

## DAMAGES

Pages 820 and 824 refers to extracts from the dissenting speech of Lord Millett which is set out below.

### Lord Millett [dissenting]

My Lords, Lord Griffiths was not proposing to depart from the general rule that a plaintiff can only recover compensatory damages for breach of contract in respect of a loss which he has himself sustained. He was insisting that, in certain kinds of contract at least, the right to performance has a value which is capable of being measured by the cost of obtaining it from a third party. . .

[he considered the academic literature in which Lord Griffiths' approach was analysed and continued]

To my mind the most significant feature of the academic literature is that no one has suggested that the adoption of the broad ground would have any adverse consequences on commercial arrangements. Nor, despite every incentive to do so, has McAlpine been able to suggest a situation in which it would cause difficulties or defeat the commercial expectations of the parties. In my view it would help to rationalise the law and provide a sound basis for decisions like *Ruxley Electronics and Construction Ltd v. Forsyth* [1996] AC 344 and *Jackson v. Horizon Holidays Ltd* [1975] 1 WLR 1468. If it is adopted, it will be for future consideration whether it would provide the better solution in cases such as *St Martins* also.

In the *Ruxley* case your Lordships' House refused to allow the full costs of reinstatement on the well-recognized ground that reinstatement would be an unreasonable course to take. But it was not constrained to withhold substantial damages on the ground that the value of the property was unaffected by the breach. It expressly rejected the view that these were the only two possible measures of damage in a building case. It awarded an intermediate sum for 'loss of amenity'. The evidence, however, showed that, viewed objectively, there was no loss of amenity either. The amenity in question was entirely subjective to the plaintiff; and its loss could equally well, and perhaps more accurately, be described as a defeated expectation.

In *Woodar Investment Development Ltd v. Wimpey Construction UK Ltd* [1980] 1 WLR 277 Lord Wilberforce was prepared to support the *Jackson* case [1975] 1 WLR 1468 either as a broad decision on the measure of damages or as an example of a type of contract calling for special treatment. Other examples which he instanced were persons contracting for family holidays, ordering meals in restaurants for a party, or hiring a taxi for a group. He observed that there are many situations of daily life which do not fit neatly into conceptual analysis but which require some flexibility in the law of contract.

It must be wrong to adopt a Procrustean approach which leaves parties without a remedy for breach of contract because their arrangements do not fit neatly into some precast contractual formula. When such arrangements have been freely entered into and are of an everyday character or are commercially advantageous to the parties, it is surely time to re-examine the position.

This is the product of the narrow accountants' balance sheet quantification of loss which measures the loss suffered by the promisee by the diminution in his overall financial position resulting from the breach. One of the consequences of this approach is to produce an artificial distinction between a contract for the supply of goods to a third party and a contract for the supply of services to a third party. A man who buys a car for his wife is entitled to substantial damages if an inferior car is supplied, on the assumption (not necessarily true) that the property in the car is intended to vest momentarily in him before being transferred to his wife, whereas a man who orders his wife's car to be repaired is entitled to nominal damages only if the work is imperfectly carried out. This is surely indefensible; the reality of the matter is that in both cases the man is willing to undertake a contractual liability in order to be able to provide a benefit to his wife.

The idea that a contracting party is entitled to damages measured by the value of his own defeated interest in having the contract performed was not new in 1994. A strong case for its adoption in the case of consumer contracts was made in an important article 'Contract Remedies and the Consumer Surplus' (1979) 95 *LQR* 581, in which the authors explained that this would make a significant difference only in a minority of cases. As I shall show, the language of defeated expectation has been employed in the context of building contracts, at least in ordinary two-party cases like *Ruxley*, since the 19th century. As for three-party cases like the present, Lord Keith adverted to it as a possible solution in the *Woodar* case [1980] 1 WLR 277, and in the same case both Lord Salmon and Lord Scarman expressed the view that the question required consideration by the House. Lord Scarman said, at pp. 300–301:

'Likewise, I believe it open to the House to declare that, in the absence of evidence to show that he has suffered no loss, A, who has contracted for a payment to be made to C, may rely on the fact that he required the payment to be made as prima facie evidence that the promise for which he contracted was a benefit to him and that the measure of his loss in the event of non-payment is the benefit which he intended for C but which has not been received. Whatever the reason, he must have desired the payment to be made to C and he must have been relying on B to make it. If B fails to make the payment, A must find the money from other funds if he is to confer the benefit which he sought by his contract to confer upon C. Without expressing a final opinion on a question which is clearly difficult, I think the point is one which does require consideration by your Lordships' House.'

Whether the law should take account of the performance interest when considering the measure of damages for breach of contract arose clearly in the seminal case of *Radford v. De Froberville* [1977] 1 WLR 1262. The landlord of premises let to tenants had obtained a covenant from the owner of neighbouring land to build a garden wall on the neighbour's side of the boundary. The wall was not built. The landlord sued on the covenant for damages, claiming the cost of building a similar wall on his own side of the boundary. Oliver J found that the absence of the wall caused no reduction in value to the landlord's reversionary interest, and that the landlord (as opposed to his tenants) would derive no amenity or other advantage from having the wall built. The defendant contended that, since the landlord had suffered no loss, he was entitled to nominal damages only. The judge found that the landlord intended to apply the damages in building the wall in order to provide his tenants with the amenity which

the promised wall would have done, and that this was a reasonable course for him to take. On these findings Oliver J awarded the landlord the cost of building the wall. He said, at p. 1270:

'Now, it may be that, viewed objectively, it is not to the plaintiff's financial advantage to be supplied with the article or service which he has stipulated. It may be that another person might say that what the plaintiff has stipulated for will not serve his commercial interests so well as some other scheme or course of action. And that may be quite right. But that, surely, must be for the plaintiff to judge. *Pacta sunt servanda*. If he contracts for the supply of that which he thinks serves his interests—be they commercial, aesthetic or merely eccentric—then if that which is contracted for is not supplied by the other contracting party I do not see why, in principle, he should not be compensated by being provided with the cost of supplying it through someone else or in a different way, subject to the proviso, of course, that he is seeking compensation for a genuine loss and not merely using a technical breach to secure an uncovenanted profit.'

This is the language of Lord Griffiths's broad ground. Moreover, Oliver J raised the question of the tenants' interest, recalling the defendant's argument that the landlord was merely a landlord with an investment property and that he was not entitled to damages for a loss suffered by his tenants who were strangers to the contract. He dealt with the point, at p. 1285:

'Whilst I see the force of this, I do not think that it really meets the point that, whatever his status, the plaintiff had a contractual right to have the work done and does in fact want to do it. I refrain from expressing any view about what the position would be if his motives were merely capricious, for there is no suggestion of anything of that sort. As it seems to me, the fact that his motive may be to confer what he conceives to be a benefit on persons who have no contractual rights to demand it cannot alter the genuineness of his intentions. The recent case of *Jackson v. Horizon Holidays Ltd* [1975] 1 WLR 1468 demonstrates that the plaintiff may obtain damages for breach of a contract entered into for the benefit of himself and other persons not parties to the contract.'

This is the language of defeated expectation with substantial damages being awarded for the loss of the performance interest.

My Lords, Oliver J's judgment has been very influential. His test of reasonableness was approved and applied by your Lordships' House in *Ruxley Electronics and Construction Ltd v. Forsyth* [1996] AC 344. I believe that it provides the key to the present case. The similarity of the two cases is striking. Both are concerned with building contracts in circumstances where performance would benefit a third party to the contract but not the promisee. I would draw particular attention to the fact that in *Radford v. De Froberville* [1977] 1 WLR 1262 the proper measure of damages was taken to be the cost of doing the promised work (i.e. fulfilling the landlord's contractual expectation) and not the tenants' loss of amenity. No independent attempt was made to evaluate this.

The seed was planted more than 20 years ago. It has been long in germination, but it has been watered and nurtured by favourable judicial and academic commentators in the meantime. I think the time has come to give it the imprimatur of your Lordships' House. I am not impressed by the argument that such a radical change, with the attendant risk of opening the floodgates to capricious and complex claims to damages in unforeseen situations of every kind, should be left to Parliament. In the first place, I do not think that it is a radical change. I respectfully agree with Steyn LJ in *Darlington Borough Council v. Wiltshier Northern Ltd* [1995] 1 WLR 68 that it is based on orthodox contractual principles. And in the second place,

the development of the remedial response to civil wrongs and the appropriate measure of damages are matters which have traditionally been the province of the judiciary. For the present I would restrict the broad ground to building contracts and other contracts for the supply of work and materials where the claim is in respect of defective or incomplete work or delay in completing it. I would not exclude the claim for damages for delay, since the performance interest extends to having the work done timeously as well as properly. There is no difficulty in quantifying the loss due to delay, at least in the family or group context. In the case of building contracts the broad ground is in line with the principle that the prima facie measure of damages is the cost of repair rather than the reduction in the market value of the property or any loss of amenity, even where the cost of repair is substantially greater, subject only to the qualification that the carrying out of the repairs must be a reasonable course to adopt. . .

The rationale which underlies this measure of damages is instructive. It is best summed up in a passage in the judgment of Wetmore J in an old Canadian case (*Allen v. Pierce* (1895) 3 Terr LR 319, 323) cited with approval in Hudson's Building and Engineering Contracts, 11th ed. (1995) vol. 1, p. 1047:

'It is not a mere matter of difference between the value of the material supplied and that contracted for, or of the work done and that which ought to have been done, or of the house as it stands and that which ought to have been built under the contract. If these were the standards of damages, there would be no point in a man contracting for the best materials. The owner of the building is, therefore, entitled to recover such damages as will put him in a position to have the building he contracted for.'

Again this is the language of defeated expectation. Of course, as the last sentence cited shows, Wetmore J was speaking of the ordinary two-party case where the building employer is also the building owner. But his reasoning applies equally, and perhaps with even greater force, to the case where the building employer is not the building owner. If it did not, there would be no point in the building employer entering into the contract at all. It would be strange logic to allow the building employer to recover the cost of achieving his contractual expectations even where these do not affect the value of his land, and insist at the same time that he must own the land in question if he is to recover more than nominal damages. In my opinion, it is not a departure from orthodoxy to say, adapting Wetmore J's words, that the building employer, whether or not he is also the owner of the building, is entitled to recover such damages as will put him in a position to have the building he contracted for.

Moreover, the question must be considered from a wider perspective than merely defective work. As my noble and learned friend, Lord Goff, observes, unless the law recognizes the performance interest it can provide no remedy to the building employer if the contractor repudiates the contract before he has done any work at all, and the building employer has to engage another contractor to do the work at a higher price. This would be manifestly unjust, and to defend it by saying that the loss is suffered by the building owner (who in fact has suffered none) and not by the building employer is nothing short of absurd.

The broad ground may be more readily applicable where the contracting party had a legitimate interest, though not necessarily a commercial one, in placing the order for the services to be supplied to the third party. Where there is a family or commercial relationship between them, as in the present case, any such requirement is easily satisfied, though it would not be right to limit the application of the principle to cases where such a relationship exists. The charitable donor has a legitimate interest in the object of his charity. But I do not think that the existence of such an interest should be seen as a separate or necessary requirement. It is rather an aspect of the test adopted by Oliver J., that is to say, reasonableness. There is much to be said for the view expressed by Lord Scarman in the *Woodar* case that the fact

that a contracting party has required services to be supplied at his own cost to a third party is at least prima facie evidence of the value of those services to the party who placed the order.

### *Must the building employer intend to carry out the work?*

Where the broad ground applies, the plaintiff recovers damages for his own loss, and accordingly in my opinion there can be no question of requiring him to account for them to the third party. In the *St Martins* case Lord Griffiths drew attention to the fact that the person who places the contract suffers loss because he has to spend money to obtain the benefit of the bargain which the defendant had promised but failed to deliver. He added that the court would wish to be satisfied that the repairs had been or would be carried out. Professor Treitel has argued that Lord Griffiths was merely saying that the plaintiff could recover damages in respect of his own loss in making alternative arrangements. I do not think that this can be right. If the making of such arrangements were a precondition of recovery, it would follow that in their absence no such damages would be recoverable. But a plaintiff is bound to mitigate his loss. He cannot increase it by entering into other arrangements. I respectfully agree with Steyn LJ in the *Darlington Borough Council* case [1995] 1 WLR 68 that what the plaintiff proposes to do with his damages is of no more concern to the party in breach in a three-party case than it is in a two-party case. In my opinion, it may be evidence of the reasonableness or otherwise of the plaintiff's claim to damages, but it cannot be conclusive.

In the present case, the development of the site was a group project financed by group money. Panatown was chosen to be the building employer, but it did not use its own money to fund the cost. This was provided to it from within the group, almost certainly (if implicitly) on terms that it should be applied in paying for the works and for no other purpose. UIPL was the building owner, and must be taken to have known and approved of the works and allowed Panatown to grant McAlpine permission to enter the land and carry out the works, presumably on the basis that they would be carried out properly and in accordance with the building contract. It would be inconsistent with these arrangements if Panatown were simply to retain the damages for its own benefit. They will almost certainly be held on trust to apply them at the direction of the group company which provided the building finance. . .

### *Does the existence of the DCD bar recovery?*

. . . I agree with the Court of Appeal that the existence of the DCD does not demonstrate an intention that any damages caused by defective or incomplete performance of McAlpine's obligations under the building contract should be recoverable by UIPL under the DCD and not by Panatown under the building contract. I do not, however, agree with their formulation of the question: whether the parties contemplated that the DCD would 'replace' the more detailed provisions of the building contract. It is not correct to ask whether Panatown would have had a claim under the building contract if there had been no DCD and then ask whether the parties intended to replace that claim by a claim by UIPL under the DCD. If it be relevant to impute intention to the parties, the correct approach is to examine the whole complex of contracts and ask whether they contemplated that the building contract could be enforced by Panatown.

But the broad ground does not rest on imputed intention . . . [It] is based on ordinary contractual principles. It has nothing to do with the privity rule. The plaintiff is a contracting party who recovers for his own loss, not that of a third party. Whatever arrangements the third party may have entered into, these do not concern the plaintiff and cannot deprive him of his contractual rights. He is not accountable for the damages to anyone else, and he cannot be denied a remedy because 'it is not needed'. I respectfully agree with my noble and learned friend Lord Goff of Chieveley that the exception identified by Lord Diplock in *The Albazero* [1977] AC 774 is confined to the narrow ground and that it is inappropriate to apply it to the broad ground.

The real significance of the DCD is different. By giving the third party a cause of action, it raises the spectre of double recovery. Even though the plaintiff recovers for his own loss, this obviously reflects the loss sustained by the third party. The case is, therefore, an example, not unknown in other contexts, where breach of a single obligation creates a liability to two different parties. Since performance of the primary obligation to do the work would have discharged the liability to both parties, so must performance of the secondary obligation to pay damages. Payment of damages to either must *pro tanto* discharge the liability to both. The problem, in my view, is not one of double recovery, but of ensuring that the damages are paid to the right party.

There can be no complaint by the building employer if the damages are recovered by the building owner, since he was the intended beneficiary of the arrangements in the first place. The building employer's performance interest will be satisfied by carrying out the remedial work or by providing the building owner with the means to pay for it to be done. This provides the key to the proper approach in the converse case like the present where the action is brought by the building employer despite the existence of a cause of action in the building owner. Since the building employer's expectation loss reflects and cannot exceed the loss suffered by the building owner, and would be satisfied by any award of damages to the latter, his claim should normally be subordinated to any claim made by the building owner. While, therefore, I do not accept that Panatown's claim to substantial damages is excluded by the existence of the DCD, I think that an action like the present should normally be stayed in order to allow the building owner to bring his own proceedings. The court will need to be satisfied that the building owner is not proposing to make his own claim and is content to allow his claim to be discharged by payment to the building employer before allowing the building employer's action to proceed.

My noble and learned friend, Lord Browne-Wilkinson, has postulated the case where the breach does not occur (or the defects are not discovered) until after completion of the work and sale of the building to a purchaser who has taken an assignment of a collateral warranty.

I do not share his concern that such a case will cause difficulty in practice. The position will be the same as in the ordinary case where the building owner and the building employer are one and the same. In such a case, the building employer/owner suffers no financial loss if he disposes of the building before the breach occurs or the defects are discovered. It cannot make any difference that the building owner and the building employer are different. The purchaser will have a cause of action under the collateral warranty. Whether this bars the remedy of the building employer depends on whether the *St Martins* case is properly regarded as covered by the narrow ground or, now that it is available, the broad ground. If the former, it is an exception to the privity rule, and the building owner's action is barred (because it is not needed) by the existence of the purchaser's cause of action. If the latter, then the building owner is in theory entitled to bring proceedings in respect of his own defeated expectation interest, but they are likely to be stayed since in practice the purchaser will normally prefer to bring his own.

All the supposed difficulties disappear once it is grasped that the building employer's performance interest merely reflects the interest of the building owner and that his loss cannot exceed that of the building owner.

### *Conclusion*

In the present case UIPL is fully aware of the present proceedings and supports Panatown's claim to substantial damages. It has no wish to be forced to invoke its own subsidiary and inferior remedy under the DCD. There is no need to join it in the proceedings or require it to enter into a formal waiver of its claim under the DCD. Any claim it may have under the DCD will be satisfied by the payment of damages to Panatown.

I would dismiss the appeal.

**Incorporated Council of Law Reporting:** extracts from the *Law Reports: Appeal Cases (AC)*.