter, so that the market value of the undelivered performance could actually be calculated.[133] Thus, while Gageler J's approach does appear to be capable of a principled defence, it also seems to be inconsistent with decisions like Diamond Cutting Works Federation Ltd v Triefus & Co Ltd,[134] and Mouat v Betts Motors Ltd,[135] which hold that the non-profitable nature of the subject goods to the claimant does not displace the right to recover the market value of the lost performance, where a relevant market exists.

(c) *A Discount for 'Betterment'?*

For Keane J, in accordance with the thesis presented here, the fact that Clark was claiming for the value of the lost contractual performance – rather than for consequential loss – provides the best explanation for why evidence of the substantial recoupment of her replacement costs was irrelevant. However, as his Honour also explained, a distinct argument advanced by Macourt was that a discount should be made in relation to Clark's award because she was made 'better off by utilising [superior] replacement donor sperm in patient treatments, as compared to if she had been able to use contractually compliant St George donor

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[131] *Clark* above n 1 at [70].

[132] [1991] 1 Lloyd's Rep 120 (*The Alecos M*), criticised in GH Treitel 'Damages for non-delivery' (1991) 107 LQR 364. Some support might arguably also be found in Lord Mustill's speech in *Ruxley Electronics v Forsyth* [1996] AC 344, 360 (HL). However, the focus on the particular promisee's position there was in order to justify a substantial award for Forsyth's *non-pecuniary* 'loss of amenity'.

[133] I.e. in *Oceanvoice*, the only relevant market was in 'scrap', there being no market in spare propellers.

[134] [1956] 1 Lloyd's Rep 216, referred to by Hayne J and Crennan & Bell JJ in *Clark* above n 1 at [28], [67].

[135] [1959] AC 71 (PC). See also *British Motor Trade Association v Gilbert* [1951] 2 All ER 641.

sperm'.[136] A final important question that therefore arises in this context is whether and, if so, precisely *how* such 'betterment', when proven, should figure in the assessment of damages.

To explain the issue further, the term 'betterment' is generally used to refer to occasions where, as a result of expenditure incurred in consequence of the defendant's breach of duty, the claimant is made better off in certain respects than she would have been had that wrong not occurred.[137] As Barnett & Harder explain, the betterment issue is simply 'a particular instance of the broader issue of whether benefits obtained by the plaintiff from the wrong are to be taken into account in assessing compensation', [138] which was discussed immediately above. It is hopefully clear, however, that if one recognises the distinction advanced here between 'substitutionary' claims and claims for consequential loss, distinguishing between two different kinds of 'betterment' also becomes necessary.

One kind of 'betterment' occurs when an award for consequential loss has the effect of placing the claimant in a superior financial position than had the breach not occurred. A good example is *Harbutt's "Plasticine" v Wayne Tank & Pump Co*.[139] The defendant breached its contract with the claimant by performing certain building work defectively, which caused a fire to break out that destroyed the claimant's factory. The relevant planning authorities required the claimant to replace the old factory with one that was in certain respects superior to the old one. The defendant nevertheless sought to limit its liability to the difference in value of the old mill before and after the fire on the basis that to award the cost of building the new factory would put the claimant in a better position than had the breach not occurred. This approach was rejected and full recovery ordered, essentially because the claimant had no choice but to rebuild.

However, on the bifurcated account proposed here, a conceptually distinct kind of 'betterment' occurs when the market substitute used as the basis for quantifying an award for the value of the lost contractual performance is superior in quality to the goods or services that were promised but not provided. The idea here is that, while a defendant may be unable to show that a cheaper market substitute was available, he may demonstrate that the substitute put forward by the promisee as

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[136] *Clark* above n 1 at [139]. As Keane J explained, the primary judge accepted at trial that the information available concerning Xytex's donors was more extensive than would have been available for compliant St George sperm; but that Macourt had 'failed to prove "the presence of betterment and its quantum",' [140].

[137] For a useful elaboration of the general principles, see *Tyco Australia Pty Ltd v Optus Networks Pty Ltd* [2004] NSWCA 333 at [260]-[264] per Hodgson JA.

[138] See K Barnett & S Harder, *Remedies in Australian Private Law*, Cambridge University Press, 2014 at 27.

[139] [1970] 1 QB 447.

the basis for quantifying her claim is superior in quality to what was promised.[140] This is the sort of 'betterment' Macourt appeared to allege had occurred in *Clark*, though ultimately the Court was not required to rule upon this issue because of the factual findings made at trial.

The approach advocated in this article appears to suggest that 'betterment' of this kind should normally be disregarded because it is simply beside the point given that the objective of the award is to substitute for the performance not provided rather than to make good the breach's ultimate financial consequences. By contrast, describing awards for the value of the lost contractual performance as concerned with making good 'loss' might suggest that such 'betterment' generally should be taken into account, even where the superior replacement is all that is available.[141] This is certainly one possible view, but endorsing a 'substitutionary' approach does not commit one to this position. An alternative means by which 'betterment' of this sort might be accounted for would be via use of the 'unjust enrichment' principle.[142] On this approach, a defendant could set-off his damages liability by the amount he can show that the substitute used as the basis for quantifying the claimant's award exceeds the market value of what was promised. No position is taken here as regards whether such an enrichment is indeed 'unjust' in the relevant sense. But if one were to hold it was, the principle against 'unjust enrichment' would here operate prophylactically to *prevent* (rather than reverse) the relevant 'enrichment', similarly to how Lord Hoffmann described the effect of non-contractual subrogation in *Banque Financière de la Cité v Parc (Battersea) Ltd*.[143]

4 *Approach to Assessment Contrary to the Parties' Intentions?*

Finally, the authors also claim that *Clark* produced a result contrary to the parties' intentions at contract formation. Their starting point in advancing this objection is that, in light of Lord Hoffmann's comments in *The Achilleas* that, in determining what 'loss' a contract-breaker is liable for, 'one must first decide whether the loss… is of a 'kind' or type for which the contract-breaker… accepted responsibility',[144] there is 'no reason' why the scope of a breaching party's

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[140] This of course appears to be one allegation made by Macourt in *Clark*. Such a scenario seems likely to arise only when there is not a liquid market for the promised performance.

[141] Note Gzell J's reasoning in *St George*, above n 63 at [82]-[83] that: 'Here the market comprised but one seller, Xytex. Dr Clark had no choice. It was not suggested that she could have acquired the sperm more cheaply elsewhere. It was not suggested that the price paid was inflated by the agreement for exclusive supply to Fertility First. And St George Fertility and Dr Clark failed to establish the quantum of any benefit'. Thus, concluded his Honour, 'Dr Clark does not have to give credit for any betterment'.

[142] For a similar suggestion made in the context of explaining the High Court's decision *Butler v Egg and Egg Pulp Marketing Board* (1966) 114 CLR 185, see R Stevens, *Torts and Rights* (OUP 2007) 66.

[143] [1999] 1 AC 221 at 231G-H.

[144] *Transfield Shipping Inc v Mercator Shipping Inc* [2008] UKHL 48; [2009] 1 AC 61 at [15]. Lord Hope expressed similar views at [32].

compensatory liability 'cannot be determined as a matter of inference… [from] the contract'.[145]

The first point to make here is that while the parties' agreement may of course limit the scope of a party's liability upon the occurrence of a particular breach, the conventional view is that an express or implied contractual provision is required to produce this result. The extent to which this position has been altered by *The Achilleas* is somewhat unclear. One view is that all questions of 'remoteness' are now to be determined by the parties' agreement. Arguably, a problem with this suggestion is that there will inevitably be cases where the agreement does not clearly allocate responsibility for the particular loss in question. Another view, expressed in some subsequent English cases, is that *The Achilleas* has not displaced the conventional approach to remoteness evident in decisions like *Hadley v Baxendale*,[146] and *The Heron II*,[147] with the decision merely adding a 'gloss' to the usual approach, requiring the court to consider, alongside whether loss of the kind claimed was within the parties' reasonable contemplation, whether such loss was within the scope of the liability accepted by the breaching party at contract formation.[148]

Yet a further view is that the approach favoured by Lord Hoffmann in *The Achilleas* is only applicable to a claim for 'consequential loss' and has no relevance to a claim for the market value of the undelivered performance. This is essentially the view that Professor Treitel expressed when criticising the Court of Appeal's decision in *Bence Graphics International Ltd v Fasson UK Ltd*.[149] In the language of Alderson B's famous dictum in *Hadley v Baxendale*, a claim for the value of the promised, but undelivered, performance arises 'naturally… according to the usual course of things',[150] and is always recoverable absent an express or implied term to the contrary.

But let us suppose for now that Lord Hoffmann's analysis in *The Achilleas* is applicable even to a claim for the market value of the lost performance so that the parties' agreement provides the starting point in determining whether Clark was entitled to succeed. The difficulty here is that the agreement was completely silent

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[145] See Carter, Courtney and Tolhurst, above n 2 at 177.
[146] (1854) 9 Exch 341 at 354 per Alderson B.
[147] *Koufos v C Czarnikow Ltd* [1969] 1 AC 350 (HL). Decisions like *Supershield Ltd v Siemens Building Technologies FE Ltd* [2010] EWCA Civ 7, *Sylvia Shipping Co Ltd v Progress Bulk Carriers Ltd* [2010] EWHC 542 (Comm) and *John Grimes Partnership Ltd v Gubbins* [2013] EWCA Civ suggest that the decision merely adds a 'gloss' to the usual approach, requiring a court also to consider, alongside whether loss of the kind claimed was within the parties' reasonable contemplation, whether such loss was within the scope of the liability accepted by the breaching party at the time of contract formation.
[148] See, for example, *Supershield Ltd v Siemens Building Technologies FE Ltd* [2010] EWCA Civ 7; *Sylvia Shipping Co Ltd v Progress Bulk Carriers Ltd* [2010] EWHC 542 (Comm) and *John Grimes Partnership Ltd v Gubbins* [2013] EWCA Civ.
[149] [1998] QB 87. See Treitel, 'Damages for breach of warranty of quality' (n 8).
[150] (1854) 9 Exch 341 at 355.

regarding how the loss in question was to be allocated. Carter et al attempt to overcome this problem by arguing that because it was known by both parties that Clark never intended to supply the sperm at a profit or even to 'pass on the cost of purchasing the sperm to her patients', recovering such 'loss' exceeded the scope of the liability for breach accepted by the vendor upon contract formation.[151] More specifically, those authors allege that:

> By using the sale of goods measure, the majority treated the Purchaser as the buyer of particular assets with which she could deal as if they were chattels… [which was] contrary to… evidence, not only as to her intention, but also as to her ethical position.[152]

As noted earlier, this suggestion also seems to underpin Gageler J's dissent, though (sensibly) his Honour did not express matters in terms of 'remoteness'. The difficulty here is that Clark's ethical position was irrelevant to her *legal* claim for damages. Matters may have been different had it been unlawful,[153] rather than simply unethical, for Clark to profit from selling donor sperm. Denying Clark's claim *might* then have been justified by reference to the 'illegality' defence if her damages award could legitimately be characterised as 'profit from the sale of donor sperm'.[154] All that one can really say about Clark's *legally relevant* intention at contract formation is that her ethical obligations indicated that there was a common understanding that Clark would not sell any donor sperm she obtained for more than what she paid for it. But the High Court's award clearly did not contradict this common intention since Clark did not in fact sell any sperm to her patients for a price exceeding its cost. It is also clear that even if Clark had breached her ethical obligations, this could have no significance for her legal dispute with Macourt,[155] so that, in determining her legal rights vis-a-vis Macourt, the Court was correct to disregard these ethical obligations.[156]

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[151] The implicit assumption here is obviously that Macourt knew about Clark's intended use of the sperm.

[152] See Carter, Courtney and Tolhurst, above n 2 at 183.

[153] Due to s 16 of the *Human Cloning for Reproduction and Other Prohibited Practices Act* 2003 (NSW), it is now illegal to profit from the sale of donor sperm. As explained above, whether this provision would have precluded Clark's claim depends upon whether a 'damages' award constitutes 'profit from the sale of donor sperm'. Note, however, that Keane J considered whether making a profit by Clark was illegal even prior to the passing of this Act due to the *Human Tissue Act* 1983 (NSW), but held that it was not, at [115].

[154] This seems unlikely because it would require money obtained as 'damages' to fall within the definition of 'profit' under the legislation. A further difficulty here is that the 'illegality' defence typically applies in circumstances where the contract *itself* (or the performance it requires) is unlawful and there is no suggestion that this was the case here even if the legislation made it unlawful for Clark to 'profit from the sale of donor sperm'.

[155] It is of course possible that it may have had other consequences for her in relation to her practice as an ART practitioner, but this is beside the point.

[156] This is not to deny the possibility of restitutionary claims by Clark's patients if the fees that they paid were provided on the 'basis' that Clark would not recoup her expenses, though it seems unlikely that

V CONCLUSION

This article sought both to demonstrate that the common law recognises the general availability of a claim for the market value of the contractual performance denied by breach and to defend the High Court's decision in *Clark* from various criticisms levelled against it. The first step in achieving these objectives was establishing that there is more than one way that an award can give effect to the *Robinson v Harman* principle's stated objective of putting the promisee into 'the same situation… as if the contract had been performed'. Recognition that not all awards upholding this principle are concerned with making good the breach's eventual detrimental consequences for the promisee reveals the logic of the High Court's decision. It is nevertheless clear that there are inconsistencies in the terminology and authorities within this area of the law, which has understandably generated significant uncertainty as regards the true position.

After outlining the basic indeterminacy present in the *Robinson v Harman* principle in Part II, Part III demonstrated that, following a failure to deliver goods or services conforming to the contract, both Australian and English law recognise that the buyer is normally entitled to recover the market value of the contractual performance denied by the relevant breach. Part IV considered *Clark v Macourt*. The decision's principal significance, it was suggested, lies in recognising the availability of a claim for the market value of the lost contractual performance following the seller's failure to deliver a promised asset even where the buyer not only substantially recouped the costs incurred in acquiring a replacement asset but was also ethically bound not to profit from selling this asset to her patients.

As noted, the ruling in *Clark* is controversial and has provoked significant criticism. The bulk of Part IV was accordingly devoted to defending the decision from the academic objections raised against it. The key misunderstanding underpinning these objections is a mischaracterisation of Clark's claim. Recognition that Clark was claiming, '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',[157] reveals why her ethical obligation not to profit from selling donor sperm and her substantial recoupment of the costs incurred in acquiring replacement sperm were both irrelevant. It is often assumed that contractual damages awards aim simply to make good certain deteriorations in the promisee's eventual balance sheet position that can be causally attributed to the breach. The better view, however, is that neutralizing such consequences is simply part of the law's process for achieving next-best conformity with the promisor's

such a claim would succeed in light of the High Court's decision in *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516.

[157] *Clark* above n 1 at [103] and [128]-[129].

primary duty to perform, an objective that constitutes the true purpose of awarding contractual damages.